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WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

KAREN WEISMANN, *Respondent*

vs.

SAFECO INSURANCE COMPANY OF ILLINOIS, *Appellant*

RESPONDENT'S BRIEF

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I. INTRODUCTION

When a plaintiff injured in an automobile collision is covered by a personal injury protection (PIP) policy that pays her medical bills, and she then recovers other monies on account of the collision that are used to pay back the PIP insurer, she has created a *common fund* for the benefit of the PIP insurer. This requires the PIP insurer to reduce the amount of its reimbursement to account for its proportionate share of the plaintiff's expenses in creating the common fund. *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998). Supreme Court cases decided subsequent to *Mahler* have expanded the circumstances in which the law says a common fund has been created. This includes when the monies making up the common fund and the PIP payments come from the same insurer, under the same policy.

Young v. Teti, 104 Wn.App 721, 16 P.3d 1275 (2001), the case Safeco relies on, held that when PIP payments come from the tortfeasor's policy, a common fund is not created when the plaintiff recovers under the tortfeasor's liability policy. *Young* has been impliedly overruled by *Winters v. State Farm*, 144 Wn.2d 869, 31 P.3d 1164, 63 P.3d 764 (2001), and *Hamm v. State Farm*, 151 Wn.2d 303, 88 P.2d 395 (2004). These

cases make clear that when a plaintiff's efforts produce a common fund, from whatever source, for the benefit of the insurer *in its capacity as PIP carrier*, the insurer must reduce its PIP right of reimbursement to account for its share of the plaintiff's attorney fees and costs. Safeco has benefited in its PIP capacity, but despite *Winters* and *Hamm* still clings to *Young*, an isolated court of appeals case whose logic has long since been usurped.

II. STATEMENT OF THE CASE

On July 22, 2005, a vehicle covered under Darlene Kangas' Safeco auto policy, being driven by Ms. Kangas, struck a motorized wheelchair being operated by Karen Weismann. Clerk's Papers (CP) at Pg. 73, #1. Ms. Kangas' policy was issued in Illinois to a Washington resident. CP at 73, #2. The automobile collision with the motorized wheelchair caused injuries to Ms. Weismann. CP at 73, #3.

Following the collision, Ms. Weismann received PIP insurance benefits under the Ms. Kangas' policy in the amount of \$9,012.95. CP at 73, #4. Ms. Weismann is an "insured" by definition under the personal injury protection coverage provision of the insurance contract issued to Ms. Kangas because she was a pedestrian struck by Ms. Kangas' covered auto. CP at 74, #5. Ms. Weismann is also a claimant under the liability

portion of Ms. Kangas' policy, but is not an insured under that portion of the policy. CP at 74, #6.

On May 16, 2008, during ongoing settlement negotiations between Ms. Weismann and Safeco, Safeco's adjuster advised Ms. Weismann's counsel that the amount Safeco would pay Ms. Weismann in settlement of her claim against Ms. Kangas would be offset by \$9,012.95, the entire amount of PIP benefits received by Ms. Weismann, without reduction of the offset by Safeco's proportionate share of Ms. Weismann's attorney fees and costs. CP at 74, #7. Ms. Weismann alleged such a reduction was required under Washington law. CP at 74, #7. Safeco alleged that no reduction was required under Washington law, relying specifically on *Young v. Teti*, 104 Wn.App 721, 16 P.3d 1275 (2001). CP at 74, #7. On May 21, 2008, Ms. Weismann and Safeco entered into an agreement to settle Ms. Weismann's claim against Ms. Kangas for \$44,521.19, with Safeco taking an offset of the entire PIP amount, \$9,012.95, and paying Ms. Weismann and her attorney the difference, \$35,508.24. CP at 74, #8. The agreement reserved Ms. Weismann's right to bring an action against Safeco to determine whether Safeco is required to reduce its offsets for PIP payments by a proportionate share of attorney fees and costs and for other remedies. CP at 75, #11.

On May 30, 2008, Ms. Weismann mailed to Safeco and to the

Office of the Insurance Commissioner a Notice of Insurance Fair Conduct Act Violation. CP at 74, #9. On June 3, 2008, Safeco's claims analyst wrote to Ms. Weismann's attorney in response to the May 30, 2008, letter, stating that *Young v. Teti* appeared to be the controlling law in Washington. CP at 74, #10. Ms. Weismann continues to assert that *Young v. Teti* has been impliedly over ruled by subsequent cases, specifically *Hamm v. State Farm Insurance Company*, 151 Wn.2d 303, 88 P.2d 395 (2004). CP at 74-75, #10. Safeco timely reaffirmed its prior rejection of Ms. Weismann's request for a reduction of the PIP offset. Ms. Weismann subsequently filed suit against Safeco. CP at 75, #10.

