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84686-3

No. ~~84686-3~~

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.

BRIEF OF RESPONDENT  
STATE FARM FIRE AND CASUALTY COMPANY

Kenneth E. Payson, WSBA #26369  
Stephen M. Rummage, WSBA #11168  
Hozaifa Cassubhai, WSBA # 39512  
Davis Wright Tremaine LLP  
Attorneys for Respondent  
State Farm Fire and Casualty Company

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

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

Olga Matsyuk rests her case on the false premise that she had to pay a lawyer to obtain a recovery sufficient to reimburse State Farm Fire and Casualty Company (“State Farm Fire”) for \$1,874 that it advanced to her under the personal injury protection (“PIP”) provisions of the alleged tortfeasor’s insurance policy. She urges the Court to adopt a rule that would require State Farm Fire to pay the attorneys’ fees associated with that supposed reimbursement. As a matter of law, however, Ms. Matsyuk did not in any sense “reimburse” State Farm Fire for the PIP payments it made on her behalf. Her claim founders on that undisputed point.

In arguing to the contrary, Ms. Matsyuk urges that this Court’s decisions hold that a PIP insurer is “reimbursed” for its PIP payments any time it takes PIP payments into account in determining a liability payment under the same policy, thereby triggering an obligation to pay fees. But Ms. Matsyuk ignores the determinative effect of subrogation principles and the collateral source rule, which make clear that she could not—and did not—recover the amounts necessary to reimburse State Farm Fire. This Court should hold that Washington law does not compel fee sharing in these circumstances, for three separate and independent reasons.

*First*, under *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998), subrogation principles give rise to an insurer’s obligation to pay

attorneys' fees when an insured reimburses the insurer for prior payments. Under settled subrogation principles, however, State Farm Fire could not subrogate against its own insured, Mr. Stremditskyy. As a result, it had no right to have Mr. Stremditskyy reimburse it for PIP benefits it paid to cover Ms. Matsyuk's medical expenses. Necessarily, therefore, Ms. Matsyuk could not have "recovered" from Mr. Stremditskyy and "reimbursed" to State Farm Fire pursuant to a PIP subrogation interest it never had. State Farm Fire therefore has no obligation to reimburse Ms. Matsyuk for any attorneys' fees she incurred in recovering from Mr. Stremditskyy.

*Second*, unlike the PIP recipients in *Mahler, Winters v. State Farm Mutual Automobile Insurance Co.*, 144 Wn.2d 869, 31 P.3d 1164 (2001), and *Hamm v. State Farm Mutual Automobile Insurance Co.*, 151 Wn.2d 303, 88 P.3d 395 (2004), State Farm Fire extended PIP benefits to Ms. Matsyuk under the alleged tortfeasor's policy, not her own policy. Thus, Ms. Matsyuk could not invoke the "collateral source" rule to enable her to recover again from Mr. Stremditskyy the medical expenses that State Farm Fire already paid pursuant to the policy he bought. For that reason, Ms. Matsyuk could not and did not "recover" (and, *ipso facto*, could not "reimburse" to State Farm Fire) an amount equal to its PIP subrogation interest.

*Third*, unlike *Winters* and *Hamm*, State Farm Fire did not offset its PIP payments against a total damages award (including the amount already paid by PIP) that it otherwise would have been required to pay to Ms. Matsyuk in full, subject to a right to be reimbursed its PIP payments. Instead, Ms. Matsyuk settled and released her personal injury claim against Mr. Stremditskyy in exchange for an additional and incremental payment of \$4,000 from State Farm Fire. Ms. Matsyuk did not reimburse State Farm Fire the PIP benefits it extended to her.

Ms. Matsyuk bases all of her causes of action on the false premise that her liability recovery effectively reimbursed State Farm Fire its PIP payments. Thus, the trial court properly dismissed all of her claims (including her contract-based claim and her claim regarding the release negotiations). The trial court properly denied leave to amend since amendment would have been futile. The trial court properly denied Ms. Matsyuk's summary judgment motion because it rested on the same false premise and because the record on summary judgment further established that Ms. Matsyuk did not reimburse State Farm Fire its PIP payments.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

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

1. Did the trial court properly dismiss 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 trial court properly dismiss Ms. Matsyuk's breach of contract claim given the absence of any contractual fee-sharing language in the policy?

3. Did the trial court properly dismiss Ms. Matsyuk's bad faith claim where the release she executed expressly allowed Ms. Matsyuk 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?

4. Did the trial court properly deny Ms. Matsyuk leave to amend given that (a) Ms. Matsyuk never identified any amendment that

she might make to salvage her Complaint and (b) on the face of the Complaint, any amendment would have been futile?

5. Did the trial court properly deny Ms. Matsyuk's motion for partial summary judgment where that motion was based on the same flawed arguments Ms. Matsyuk made in opposing the motion to dismiss and the undisputed record further established she did not reimburse State Farm Fire its PIP payments?

### **III. STATEMENT OF THE CASE**

#### **A. Factual Background**

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

Mr. Stremditsky's policy also included PIP coverage, which provided (among other things) payment for certain reasonable, accident-related medical expenses not only for Mr. Stremditsky, but also for his

passengers, regardless of fault. CP 77 ¶ 6; CP 90. The law does not require automobile owners to buy this additional layer of “no-fault” protection for the benefit of their passengers, but Mr. Stremditskyy’s policy included PIP coverage. CP 77-78 ¶ 6. 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. Between July 30, 2008, and October 20, 2008, State Farm Fire paid \$1,874 under the PIP coverage of Mr. 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. (In fact, the undisputed record shows that she did not settle her liability claim against Mr. Stremditskyy and recover *anything* beyond her PIP payments until two months *after* she filed her Complaint. CP 32 (settlement agreement). As this sequence shows, Ms. Matsyuk’s lawyer had a theory in search of a settlement.) 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

incurred in obtaining a liability recovery from Mr. Stremditsky, from which she supposedly reimbursed State Farm Fire its PIP payments. 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. Stremditsky 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 add up to \$5,874, which Ms. Matsyuk characterizes as the "total settlement" of her claims. CP 4.

**B. The Trial Court's Decisions**

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*. 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*. 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, triggering a fee-sharing obligation. CP 33-44.