Ms. Weismann moved for summary judgment, asking the superior court to rule that *Young* had been impliedly overruled by the line of cases expanding on *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998), including *Winters v. State Farm*, 144 Wn2d 869, 31 P.3d 1164, 63 P.3d 764, and *Hamm v. State Farm*, 151 Wn.2d 303, 88 P.2d 395. CP at 12-13, 15-25. Safeco also moved for summary judgment, asking the court to affirm that *Young* governed, and for dismissal of all of Ms. Weismann's claims. CP at 76-89. The superior court ruled that, given the analysis the Supreme Court had adopted in the subsequent cases, *Young* was no longer good law. CP at 202-06. The superior court granted Ms. Weismann's motions and ordered Safeco to pay Ms. Weismann 1/3 of

the PIP offset amount. CP at 388-89. The court denied Safeco's motions. CP at 388-89.

Ms. Weismann then moved for an award of attorney fees under *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37811 P.2d 673 (1991), on the basis that, consistent with *Safeco v. Woodley*, 150 Wn.2d 765, 82 P.3d 660 (2004), the dispute between Ms. Weismann and Safeco over the *Young* issue was more akin to a dispute over access to the full benefits of the PIP policy (for which *Olympic Steamship* fees were available), rather than simply a dispute over the value of the claim (for which such fees were not available). CP at 223-29. The superior court granted the motion and awarded fees to Ms. Weismann. CP at 388-89.

Safeco asked the superior court for an order staying the proceedings pending the outcome of an appeal in a King County case¹ also involving the continued viability of *Young*, a case in which the superior court had ruled that *Young* still governed. CP at 231-42. The superior court denied Safeco's request for a stay, and Safeco has appealed the rulings against it. CP at 389, 400-01.

¹ *Matsyuk v. State Farm*, Supreme Court No. 82819-9. To the best of counsel's knowledge this case has neither been accepted nor rejected for direct review.

III. ARGUMENT

A. Overview of *Young v. Teti*

Safeco relies on *Young v. Teti*, 104 Wn.App. 721, 723, 16 P.3d 1275 (2001), as authority for its primary argument: that because Safeco is both the liability carrier and the PIP carrier, Ms. Weismann's efforts to recover on the liability portion of the policy did not create a common fund for Safeco's benefit, and therefore Safeco is not obligated to reduce its PIP offset.

The factual scenario presented in *Young* was that Teti, the defendant, caused an automobile accident which injured Young, the plaintiff, who had been Teti's passenger. Teti's insurer, Allstate, paid Young PIP benefits under Teti's policy. *Id.* Young also sued Teti for negligence, alleging future special damages and general damages. *Id.* A jury awarded Young \$20,000; Allstate was not a party to the lawsuit. *Id.* Teti then moved to offset the jury award by Allstate's earlier PIP payment to Young; Young agreed, but argued that she was entitled to deduct from the offset her attorney fees and costs under *Mahler v. Szucs*.² The trial court agreed. *Young*, 104 Wn.App. at 723, 16 P.3d 1275.

In its decision on appeal, the Court of Appeals explained the basis

² 135 Wn.2d 398, 957 P.2d 632, *amended by* 966 P.2d 305 (1998)

for a PIP insurer's obligation to share in the expenses of an insured's recovery against a tortfeasor by citing to *Mahler*. In *Mahler*, the Washington Supreme Court found the insurers' promise to share in their insureds' recovery expenses 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." *Young*, 104 Wn.App. at 724-25, 16 P.3d 1275, citing *Mahler*, 135 Wash.2d at 426-27, 957 P.2d 632. The reasoning was that: (1) the insureds' litigation had generated a fund of money paid by the tortfeasors (i.e., settlement proceeds); (2) this fund would compensate both the insureds for their damages and their insurers for their previous PIP payments; and (3) because both insured and insurer benefited, each was obligated to pay a pro rata share of fees and costs incurred to generate the funds. *Id.*

However, the *Young* court noted that the situation in the case before it was different than in *Mahler*. *Young*, the injured plaintiff, had initially received PIP payments from the tortfeasor's insurer. *Young*, 104 Wn.App. at 725, 16 P.3d 1275. Thus, when *Young* sued the tortfeasor and recovered, she "did not create a fund to benefit, or to reimburse, anyone other than herself." *Id.* *Young's* jury verdict increased Teti's, and Allstate's overall financial obligation to *Young* to an amount more than

the PIP benefits that Allstate had already paid Young under Teti's PIP coverage. *Id.* Because Young's litigation allegedly did not "benefit" Allstate, *Mahler* did not apply, and Allstate was not required to share in Young's litigation costs. *Id.*

B. *Winters* and *Hamm* Expanded the Definition of what Constitutes a Common Fund, Impliedly Overruling *Young*

To see exactly how the law related to PIP reimbursements has developed since *Young* was decided, and how *Young* is no longer viable precedent, a brief review of two seminal cases, *Winters v. State Farm Mutual Automobile Insurance Company* and *Hamm v. State Farm Mutual Automobile Insurance Company*, is in order.³

The issue presented in *Winters*, 144 Wn.2d 869, 875, 880, 31 P.3d 1164, was whether a PIP insurer must pay a pro rata share of its insured's attorney fees when the PIP insured creates a common fund from liability insurance payments *and* UIM benefits. The court held that the PIP insurer must do so. *Id.* at 880, 31 P.3d 1164. In that situation, the insured secured the proceeds from the at-fault driver's insurer and then recovered from his or her respective UIM carrier; these pooled funds became the common

³ The bedrock principles of *Mahler v. Szucs* are discussed in passing in the summary of *Young, supra*. *Mahler's* refinement in *Winters* and *Hamm* is more relevant for our purposes, and receives greater attention here.

fund from which the PIP insurer was able to recoup payments it had made.

Id. The result provided uniformity among insurers. *Id.*

Winters' insurer, State Farm, contended that the "American rule" (that generally, each party must bear his or her own legal expenses) prohibited such a result. *Id.* at 882, 31 P.3d 1164. But the court stated that the question of whether or not the PIP carrier should pay a pro rata share of legal expenses for its insured in recovering PIP benefits from an UIM insurer was totally different. *Id.* *The insured should not have been worse off simply because he or she purchased two coverages (PIP and UIM) from the same insurer.* *Id.* (emphasis added). Winters was forced to hire attorneys to pursue claims against the party at fault and the UIM carrier, incurring substantial litigation costs to create a common fund for the benefit of the PIP carrier. *Id.* at 882-83, 31 P.3d 1164. Winters would not have been fully compensated if forced to bear the entire litigation costs of the common fund, costs that should have been shared by the insurer. *Id.* at 883, 31 P.3d 1164.

In *Hamm*, 151 Wash.2d 303, 307, 88 P.3d 395, the issue was whether the pro rata sharing rules 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) applied when the tortfeasor was *uninsured*, and the insured recovered only from a UIM

carrier.

The *Hamm* court explained the equitable sharing rule as follows:

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*] at 426-27, 957 P.2d 632. The “common fund” in *Mahler* consisted of the recovery the insured obtained from the tortfeasor only. From this fund, the insured was compensated and the PIP carrier was reimbursed. Because the PIP carrier reimbursed itself from a fund that the insured created, the PIP carrier was obligated to pay a pro rata share of the legal expenses incurred by the insured to create the fund. *Id.* at 436, 957 P.2d 632.

Hamm, 151 Wash.2d at 310, 88 P.3d 395.

The court went on to say that *Winters* had clarified that the pro rata sharing rule articulated in *Mahler* was based on equitable principles, not specific policy language, and applied to PIP reimbursements from UIM recoveries as well as from tortfeasor recoveries. *Hamm*, 151 Wash.2d at 310-11, 88 P.3d 395. In cases like *Winters*, where PIP coverage and UIM coverage were provided by the same carrier, the reimbursement to the PIP carrier typically came in the form of an offset applied to the UIM obligation. *Id.* at 311, 88 P.3d 395. Even though the offset *appeared* to result in a reduction of the UIM obligation, the court clarified that when

the PIP and UIM carrier were the same, an offset against the UIM obligation was an acceptable mechanism to account for the PIP reimbursement rights. *Id.*, citing *Mahler*, 135 Wash.2d at 436, 957 P.2d 632 (“Provided the insurer recognizes the public policy in Washington of full compensation of insureds and its other duties to insureds by statute, regulation, or common law, the insurer may establish its right to reimbursement and the mechanism for its enforcement by its contract with the insured”).

An insurance carrier that provided both UIM and PIP benefits was not required to pay a pro rata share of legal expenses *as UIM carrier* in order to take a UIM setoff, but was required to pay a pro rata share of legal expenses *as PIP carrier* in order to take a PIP offset pursuant to *Mahler* and *Winters*. *Hamm*, 151 Wash.2d at 311-12, 88 P.3d 395 (emphasis added). *The fact that an insurance company providing both PIP and UIM coverage chose to use an offset from its UIM obligations to account for its PIP reimbursement did not relieve the carrier of its burdens under Mahler and Winters. Id.* at 312, 88 P.3d 395 (emphasis added). The insured should not be worse off simply because he or she purchased two coverages from the same insurer. *Id.*, citing *Winters*, 144 Wn.2d at 882, 31 P.3d 1164.