King County Superior Court Judge Julie Spector heard both motions on February 13, 2009. CP 150. Judge Spector 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.

#### IV. STANDARDS OF REVIEW<sup>1</sup>

This Court may uphold the trial court's ruling on appeal on "any basis supported by the record." *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.2d 1036 (1997) (quoting *Hadley v. Cowan*, 60 Wn. App. 433, 444, 804 P.2d 1271 (1991)). An appellate court can sustain the trial court's judgment on any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989); *see also Nw. Collectors, Inc. v. Enders*, 74 Wn.2d 585, 595, 446 P.2d 200 (1968) ("the trial court can be sustained on any ground within the proof"); *Kirkpatrick v. Dep't. of Labor & Indus.*, 48 Wn.2d 51, 53, 290 P.2d 979 (1955) ("[w]here a judgment or order is correct, it will not be reversed because the court gave a wrong or insufficient reason for its rendition").

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<sup>1</sup> State Farm Fire does not challenge Ms. Matsyuk's recitation of the standard of review on rulings on summary judgment or motions to dismiss, except to the extent this Court might be inclined to revisit the latter standard in light of the United States Supreme Court's decision last month in *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937 (2009). That decision clarified that the United States Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 176 L. Ed. 2d 929 (2007) (abrogating the "no set of facts" standard underlying this Court's evaluation of rulings on motions to dismiss) is not limited to antitrust cases but applies generally as the Rule 8 pleading standard in federal cases.

## V. ARGUMENT

### A. Ms. Matsyuk Has Not Satisfied the Prerequisites to Fee Sharing Under the Principles that Underlie This Court's Fee-Sharing Jurisprudence.

Ms. Matsyuk alleges that State Farm Fire as PIP insurer effectively reimbursed itself for the PIP benefits it paid because it declined to pay Ms. Matsyuk's medical expenses a second time under the liability coverage of Mr. Stremditsky's policy. That argument, however, turns on a superficial reading of this Court's fee-sharing jurisprudence, ignoring the roles that subrogation principles and the collateral source rule play in the application of the common-fund fee doctrine. Accordingly, State Farm Fire will first explore the settled principles that provide the foundation for a PIP insurer's fee-sharing obligation, show how this Court applied those principles in *Mahler*, *Winters*, and *Hamm*, and then explain that the trial court properly applied those principles in this case.

In short, a tort victim who receives PIP payments under her own insurance policy may seek and recover from the tortfeasor her entire damages, including those for which her PIP already has provided compensation—subject to the insurer's reimbursement right. In contrast, a tort victim who receives PIP under the tortfeasor's insurance policy (the position Ms. Matsyuk occupies here) may recover from the tortfeasor *only* her remaining, uncompensated damages. She cannot recover at all from

the tortfeasor—for her own benefit or for the PIP insurer’s benefit—the damages already paid by the PIP coverage of the tortfeasor’s policy. For that reason, the trial court properly determined that no fee sharing obligation arose in the circumstances of this case.

**1. Fee-Sharing Arises Where the Collateral Source Rule Allows Recovery of a Common Fund from Which an Insurer May Be Reimbursed Pursuant to Subrogation Rights.**

*Mahler* and its progeny grow directly out of subrogation principles. “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) (alterations in original). The insurer may enforce its right to reimbursement in either of two ways: (1) if the insured/subrogor *does not* seek recovery from the tortfeasor (for example, if she is content with her insurance proceeds, as often occurs in the context of insured property damage losses), the insurer/subrogee may pursue an action in the subrogor’s name against the tortfeasor to recover reimbursement for the payments it advanced to the insured/subrogor, *see id.* at 415-18; or (2) if the insured/subrogor *does* seek recovery from the tortfeasor, the insurer/subrogee has a right to receive reimbursement from

any recovery the insured/subrogor obtains from the tortfeasor remaining after the insured/subrogor is fully compensated for her loss. *Id.*

But an insurer does *not* have a right of subrogation against its own insured. “No right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty.” *Id.* at 419 (quoting *Stetina v. State Farm Mut. Auto. Ins. Co.*, 196 Neb. 441, 243 N.W.2d 341, 346 (1976); 16 George J. Couch, *Insurance* § 61:136, at 195-96 (2d ed. 1983)). Thus, if its own insured bears responsibility for a loss, the insurer has no right to sue the insured to recoup its PIP payment. Indeed, such a suit would defeat the very purpose of insurance. Here, this principle precluded State Farm Fire from seeking reimbursement from its policyholder, Mr. Stremditsky, for the PIP benefits it paid to Ms. Matsyuk under his policy.

*Mahler* and the cases that follow it deal only with the second of the two subrogation scenarios described above, i.e., the circumstance in which the insured/subrogor seeks recovery from the tortfeasor. In that situation, if an insured’s recovery from the tortfeasor includes amounts for losses the insurer previously paid, the insurer has a right to reimbursement. But to the extent the subrogated insurer reaps the benefit of the insured’s efforts, the insurer must pay a pro rata share of the legal expenses incurred in

obtaining the recovery. “This equitable sharing rule is based on 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.” *Mahler*, 135 Wn.2d at 426-27. Put another way, under the common fund doctrine, “when one person creates or preserves a fund from which another then takes, the two should share, pro rata, the fees and costs reasonably incurred to generate that fund.” *Winters*, 144 Wn.2d at 877 (quoting *Winters v. State Farm Mut. Auto. Ins. Co.*, 99 Wn. App. 602, 609, 994 P.2d 881 (2000)).

The possibility that an insured/subrogor’s recovery from the tortfeasor could include compensation for damages already paid by the insurer arises entirely from the operation of the collateral source rule. Ordinarily, the law prohibits duplicative recoveries for the same damages. “[I]t is a basic principle of damages—tort and contract—that there shall be no double recovery for the same injury.” *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 (citing *Consol. Freightways, Inc. v. Moore*, 38 Wn.2d 427, 430, 229 P.2d 882 (1951); *Ciminski v. SCI Corp.*, 90 Wn.2d 802, 585 P.2d 1182

(1978)). Even when an injured party has received compensation from someone other than the tortfeasor—that is, from a collateral source—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.