The court’s ultimate holding was that the equitable principle

requiring a PIP carrier to share pro rata in the legal expenses of its insured in order to obtain reimbursement of PIP benefits did indeed apply when the insured recovered only from her UIM carrier. *Hamm*, 151 Wash.2d at 312, 88 P.3d 395.

In discussing the error of the Court of Appeals in the decision below, the *Hamm* court stated:

In its order on remand, the Court of Appeals concludes that “Hamm's UIM carrier received no benefit.” *Hamm*, 115 Wn.App. at 777, 60 P.3d 640. Focusing on State Farm's capacity as UIM carrier, the Court of Appeals decided that Hamm is not entitled to reimbursement from her UIM carrier for the legal expenses she incurred to create the UIM arbitration award. *Id.* at 778, 60 P.3d 640. In doing so, the Court of Appeals applied the rule for UIM carrier setoffs from *Dayton* rather than the rule for PIP carrier offsets from *Mahler* and *Winters*. The Court of Appeals' conclusions with respect to State Farm's obligations in its capacity as UIM carrier may be correct. As in *Winters*, however, “[t]he question presented here is totally different: whether or not the PIP carrier should pay a pro rata share of legal expenses for its insured in recovering PIP benefits from an UIM insurer.” *Winters*, 144 Wn.2d at 882, 31 P.3d 1164.

Hamm, 151 Wash.2d at 312-13, 88 P.3d 395. The court emphasized that the dissent had also erred in failing to distinguish between State Farm's separate roles as PIP and UIM carrier. *Id.* at 313, 88 P.3d 395. See also

Smith v. Arnold, 127 Wn. App 98, 110, 110 P.3d 257 (Div. 2, 2005)

("[A]ction taken between an insurer and an insured under a PIP policy is distinct from tort litigation between the insured and a third party tortfeasor"; where PIP and liability insurer were the same, insurer in its liability role did not get to benefit from action taken in its PIP role).

The court observed that by applying the facts of the case and comparing the position of separate PIP and UIM carriers to State Farm's combined position as PIP and UIM carrier, it was clear that State Farm would not be prejudiced by an application of *Mahler* and *Winters*; rather, not following *Mahler* and *Winters* would provide State Farm with a windfall when compared with separate carriers and would put Hamm in a worse position than if she had been covered by separate carriers. *Hamm*, 151 Wash.2d at 316, 88 P.3d 395. The Court of Appeals' decision in *Hamm*, later overturned by the Supreme Court, directly conflicted with *Winters*' holding that the insured should not be worse off simply because he or she purchased two coverages from the same insurer. *Id.*, citing *Winters*, 144 Wash.2d at 882, 31 P.3d 1164.

The issue presented in *Hamm* did not depend on State Farm's role as UIM carrier, but rather on whether or not the PIP carrier should pay a pro rata share of legal expenses for its insured in recovering PIP benefits from an UIM insurer. *Hamm*, 151 Wash.2d at 317, 88 P.3d 395, citing

Winters, 144 Wn.2d at 882, 31 P.3d 1164. As to State Farm's argument that Hamm could not create a common fund for the benefit of State Farm as her UIM carrier because State Farm, as such, was the adverse party to the UIM proceedings, the court stated that the argument failed because *the common fund benefited State Farm in its capacity as PIP carrier*, not as UIM carrier, and PIP carriers are not adverse parties in UIM proceedings. *Id.* at 319, 88 P.3d 395 (emphasis added).

When the development of the case law subsequent to *Young* is examined, it becomes apparent what *Young* really is: an isolated Court of Appeals case, decided prior to major clarifications and refinements in the law of PIP reimbursement being handed down from the Supreme Court, which has never been cited in any published (or unpublished) appellate decision in this state or any other state. The logic behind the expanded definition of "common fund", embodied by our Supreme Court's decisions in *Winters* and *Hamm*, is antithetical to the lower court's holding in *Young*. Insurers are now to be examined in their separate capacities as PIP and "other" carriers based upon the particular coverage at issue. See *Hamm*, 151 Wash.2d at 311-12, 88 P.3d 395. Insureds are not to be made worse off simply because two coverages written by the same insurer apply in different ways to compensate the insured for an injury. See *Id.* at 312, 88 P.3d 395, citing *Winters*, 144 Wn.2d at 882, 31 P.3d 1164. That the

Supreme Court did not utter the name of *Young* in subsequent decisions does not mean that *Young* is still good law when its foundational principles have been rejected. *Young* is an anomalous historical artifact whose reasoning has been superseded, and its holding impliedly overruled.