“The purpose of this rule is to implement the insurance company’s right of subrogation, and not to afford the respondent a double recovery.” *Consol. Freightways*, 38 Wn.2d at 430. Thus, a plaintiff’s recovery of PIP payments for her special damages under her own insurance policy does not prevent her from “subsequently recover[ing] special damages from the tortfeasor duplicating the PIP payments,” *Mahler*, 135 Wn.2d at 412 n.4, subject to the insurance company’s reimbursement right. The collateral source rule thus makes possible the creation of the common fund from which the insurer can recoup its PIP payments.

**2. The Collateral Source Rule Does Not Apply To Amounts Paid Under Tortfeasors’ Insurance Policies.**

By its terms, the collateral source rule does not apply when the injured party has received payments from the tortfeasor—for then the source of the payment is not “collateral” in any sense. As an extension of this basic principle, a tort victim may not recover damages from a tortfeasor if the tortfeasor’s insurance already has paid for those damages,

since the payments in that instance flow from the tortfeasor, notwithstanding that the payments necessarily are made based on the PIP recipients' status as a defined insured/third-party beneficiary under the policy (the position Ms. Matsyuk's occupies in the present case).

*Maziarski v. Bair*, 83 Wn. App. 835, 924 P.2d 409 (1996), illustrates the point. Edna Bair struck a bicyclist, Jeffrey Maziarski, with her car. Ms. Bair had purchased a Hartford Insurance policy that provided both liability and PIP coverage. *Id.* at 837. Hartford paid Mr. Maziarski's medical bills as a defined insured under Ms. Bair's PIP coverage before any fault determination. *Id.* Mr. Maziarski sued Ms. Bair for negligence. The trial court granted Ms. Bair's request to exclude evidence of the PIP payments.<sup>2</sup> After the court entered judgment against her, it granted Ms. Bair's request to offset the PIP payments made under her policy. Although the Court of Appeals disallowed the offset "due to defendant's failure to carry her burden of proof," *id.* at 837, the Court also held:

[Ms. Bair] has established without dispute that Hartford made the \$7,753 in PIP payments before trial, and that Hartford's payments *should not be treated as coming from a collateral source.*

*Id.* at 841 (emphasis added). The court explained:

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<sup>2</sup> Sometimes "a defendant decides not to introduce such evidence [of partial payment by its insurer] because the defendant does not want to call attention to the presence of insurance coverage[.]" *Bliss v. City of Newport*, 58 Wn. App. 238, 241, 792 P.2d 184 (1990).

The collateral source rule provides that a tortfeasor may not reduce its liability due to payments received by the injured party from a collateral source. *Ciminski v. SCI Corp.*, 90 Wn.2d 802, 804, 585 P.2d 1182 (1978); *Stone v. City of Seattle*, 64 Wn.2d 166, 172, 391 P.2d 179 (1964). It applies when payment comes from a source independent of the tortfeasor, *Ciminski*, 90 Wn.2d at 804, 585 P.2d 1182, *Bliss v. City of Newport*, 58 Wn. App. 238, 241 n.2, 792 P.2d 184 (1990), *Lange v. Raef*, 34 Wn. App. 701, 704, 664 P.2d 1274 (1983), but not when payment comes from the tortfeasor or a fund created by the tortfeasor. *Lange*, 34 Wn. App. at 704, 664 P.2d 1274; DeWolf, *Tort Law and Practice*, 16 Wn. Prac. § 4.42, at 96 (1993). ***It does not apply here because, as noted in the text, the payments in issue here come from [the tortfeasor] Bair's PIP coverage, and such coverage is a fund created by her.***

*Id.* at 841 n.8 (emphasis added). Although this Court has not yet decided the issue, Washington authority uniformly recognizes the distinction between collateral insurance sources and insurance sources attributable to the tortfeasor. *See, e.g., Bliss v. City of Newport*, 58 Wn. App. 238, 241 n.2, 792 P.2d 184 (1990) (“The collateral source rule does not apply because the source of the collateral payments here is the [defendant] City’s insurer, a fund created by the City by its insurance agreement.”); *Lange v. Raef*, 34 Wn. App. 701, 704, 664 P.2d 1274 (1983) (“[w]here the source of the collateral payments is the tortfeasor or a fund created by him to make such [PIP] payments . . . the collateral source rule is inapplicable, and such payments may be proven at trial to prevent double recovery by the injured party from the tortfeasor,” but denying offset for failure to

preserve objection); 16 WASH. PRAC., TORT LAW & PRAC. § 5.42 (2008)

(“The collateral source rule does not apply where the source of the collateral payments is the tortfeasor or a fund created by him to make such payments.”).

**3. This Court Has Allowed “Common-Fund” Recoveries Only Where the PIP Insurer Has A Subrogation Right Against the Alleged Tortfeasor and the PIP Insured Was Able to Invoke the “Collateral Source” Rule.**

*Mahler, Winters* and *Hamm* all fit neatly within these principles.

In each case (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.

**a. *Mahler***

*Mahler* considered two consolidated cases, each involving a fault-free plaintiff who collected PIP benefits for medical expenses as an insured under *her own* State Farm Mutual auto policy. Each plaintiff sued the driver of the other vehicle involved in her respective 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. 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 *Mahler* plaintiffs already had received PIP payments for their special damages under their own insurance policies did not prevent them from "subsequently recover[ing] special damages from the tortfeasor duplicating the PIP payments." *Id.* at 412 n.4. Thus, each settlement *included* payments for medical expenses and other economic damages that State Farm Mutual had paid under the PIP coverage of the plaintiff's policy. Based on standard subrogation principles, State Farm Mutual shared in its PIP insureds' recoveries by recouping from the tortfeasors' insurers' settlement payments the PIP payments it previously made under the plaintiffs/passengers' State Farm Mutual policies.

Further, the auto policy at issue in *Mahler* specifically addressed recoveries pursuant to subrogation rights: "If the insured recovers from the party at fault and we share in the recovery, we will pay our share of the legal expenses. Our share is that percent of the legal expenses that the amount we recover bears to the total recovery." *Mahler*, 135 Wn.2d at 419 (quoting policy). Based on this policy language, this 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.

This Court observed 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. The Court reasoned that (i) the insureds' efforts had generated a fund of money paid by the tortfeasors' liability insurers; (ii) this fund compensated both the PIP insureds for their damages and their insurers from which they purchased their PIP coverage for the PIP benefits previously paid; and (iii) because both the PIP insureds and their PIP insurer benefited from the PIP insureds' recoveries from the tortfeasors, each was obligated to pay a pro rata share of the legal expenses incurred in generating the "common fund." *Id.* at 426-27.

**b. *Winters***

In *Winters*, Sara Winters purchased *her own* automobile insurance policy from State Farm Mutual.<sup>3</sup> 144 Wn.2d at 872. She paid separate premiums for PIP and UIM coverage. *Id.* She was injured in an automobile accident with an insured driver. After the accident, State Farm

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<sup>3</sup> As did Ms. Matsyuk in her Appellant's Brief (and as did this Court's later *Hamm* decision), for simplicity this brief will discuss only Ms. Winters's facts, though the *Winters* decision in this Court involved two consolidated cases.

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 incurred considerable expense pursuing her claims since the driver denied liability. Only after more than two years of litigation was Ms. Winters able to convince the driver's insurer to pay policy limits. *Id.* at 878. Believing she had not been fully compensated for her injuries, Ms. Winters thereafter pursued a UIM claim against State Farm Mutual.

The arbitrator awarded Winters total damages that included special medical and wage loss damages that the PIP insurer had already paid, as well as the amount already recovered from the tortfeasor's liability policy. *Id.* at 873. State Farm Mutual offset both the driver's liability payment and its earlier PIP payments from the total damages arbitration award and paid only the difference. Ms. Winters, however, argued that State Farm Mutual had no right to offset its earlier PIP payments to avoid double payment of the medical and wage loss damages it had already paid. *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 the legal expenses Ms. Winters incurred. *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 then explained that “[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.” *Id.* at 877. 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 could not be reimbursed its PIP until Ms. Winters had been fully compensated. *Id.* at 881. 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.* 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 pro rata sharing rule for legal expenses articulated in *Mahler* (recovery from a *fully* insured tortfeasor) and in *Winters* (combined recovery from an *underinsured* tortfeasor and a UIM carrier) apply when the tortfeasor is *uninsured* and the insured recovers only from a UIM carrier?” 151 Wn.2d. at 307 (emphasis in original). 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 her 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 tendered a check for the balance. *Id.* at 306-07.

In deciding whether the PIP carrier had to share in its insured's attorneys' fees, the Court focused on whether the PIP carrier reimbursed itself from a fund the PIP insured created. 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:***

In cases where the PIP and UIM carriers are separate companies, the PIP carrier remains entitled to receive actual reimbursement, and the UIM carrier remains obligated to pay the entire amount of the UIM award. In such cases, no opportunity for an offset exists. When the PIP carrier and UIM carrier are the same company, however, an offset against the UIM obligation is an acceptable mechanism to account for the PIP reimbursement rights.

*Id.* at 311. The Court further explained:

The only difference between State Farm's position vis-à-vis two separate carriers providing the same types of coverage is that State Farm chose to receive its PIP reimbursement through an offset instead of the UIM carrier tendering a check for \$16,000.00 and the PIP carrier receiving a check for \$8,669.71.

*Id.* at 318. In other words, when the same carrier provides both PIP and UIM coverage to a policyholder under *her* own 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.

**4. Where the PIP Insurer Does Not Have a Subrogation Right and the PIP Insured Could Not Invoke the Collateral Source Rule, the Insured Could Not Make a Recovery from Which the PIP Insurer Could Be Reimbursed.**

In contrast to *Mahler*, *Winters* and *Hamm*, in both *Young* and the present case: (i) the PIP insurer had no subrogation right against the alleged tortfeasor under whose policy the PIP benefits were paid; (ii) because the PIP benefits were provided under the alleged tortfeasor's policy, the PIP beneficiary could not invoke the "collateral source" rule to recover again the medical expenses already paid by PIP; and (iii) the carrier in its role as PIP insurer *was not* reimbursed its PIP benefits, but instead, in its role as liability insurer, it need not pay the PIP recipient's medical expenses a second time under the tortfeasor's liability coverage.

This is precisely what Division II held in *Young*. In that case, Allstate insured the driver, Teti, who caused an accident that injured his passenger, Young. Allstate paid \$9,386 for Young's medical expenses and wage loss under the PIP coverage of Teti's policy. Young then sued Teti and recovered a verdict for a total of \$20,000, *including* a double recovery of her medical expenses and wage loss. 104 Wn. App. at 723.

Although the collateral source rule did not apply on those facts, sometimes “a defendant decides not to introduce such evidence [of partial payment by its insurer] because the defendant does not want to call attention to the presence of insurance coverage[.]” *Bliss*, 58 Wn. App. at 241. In such cases, a defendant may choose to allow entry of a damages award that includes amounts already paid by his insurer, and then take an offset to avoid double payment. That is what happened in *Young*.

When Teti offset the \$9,386 of PIP benefits previously paid under his Allstate policy from the jury verdict, the trial court reduced the offset, accepting Young’s argument that under *Mahler* Allstate had to pay its “share” of the attorneys’ fees that Young incurred in effecting her “recovery” against Teti. The trial court held that *Mahler* applied because Young had “recovered” PIP payments on behalf of Allstate, which Allstate recouped when it deducted them from the verdict—the same argument Ms. Matsyuk makes here. *Young*, 104 Wn. App. at 723-24.

The Court of Appeals reversed. The Court distinguished a situation in which the same liability carrier pays benefits to the accident victim under both the liability coverage and the PIP coverage of *the tortfeasor’s* insurance policy (as in *Young* and this case) from the situation in *Mahler* and in *Winters*, where the tort victims received PIP benefits under *their own* insurance policies and recovered liability payments from

*the tortfeasor's* policies alone or in combination with UIM proceeds from which *their own* insurance carriers received reimbursement for the PIP benefits they had paid. As the Court of Appeals aptly stated:

Young, the injured plaintiff, initially received PIP payments, *not from her own insurer*, as in *Mahler*, but rather from the tortfeasor's insurer. Thus, when Young sued the tortfeasor, Teti, and recovered, *she did not create a fund* to benefit, or to reimburse, anyone other than herself.