C. Weismann Created a Common Fund Under the New Understanding Embodied in *Winters* and *Hamm*

Safeco is simply wrong in its view of the law because there is no principled distinction between the present case and *Hamm*. Here, Ms. Weismann was covered as an insured under Darlene Kangas' PIP policy.⁴ Ms. Weismann hired an attorney and incurred costs in order to recover her damages from Ms. Kangas' liability insurer, Safeco, and Safeco reduced its liability payment to Ms. Weismann by the amount of the PIP

⁴ Safeco agrees that Ms. Weismann is an "insured" under the policy issued to Kangas, see CP at 74. RCW 48.22.005(5)(b)(ii) also specifically identifies pedestrians struck by automobiles as insureds. The fact that Ms. Weismann obtained her status as an insured because she was a pedestrian struck by Ms. Kangas is of no consequence. The cases do not distinguish between insureds based upon whether the insured was the person to whom the policy was issued, a relative of the named insured, a permissive user of the insured's vehicle, a passenger, or a pedestrian, or whether the insured was the one who paid the premiums. In fact, the PIP insured in *Perkins v. State Farm*, the companion case to *Winters*, was a permissive user of the named insured's vehicle, and as a borrower of the car almost assuredly did not pay the insurance premiums on it. See *Winters*, 144 Wn.2d at 874, 31 P.3d 1164. All that matters is that Ms. Weismann, by the terms of the policy, was an "insured" under the PIP portion of the coverage.

benefits it had previously paid her. The fact that the insurer cutting the check here is acting in its capacity as liability carrier, and the insurer cutting the check in *Hamm* was acting in its capacity as UIM carrier, simply does not matter. This is because both insurers are in the same position, providing the coverage that ends up being ultimately responsible for Plaintiff's damages⁵, *as well as* PIP coverage.

Safeco's bottom line, when looked at *as a whole*, is admittedly not benefited by Ms. Weismann's creation of the common fund, because the common fund created to reimburse the PIP payments consists of liability payments from Safeco itself. The folly of Safeco's position, however, is its failure to recognize that *Hamm* brought with it a new understanding of what it means for a PIP insurer to benefit from the creation of a common fund. That new understanding emphasizes that Safeco acts in different capacities as PIP carrier and liability carrier, and that the benefit of the common fund created by Ms. Weismann's efforts is to be analyzed from the perspective of Safeco *in its capacity as PIP carrier*. See *Hamm*, 151 Wash.2d at 312-13, 317, 319, 88 P.3d 395. In its PIP capacity, Safeco benefits because it is being given credit for the PIP payments it made. *

⁵ Here, the coverage was Ms. Kangas' liability coverage. Although in *Hamm* it was the plaintiff's UIM coverage, it is conceptually the same since a UIM insurer steps into the shoes of the defendant.

The fact that no actual transfer of funds will occur to Safeco's PIP department (thereby *directly* benefiting the PIP) is of no consequence. As discussed *supra*, *Hamm* clearly states that an insurer may take an offset in its capacity as UIM carrier to account for the reimbursement due to it in its capacity as PIP carrier. The same accounting mechanism is at work in this situation. Safeco in its capacity as liability carrier settled the case for \$44,521.19, then wrote Ms. Weismann a check for only \$35,508.24 to account for the \$9,012.95 in PIP benefits it had already paid. Safeco in its capacity as PIP carrier benefits from the offset taken in its capacity as liability carrier in the same way the insurer in *Hamm* benefitted in its PIP capacity when it took an offset in its UIM capacity.

Additionally, were Safeco not required to reduce its offset to account for its share of fees and costs, a fundamental principle of both *Winters* and *Hamm* would be violated. Namely, Ms. Weismann would be made worse off than if she had been covered by PIP and liability coverages provided by separate insurers, and Safeco would receive a windfall compared to what the situation would be had it only provided PIP coverage. *Hamm*, 151 Wash.2d at 316, 88 P.3d 395, citing *Winters*, 144 Wash.2d at 882, 31 P.3d 1164. Had Ms. Weismann been covered by a PIP policy provided by Insurance Company X, Company X would have been reimbursed for the benefits it paid out from the fund generated by Ms.

Weismann's settlement with Safeco. This hypothetical PIP insurer would, without question, have had to reduce its reimbursement right by its share of Ms. Weismann's fees and costs under *Mahler* and its progeny. *Winters* and *Hamm* make clear that that fact that two different types of coverage are provided by the same insurer should not serve to put the insured in a worse position, nor the insurer in a better one.

D. The Collateral Source Rule does not Eliminate Safeco's Responsibility to Pay its Proportionate Share

Safeco argues that the collateral source rule⁶ negates its obligation to pay fees under *Hamm*, on the theory that the PIP benefits were not a collateral source, but rather payments from the tortfeasor or a fund created by her, thereby allowing her to take full credit for them. Safeco cites *Lange v. Raef*, 34 Wn. App. 701, 664 P.2d 1274 (1983), and *Miziarski v. Bair*, 83 Wn. App. 835, 924 P.2d 409 (1996)⁷, and states that these cases

⁶ In short, the rule states that a tortfeasor may not reduce damages, otherwise recoverable by a plaintiff, to reflect payments received by the plaintiff from a source independent of the tortfeasor. 16 Wash. Prac. Series §5.42. Such sources have been held to include workers compensation benefits, pension benefits, free medical services, health insurance benefits, and PIP benefits.

⁷ To the extent *Lange* and *Miziarski* are inconsistent with *Winters* and *Hamm* they have been impliedly overruled, for the same reasons *Young* has been, as discussed *supra*.

control because they have not been explicitly overruled.⁸

In trying to support its position that no common fund was created because the PIP payments were not a collateral source, Safeco asserts as follows:

The tortfeasor and her insurer are simply being relieved from paying twice for special damages already paid under PIP.

Pg. 15-16 of Appellant's brief. Additionally:

Here, Ms. Kangas created a fund to pay Ms. Weismann's medical bills and Ms. Kangas is entitled to credit for payments from that fund, just as she would be if the payment had come directly from her, instead of being made on her behalf by her insurance carrier. Ms. Weismann did not make any payments towards the fund.... Therefore, the collateral source rule did not apply in this case.

Safeco appears to think that its PIP payments were really an advance on the liability settlement, created by it or its insured's benevolence, from which it can offset fully. It also focuses on the fact that Ms. Weismann was not the person who paid the premiums. Safeco continues to ignore the fact, a fact which has been stipulated to by the

⁸ It should also be noted that *Young* court never mentioned the collateral source rule as a basis for its decision. *Young* was clearly based upon the erroneous conclusion, as we now know, that no common fund was created.

parties, that Ms. Weismann was *an insured* under the policy. Safeco owed duties to Ms. Weismann, separate and apart from its duties to its other insured, Ms. Kangas.⁹

“Insureds” come in myriad varieties under auto insurance policies, yet inevitably only one of the insureds pays the premiums. This does not relegate the non-paying insureds to second-class citizen status, outsiders to the policy unable to access its full benefits. None of the seminal cases in the line that ushered in the new understanding of common fund creation were decided upon whether the PIP insured was the one who wrote the premium check.¹⁰ Instead, the cases focus on the fact that insurers act in different capacities under different coverages, and are to be viewed in those different capacities sorting out issues about the source of payments to, and fee-sharing with, insureds. See *Hamm*, 151 Wash.2d at 312-13, 317, 319, 88 P.3d 395.

⁹ If Ms. Weismann had been found to be comparatively at fault for the collision, would Safeco still assert that Ms. Kangas was entitled to a full offset for the PIP benefits it paid to Ms. Weismann? Is so, Safeco would be asking this court to disregard the principles found in *Sherry v. Financial Indemnity*, 160 Wn.2d 611, 160 P.3d 31 (2007). There are many implications in Safeco’s position that run counter to existing case law.

¹⁰ As noted *supra*, the PIP insured in *Perkins v. State Farm*, the companion case to *Winters*, was a permissive user of the named insured’s vehicle. *Winters*, 144 Wn.2d at 874, 31 P.3d 1164

Ms. Weismann was a PIP insured, independent of whether there was to be any liability settlement, regardless of fault. The policy laid out what benefits she was owed as an insured; those benefits were owed when the medical bills were incurred and were not an item of “special damages” paid, in advance, by Safeco wearing its liability hat. Safeco-liability did not “pay twice” for the medical bills; Safeco-PIP paid them the first time and received credit for their repayment in the form of an offset against the liability payment. Under *Winters/Hamm* we know that just because Safeco’s name appears on two different checks (liability and PIP) it doesn’t mean the payments came from the same source. In order for Ms. Weismann not to be worse off than if the coverage were written by different insurers, one of the foundational principles of *Winters/Hamm*¹¹, Safeco must reduce its offset through the proper theoretical process. Safeco-PIP is reimbursed less its share of fees and costs; it takes its reimbursement in the form of an offset to the liability obligation. The liability obligation is only decreased because it is the most efficient mechanism to reflect the PIP credit, not because any advances on liability had been made by Safeco.