....

Rather than reimbursing Allstate, the proposed \$9,386 offset simply relieved Allstate and Teti from having to pay Young *again* for the same \$9,386 medical expenses and lost wages that it had already paid Young under Teti's PIP coverage.

....

*Mahler* awards are inappropriate here, where an injured, faultless third person recovers only from the insured tortfeasor, rather than also from the injured party's own insurer. We hold that *Mahler* does not apply here and that Teti's offset should not have been reduced by Young's attorneys' fees and costs.

*Id.* at 725-27 (footnotes omitted) (emphasis in original).

Although Ms. Matsyuk emphasizes that the Court of Appeals decision in *Young* issued before this Court's decisions in *Winters* and *Hamm*, App. Br. at 21, she overlooks that this Court largely adopted its analysis in *Winters/Hamm* from the underlying *Winters* Court of Appeals

decision,<sup>4</sup> which Division II decided *before Young*. Thus, the court that explained in *Winters* why *Mahler* fees are owed when a UIM award is reduced by PIP amounts paid is the same court that *later* explained in *Young* why *Mahler* fees are *not* owed when a liability carrier declines to pay again amounts it already paid under the PIP coverage of the tortfeasor's policy. Indeed, the Court of Appeals in *Young* expressly ruled that the fee-sharing rationale it articulated in *Winters* did not apply. In doing so, it observed that its decision in *Winters* warned that its rationale was not to be read as applying where (as here) the PIP and liability payments are both made under the alleged tortfeasor's policy. *See Young*, 104 Wn. App. at 727 n.14.<sup>5</sup>

With the exception that she does not have a judgment against the alleged tortfeasor,<sup>6</sup> Ms. Matsyuk faces the same situation as *Young*. She

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<sup>4</sup> *Winters*, 144 Wn.2d at 876 (“We agree with the Court of Appeals on the issues before us and have borrowed liberally from Judge Morgan’s opinion.”).

<sup>5</sup> Ms. Matsyuk criticizes *Young*’s reference to the tortfeasor, Mr. Teti, as the “at-fault PIP insured,” insisting that “the PIP insured was not Teti—it was *Young*; just as the PIP insured here is not Stremditsky, it is Matsyuk.” App. Br. at 22 n.12. She overlooks that both Mr. Teti and Mr. Stremditsky as policyholders are named insureds under their policies of insurance. The fact that others such as Ms. *Young* or Ms. Matsyuk might become defined insureds does nothing to change the policyholders’ status as insureds as well. Read in context, the *Young* court obviously was referring to Mr. Teti’s status as the at-fault named insured, i.e., policyholder or *the person who purchased the PIP coverage*.

<sup>6</sup> As discussed in Section V.A.7 of this brief, *infra*, even if this Court concludes that *Hamm* overruled *Young*, Ms. Matsyuk does not have a judgment or arbitration award against Mr. Stremditsky for an amount that includes her special medical damages paid by PIP against which State Farm Fire offset its earlier PIP payments. Instead she settled her claim against Mr. Stremditsky for an additional payment of \$4,000 beyond the PIP

alleges she was injured while a passenger in a car being driven by the at-fault driver. CP 4 (Compl. ¶ 5). She received PIP payments from the tortfeasor's auto policy, not under a policy that she purchased or that someone other than the tortfeasor bought. CP 4 (Compl. ¶¶ 6, 8). She sought to recover her personal injury damages from the tortfeasor. CP 4 (Compl. ¶ 9). The same liability insurer for the tortfeasor that paid for Ms. Matsyuk's medical expenses by extending PIP benefits under *the tortfeasor's PIP coverage*, declined to pay Ms. Matsyuk a second time for the medical expenses it had already paid under Mr. Stremditsky's PIP coverage. CP 4 (Compl. ¶ 11).

As in *Young*, Ms. Matsyuk's claim for liability payments under the at-fault driver's State Farm Fire policy "produced no additional party from whom [State Farm Fire] could recoup any money." Ms. Matsyuk's only source of recovery is from insurance coverage extended under the tortfeasor's own auto policy, with nothing paid from or reimbursed with respect to coverage extended under her own auto policy or from any source other than the tortfeasor's insurance.

Under the circumstances, State Farm Fire has no PIP subrogation right against Mr. Stremditsky, so there is no PIP subrogation interest for

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payments she received. This is another independently dispositive reason why State Farm Fire was not reimbursed its PIP here.

Ms. Matsyuk to “recover” and “reimburse” to State Farm Fire from her recovery from Mr. Stremditskyy. In addition, she has no right or ability to force Mr. Stremditskyy to pay again for the medical expenses that the PIP coverage of *his* auto policy already paid since she cannot invoke the collateral source rule. Thus, she could not have—and did not—recover from Mr. Stremditskyy and reimburse to State Farm Fire the PIP payments it advanced. Thus, State Farm Fire has no obligation to share in Ms. Matsyuk’s legal expenses incurred in securing a recovery that benefited her—and her alone.

**5. *Winters and Hamm Did Not Overrule Young or Reject Its Reasoning.***

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 observes that in both *Winters* and *Hamm* the “liability” payments (by way of UIM payments) and PIP payments were made under the same policy and this Court held that *Mahler* fees were owed. App. Br. at 14-20. She reasons, therefore, that since her PIP payments and liability payment were made under the same policy, she must be entitled to *Mahler* fees as well. *Id.*

But Ms. Matsyuk's characterization of *Winters* and *Hamm* glosses over the dispositive factual distinction from this case: in *Winters* and *Hamm*, the injured parties recovered PIP benefits from *their own* policies and then recovered UIM benefits that fully compensated them for *all* of their damages, *including duplication of their PIP recoveries*. Ms. Matsyuk did no such thing. Perhaps more important, she *could not* do any such thing, as State Farm Fire has no PIP subrogation right against its policyholder/alleged tortfeasor driver for the same reason that she cannot invoke the collateral source rule to make a double recovery of her medical damages.