¹¹ See *Hamm*, 151 Wash.2d at 316, 88 P.3d 395, citing *Winters*, 144 Wash.2d at 882, 31 P.3d 1164.

E. The Trial Court Was Correct in Awarding *Olympic Steamship Fees*

Ms. Weismann is seeking an award of reasonable attorney fees pursuant to the doctrine expressed in *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37811 P.2d 673 (1991), and its progeny. *Olympic Steamship* stands for the proposition that when an insurer denies benefits owing under a policy, and an insured is forced to file suit against the insurer to obtain the benefit of the insurance contract, the insured is entitled to attorney fees. See *Little v. King*, 147 Wn, App. 883, 890, 198 P.3d 525 (Div. 1, 2008); *Olympic Steamship*, 117 Wn.2d at 53, 811 P.2d 673 (award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action to obtain the full benefit of his insurance contract). Subsequent cases have refined the *Olympic Steamship* rule to award fees to insureds bringing actions over disputes involving “coverage” issues, but not to insureds bringing actions disputing factual questions like liability or the monetary value of the claim. See, e.g., *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994) (fees not awarded where UIM insured brought suit to confirm amount of UIM arbitration, where issue was the value of the claim presented under the policy).

The present case clearly involves a dispute over a benefit owed

under the insurance contract, which triggers an award of fees under *Olympic Steamship. Safeco Ins. Co. v. Woodley*, 150 Wn.2d 765, 82 P.3d 660 (2004). Woodley was an insured who had received PIP and UIM benefits under her Safeco auto policy, and also recovered from the tortfeasor. 150 Wn.2d at 767, 82 P.3d 660. After the UIM arbitration was complete, Safeco offset the amount owed to Woodley by the full amount of the PIP benefits it had paid her. *Id.* Litigation followed, and the Supreme Court ruled that under its decision in *Winters*, 144 Wn.2d 869, 31 P.3d 764, if Safeco wanted to take an offset from the UIM award for PIP benefits paid, it was required to pay a pro rata share of the insured's legal expenses incurred in pursuing the liability and UIM claims, which would take the form of a reduction in the offset to account for the pro rata sharing. *Woodley*, 150 Wn.2d at 767, 82 P.3d 660.

Woodley then requested attorney fees under *Olympic Steamship. Id.* at 774-75, 82 P.3d 660. The Court framed the dichotomy between cases where fees were or were not available as follows: "while attorney fees are available for vindication of policy provisions to which the insured is entitled, attorney fees are not available to an insured in cases involving a dispute over the extent of the insured's damages or factual questions of liability." *Id.*, citing *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 889, 16 P.3d 617 (2001). The Court then went on to state:

This case does not involve a dispute over the extent of Woodley's damages or factual questions regarding liability. Instead, it involves Woodley's right to receive the full benefit of her PIP and UIM coverages, which includes, under *Winters*, a pro rata share of the legal expenses she incurred in creating the common fund from which her PIP carrier received reimbursement. If Safeco were not compelled to pay its pro rata share of legal expenses, Woodley would not receive the full benefit of her coverage. Accordingly, this case appears "more akin to a dispute over the vindication of policy provisions to which the insured is entitled (for which fees may be awarded) than a dispute over the amount of coverage (for which fees are not available)."

Id.

There is no principled distinction between *Woodley* and this case. In both cases, an insured was forced to pursue action against the insurer to require the insurer to reduce the offset it planned to take on account of PIP payments it had made to the insured. If this Court agrees with Ms. Weismann that *Young* is no longer good law, and that she did in fact create a common fund, then *Woodley* is almost exactly on point. Since the Supreme Court held that Woodley's action against Safeco to obtain *Winters* fees entitled her to an award of *Olympic Steamship* fees as well, Ms. Weismann's action against Safeco to obtain the same sort of *Mahler/Winters/Hamm*-type fees also surely entitles her to an award of

Olympic Steamship fees. Other Washington cases are consistent with the Supreme Court's sentiments in *Woodley* regarding what types of disputes trigger an *Olympic Steamship* award. See, e.g., *Barney v. Safeco Ins. Co. of America*, 73 Wn. App 426, 869 P.2d 1093 (Div. 2, 1994), overruled on other grounds by *Price v. Farmers Ins. Co. of Washington*, 133 Wn.2d 490 946 P.2d 388 (1997) (UIM insured awarded *Olympic Steamship* fees, after bringing action to determine whether policy allowed insurer to offset PIP payments from UIM award where policy did not provide for such); *Little v. King*, 147 Wn. App. 883, 198 P.3d 525 (Div. 1, 2008) (insured who pursued her UIM insurer for interest on a judgment awarded *Olympic Steamship* fees, as insurer had refused to pay interest on judgment and thereby denied benefits owing under the policy).