*Second*, Ms. Matsyuk misses the point when she argues that under *Hamm* it did not matter that the PIP and UIM payments came from the same insurance policy. App. Br. at 18. She also mistakenly focuses on the fact that the law treats payments under both UIM coverage and liability coverage as coming from the tortfeasor. *Id.* at 19. What matters is the source of the PIP payments, for that determines whether (i) the PIP insurer has a subrogation interest for the accident victim to recover on its behalf and (ii) the PIP payments came from a collateral source and therefore can be subject to double-recovery, reimbursement, and fee sharing.

*Third*, Ms. Matsyuk 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. App. Br. at 19-20. 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 (like the plaintiff in *Young*) purchased *none* of the coverages at issue. Moreover, the *Winters* and *Hamm* decisions are in the context of UIM coverage with its unique public policy concerns of ensuring a "second floating layer of protection in every case in which the insured is 'legally entitled to recover' damages from the negligent tortfeasor." *Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 623, 160 P.3d 131 (2007) (quoting *Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 757, 845 P.2d 334 (1993)). No corresponding public policy requires that accident victims who are serendipitous beneficiaries of insurance purchased by tortfeasors occupy the same position as accident victims who *buy* PIP coverage,

receive payments under coverage they purchased and, thereafter recover and reimburse to their insurers those PIP payments.

In fact, consideration of parity among injured parties weighs against Ms. Matsyuk's request for fee sharing. If Mr. Stremditsky's policy did not provide PIP coverage, Ms. Matsyuk would not have had her medical expenses paid up front. Instead she would have recovered her total damages (including her medical expenses) from Mr. Stremditsky's liability coverage and would have had to pay her own lawyers out of that recovery, without the benefit of fee sharing. No considerations of public policy require that Ms. Matsyuk be better off and have State Farm Fire pay a portion of her attorneys' fees because Mr. Stremditsky (not Ms. Matsyuk) purchased an policy that provided Ms. Matsyuk quick payment of her medical expenses under its PIP coverage without regard to fault.

In contrast, when Hamm (the accident victim in *Hamm* who received PIP under her own policy) bought her own PIP coverage, she was bargaining that State Farm Mutual would pay her accident-related medical expenses promptly and without regard to fault. She paid for that coverage so she would not have to sue to get her medical bills paid. Absent fee sharing, she would not get the benefit of her bargain since, in effect, she would have to pay fees for the cost of getting the PIP recovery. This is so because the medical expenses covered by PIP would be embedded within

her total recovery and she would pay attorneys' fees on the full amount, including any amount to reimburse to State Farm Mutual for its PIP payments. Ms. Matsyuk made no such bargain.

*Fourth*, 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. App. Br. at 21-22. 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. *Hamm*, 151 Wn.2d at 311. In this case, by contrast, Ms. Matsyuk's PIP benefits came from the PIP coverage of Mr. Stremditsky's policy. As a result, because Mr. Stremditsky was the named insured, State Farm Fire has no PIP subrogation interest for her to recover and, even if it did, she could not invoke the collateral source rule to make a double recovery of her medical expenses from which to reimburse State Farm Fire. Thus, as a matter of

law, Ms. Matsyuk could not (and did not) create a fund from which State Farm Fire could be reimbursed, by offset or otherwise.

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*.

**6. Ms. Matsyuk's Status as a PIP Insured Does Not Alter the Analysis.**

Ms. Matsyuk urges that she is a PIP insured of State Farm Fire and that she therefore had a direct claim to the PIP benefits she received. App. Br. at 24-25. State Farm Fire agrees. But she misses the point in blindly insisting that therefore she has created a common fund from which State Farm Fire was reimbursed its PIP. *Id.*

None of State Farm Fire's arguments or analyses turn on whether Ms. Matsyuk was a PIP insured. What matters is who purchased the policy that provided her PIP coverage, for 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. As explained above, because Mr. Stremditskyy bought his insurance policy to be protected from personal liability, State Farm Fire has no right to recoup its PIP payments from him—which in turn means that Ms. Matsyuk had

no right to recover the amounts covered by the PIP payments under the collateral source rule. The fact that Ms. Matsyuk may have been a defined insured does not alter that analysis in any respect.

**7. The Lack of a Damages Award or Judgment that Includes the Amounts Paid by PIP Precludes Ms. Matsyuk's Request for Fee Sharing.**

Even if this Court were to agree that *Winters* and *Hamm* stand for the broad proposition that a PIP offset to reduce an adjudicated award of total damages (including a duplicative recovery of medical expenses paid by PIP) triggers *Mahler* fee sharing whenever the PIP and "liability" amounts are paid under the same policy, in her case there has been no offset against a total damages award or judgment here as in *Winters*, *Hamm* and *Young*. Ms. Matsyuk has not pled (and cannot plead) that there has been such an award or judgment in her case.

Unlike the UIM carriers in *Hamm* and *Winters*, State Farm Fire here did not relieve itself of the administrative inefficiency of tendering to Ms. Matsyuk a check for her total damages only to have her write back a check for the PIP amount. After State Farm Fire paid PIP to Ms. Matsyuk under the alleged tortfeasor's policy, the only other check it had to write was the one it agreed to (and did) write for \$4,000 in exchange for Ms. Matsyuk's release of all claims against its policyholder, the alleged tortfeasor. CP 32. State Farm Fire did not recoup its PIP payments

through offset or separate recovery. That simple fact, standing alone, bars Ms. Matsyuk's claim.

**B. The Trial Court Properly Dismissed Ms. Matsyuk's Contract-Based Claim for Fee-Sharing.**

Ms. Matsyuk argues that her breach of contract cause of action states an independent claim that should have survived State Farm Fire's motion to dismiss. She is wrong for a number of reasons.

She suggests her breach of contract claim was not properly before the trial court because State Farm Fire did not discuss that cause of action by name in its opening brief. App. Br. at 3, 5, 27-30. But State Farm Fire moved to dismiss her entire Complaint (which necessarily included her breach of contract claim) on the basis that her Complaint's allegations affirmatively established that she did not recover and reimburse to State Farm Fire the PIP payments it made on her behalf, the foundational premise of *all* of her claims—including the breach of contract claim. CP 14-22, 148-49 (Def.'s Mot. to Dismiss). Ms. Matsyuk raised her supposedly "separate" breach of contract claim in her opposition, CP 57, to which State Farm Fire replied, CP 136, so the trial court had the opportunity fully to consider the issue.

Ms. Matsyuk's breach of contract allegations consisted of the following:

43. Plaintiff hereby incorporates by reference each of the preceding allegations as though fully set forth herein.

44. Under the insurance policies defendant issued to plaintiff and the Class, defendant expressly or impliedly agreed to, inter alia, share in legal expense incurred by its insureds *when defendant recovered its payments for the applicable loss.*

45. Defendant broke its promises, causing plaintiff, and the Class to suffer damages as a result.

CP 9-10 (Compl. 7-8) (emphasis added). As discussed above, Ms. Matsyuk's allegations and the undisputed record establish that State Farm Fire did not recover its PIP payments. Thus, Ms. Matsyuk's invocation of a supposed contractual promise to share fees *if* she were to reimburse to State Farm Fire its PIP payments amounted to a hypothetical allegation that had nothing to do with the facts here.

In addition, Ms. Matsyuk's insurance policy does not contain any fee-sharing language whatsoever.<sup>7</sup> CP 81-123. Thus, Ms. Matsyuk's lengthy discussion in her appeal brief of the PIP coverage terms and State Farm Fire's right to recover payments is irrelevant. App. Br. at 25-30. Indeed, Ms. Matsyuk eventually concedes that her "independent" contract

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<sup>7</sup> Since Ms. Matsyuk refers to Mr. Stremditsky's insurance policy in her Complaint, the Court may consider that document in considering the present motion to dismiss. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725, 189 P.3d 168 (2008) ("Documents whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss.").

claim rests on a policy “interpretation” that *implies* the equitable fee-sharing rule as a contract term. *See* App. Br. at 29.

In any event, the foregoing breach of contract allegations amount to pure legal conclusions that the Court need not accept. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717, 189 P.3d 168 (2008) (citing *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987)). For any and all of these reasons, the trial court properly dismissed Ms. Matsyuk’s contract-based fee-sharing claim.

**C. Ms. Matsyuk’s Allegations Regarding State Farm Fire’s Supposed Attempt to Obtain Release of Her Fee-Sharing Claim Do Not Save Her Complaint.**

Ms. Matsyuk alleges that State Farm Fire caused her injury and damages by its supposed refusal to settle her liability claim against its policyholder, Mr. Stremditsky, unless she released her fee-sharing claims as PIP insured. CP 5, 8, 9, 10 (Compl. ¶¶ 15, 33, 39, 45).<sup>8</sup> On appeal, she makes a number of meritless arguments as to why these allegations should have survived dismissal even though she had no fee-sharing claim.

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<sup>8</sup> Although dismissal was proper even if this allegation were true, it is false. State Farm Fire simply asked Ms. Matsyuk to execute its standard liability release, which her counsel contended would release her fee-sharing claim. The parties then negotiated and Ms. Matsyuk executed a unique release to expressly reserve any *Mahler*-fee claim. CP 32. Since Ms. Matsyuk refers to the parties’ settlement in her Complaint, CP 4-5, the Court may consider that document in considering the present motion to dismiss. *Rodriguez*, 144 Wn. App. at 725.

*First*, as with her contract claim, Ms. Matsyuk contends that the “separate” claims premised on her release allegations were not properly before the trial court because State Farm Fire did not specifically call out those allegations in its opening brief. App. Br. at 30. Again, State Farm Fire moved to dismiss her entire Complaint (which necessarily included her release-related claims) on grounds that *all* her claims were predicated on her erroneous assertion that State Farm Fire had and breached an obligation to reimburse a share of her legal expenses. *See generally* CP 14-22, 148-49 (Def.’s Mot. to Dismiss). Her contention that there is nothing to indicate that the trial court considered this “independent and alternative” basis for her claims is belied by the fact that she argued this issue in her brief opposing State Farm Fire’s motion to dismiss, CP 57, to which State Farm Fire responded. CP 136. The trial court considered and rejected Ms. Matsyuk’s arguments on this issue.

*Second*, the record Ms. Matsyuk created in support of her Motion for Partial Summary Judgment shows that State Farm Fire allowed her to reserve her claims after she refused to sign State Farm Fire’s standard form liability release. CP 32.

*Third*, Ms. Matsyuk’s allegation that State Farm Fire’s supposed insistence that she release her claims as a PIP insured “caused her injury and damages” is a legal conclusion the Court need not accept in deciding a

motion to dismiss. *Rodriguez*, 144 Wn. App. at 717 (citing *Haberman*, 109 Wn.2d 107 at 120).

*Fourth*, there is no merit to Ms. Matsyuk's new claim raised for the first time on appeal that "the resulting delay in completing the liability settlement and the lost time value of money that entailed" caused her injury and damages. App. Br. at 32 (citing *Banuelos v. TSA Wash., Inc.*, 134 Wn. App. 607, 141 P.3d 652 (2006)). Plaintiffs in *Banuelos* paid a \$1,000 deposit on a vehicle, which the seller unlawfully and undisputedly delayed in refunding. In other words, those plaintiffs experienced the loss of use of funds to which they had an undisputed entitlement. In contrast, Ms. Matsyuk had no right or entitlement to the \$4,000 State Farm Fire eventually paid in settlement of her claims against Mr. Stremditsky until the parties reached agreement on the release terms and Ms. Matsyuk executed the release agreement.

Ms. Matsyuk cannot state a claim against State Farm Fire for bad faith, violation of the CPA and breach of contract based on allegations that State Farm Fire supposedly asked her to release a non-existent claim for fee-sharing, particularly when the record on her summary judgment motion on the same issues confirms that State Farm Fire allowed her to reserve those claims when she balked at signing State Farm Fire's

standard liability release.<sup>9</sup> Once the trial court correctly concluded that Ms. Matsyuk had no cognizable claim for fee-sharing, all of her claims—including those based on the supposed request that she release her fee-sharing claim before State Farm Fire would settle the liability claim—were rendered moot.

**D. The Trial Court Properly Denied Leave to Amend Since Amendment Would Have Been Futile.**

Ms. Matsyuk argues that the trial court abused its discretion in not permitting her to amend her Complaint. App. Br. at 33-34. But a trial court may deny leave to amend where amendment would be futile. *See, e.g., Rodriguez*, 144 Wn. App. at 728-30 (affirming trial court's dismissal of complaint without leave to amend on futility grounds). Ms. Matsyuk's allegations affirmatively establish that her liability settlement did not reimburse State Farm Fire its PIP payments. No amendments could

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<sup>9</sup> Ms. Matsyuk's reliance on *Coventry Associates v. American States Insurance Co.*, 136 Wn.2d 269, 961 P.2d 933 (1998), is misplaced. *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 because the insured could incur unnecessary investigation costs of its own. *Id.* at 279-82. In other words, in the absence of coverage, bad faith claim investigation might still cause damage giving rise to actionable bad faith. Here, Ms. Matsyuk cannot show that State Farm Fire's actions were "unreasonable, frivolous, or unfounded" in negotiating the express reservation of *Mahler*-fee claims that she insisted upon or that she suffered cognizable damage as a result. *See Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003) ("To succeed on a bad faith claim, the policyholder must show the insurer's breach of the insurance contract was unreasonable, frivolous, or unfounded."); *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992) ("a showing of harm is an essential element of an action for bad faith handling of an insurance claim"). This is particularly so given the fact that *Young v. Teti* is controlling authority directly on point upon which State Farm Fire reasonably relied.

unwind the preclusive effect of her existing allegations. Indeed, even now Ms. Matsyuk does not point to anything she could add to her Complaint that would lead to a different result.

**E. The Trial Court Properly Denied Ms. Matsyuk's Motion for Partial Summary Judgment.**

Because Ms. Matsyuk's motion for partial summary rested on the same faulty arguments she made in response to State Farm Fire's motion to dismiss, the trial court properly denied Ms. Matsyuk's motion for the same reasons discussed above. The undisputed record on summary judgment further confirms the propriety of that result.

Recognizing that she lacks an award or judgment for total damages (as in *Winters* and *Hamm*) against which she can argue State Farm Fire offset its PIP payments, Ms. Matsyuk artfully pled that "State Farm, as liability insurer for Stremditsky, agreed to settle plaintiff's personal injury claim against him for \$5,874" and "that it would offset the payments it had made under the PIP coverage against the \$5,874 total settlement of plaintiff's personal injury claim, and provide only a check for the difference." CP 4 (Compl. ¶¶ 10-11). In doing so, she sought to create the impression (without alleging) that State Farm Fire agreed to pay \$5,874 *in addition* to the PIP it already paid and only then offset the amount of its prior PIP payments from this additional agreed amount.

The release agreement Ms. Matsyuk executed and which she submitted to the trial court in support of her summary judgment motion makes clear that the parties agreed that State Farm Fire would pay *only* an additional \$4,000 beyond the \$1,874 PIP payments Ms. Matsyuk received:

For the sole consideration of Five Thousand Eight Hundred Seventy-Four and No/100th Dollars (\$5,874.00) (*Four Thousand and No/100th Dollars (\$4,000.00) in addition to payments made/to be made under the Personal Injury Protection coverage* in the amount of One Thousand Eight Hundred Seventy-Four and No/100th Dollars (\$1,874.00)), the receipt and sufficiency whereof is hereby acknowledged, OLGA MATSYUK, the undersigned, hereby releases and forever discharges OMELYAN STREMDITSKYY . . . .

CP 32 (emphasis added).

In opposing Ms. Matsyuk's motion for partial summary judgment, State Farm Fire submitted the Declaration of Belinda Goodman who confirmed that "[t]he parties never reached a settlement for payment of that amount [\$5,874]; instead, State Farm Fire agreed to pay, and Ms. Matsyuk agreed to accept, \$4,000 in full and final settlement of her claims." CP 78 ¶ 8 (Goodman Decl.). In response, Ms. Matsyuk did nothing to contradict Ms. Goodman. Instead, she relied on the first portion of the release agreement, which mentions the unremarkable fact that the agreed settlement payment of \$4,000 plus the PIP payments totals \$5,874. CP 128.

In summary, the undisputed record establishes that State Farm Fire never agreed to pay anything more in settlement of Ms. Matsyuk's personal injury claim against Mr. Stremditskyk than the additional \$4,000 she agreed to accept to release her claims. To the extent Ms. Matsyuk's artful pleading created any question on this point and if this Court concludes Ms. Matsyuk's allegations on this point should have survived a motion to dismiss for failure to state a claim, the trial court should nevertheless be affirmed since it could have granted summary judgment in State Farm Fire's favor based on the undisputed record refuting those allegations. *See, e.g., Impeccoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992) ("Because the facts are not in dispute, we order entry of summary judgment in favor of DOR, the nonmoving party."); *Rubenser v. Felice*, 58 Wn.2d 862, 866, 365 P.2d 320 (1961) (granting summary judgment in favor of nonmoving party); *see generally* 14 A WASH. PRAC., CIV. P. § 25.13 (2008) (section titled "Judgment for Nonmoving Party").

## VI. CONCLUSION

This Court should affirm the trial court orders dismissing the Complaint without leave to amend and denying Ms. Matsyuk's motion for partial summary judgment.

RESPECTFULLY SUBMITTED this 17th day of June, 2009.

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

By   
Kenneth E. Payson, WSBA #26369  
Stephen M. Rummage, WSBA #11168  
Hozaifa Cassubhai, WSBA # 39512

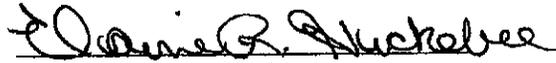
PROOF OF SERVICE

I declare under penalty of perjury that on this day I caused a copy of the foregoing Brief of Respondent State Farm Fire and Casualty Company to be served upon the following counsel of record:

Matthew J. Ide	( )	By U. S. Mail
Ide Law Office	( )	By Federal Express
801 Second Avenue, Suite 1502	( )	By Facsimile
Seattle, Washington 98104-1500	(X)	By Messenger

David R. Hallowell	( )	By U. S. Mail
Law Office of David R. Hallowell	( )	By Federal Express
801 Second Avenue, Suite 1502	( )	By Facsimile
Seattle, Washington 98104-1576	(X)	By Messenger

Dated at Seattle, Washington this 17th day of June, 2009.

  
Elaine Huckabee