Boag v. Farmers Ins. Co. of Washington, 128 Wn. App. 333, 115 P.3d 363 (Div. 2, 2005) (no *Olympic Steamship* fees where dispute was over offsets to UIM award, court characterized as a value dispute), which on its face appears inconsistent with *Woodley*, does not control. First, *Boag* clearly yields to the high court's clear proclamation on this issue. Additionally, the *Boag* court's discussion of fees is mere dicta; *Boag* was not even eligible for an *Olympic Steamship* fee award because the court ruled against her in the underlying dispute over offsets. *Woodley* was not cited in the decision.

Finally, and importantly, it has been stipulated to by the parties that Ms. Weismann was an insured under the Safeco PIP policy. With that fact as a given in the above analysis, Ms. Weismann is just as entitled to an award of *Olympic Steamship* fees when she pursues the insurer for the full benefit of the coverage and the vindication of policy provisions imposed on insurance contracts by law in this state.¹²

Safeco's argument that *Olympic Steamship* fees are not warranted because no common fund was created by Ms. Weismann is simply a slight variation of its argument regarding the primary issue in this case. That argument is addressed *supra* and will not be repeated here.

Safeco makes much of the fact that the court in *Mahler* came to a different conclusion than the court in *Woodley*. While *Mahler*'s principles regarding common fund creation and fee sharing endure, why it would control on the issue of *Olympic Steamship* fees escapes counsel. *Woodley* is the Supreme Court's most recent pronouncement on this issue.

Woodley's factual scenario is more like this case than *Mahler* because in *Woodley* the plaintiff received payments from PIP and UIM coverages

¹² Simply put, one does not have to be the individual out of whose bank account the premiums are deducted in order to fit the policy definition of "an insured", and there is no limitation on what species of insured may pursue the full benefits of the policy.

under the same policy from the same insurer, whereas in *Mahler* the PIP and liability payments came from separate policies. While the *Woodley* court's analysis of the *Olympic Steamship* issue is apparently not long enough for Safeco's liking, the court did clearly identify its reasoning in awarding fees. See discussion at page 23-24 *infra*.

Finally, Safeco points out that *Woodley* did not explicitly overrule *Mahler* by name on the issue of *Olympic Steamship* fees. Safeco is correct on this count. But the *Woodley* court, while not publishing a lengthy discussion of the issue, did not summarily rule in *Woodley*'s favor. It bears repeating:

This case does not involve a dispute over the extent of *Woodley*'s damages or factual questions regarding liability. Instead, it involves *Woodley*'s right to receive the full benefit of her PIP and UIM coverages, which includes, under *Winters*, a pro rata share of the legal expenses she incurred in creating the common fund from which her PIP carrier received reimbursement. If Safeco were not compelled to pay its pro rata share of legal expenses, *Woodley* would not receive the full benefit of her coverage. Accordingly, this case appears "more akin to a dispute over the vindication of policy provisions to which the insured is entitled (for which fees may be awarded) than a dispute over the amount of coverage (for which fees are not available)."

Woodley, 150 Wn.2d at 774-75, 82 P.3d 660. We do not know why

Mahler was not cited in *Woodley*, whether it was mere oversight or something else. What we do know is how the Supreme Court has most recently analyzed the issue before this Court, after thought and deliberation as evidenced by the passage quoted *supra*.

This Court should affirm the decision of the trial court with regards to *Olympic Steamship* fees for the above reasons, both as to the propriety of such an award in this case, and as to the amount of fees awarded, as Safeco is not challenging the hourly rate charged and time spent by Ms. Weismann's counsel in obtaining the trial court ruling on the issue of *Young's* lack of continued viability. The trial court's award was based on the Affidavit of Scott A. Staples, which is located at CP 218-21.

IV. FEEES ON APPEAL

In addition to affirming the order regarding *Olympic Steamship* fees at the trial court level, Ms. Weismann requests this Court award her attorney fees and costs on appeal pursuant to RAP 18.1(a)-(b). The argument from Section III(E), *supra*, as to why an award of *Olympic Steamship* fees is proper in this case is hereby incorporated by reference. *Olympic Steamship* fees are available on appeal; Safeco continues to compel Ms. Weismann to assume the burden of legal action to obtain the full benefit of the insurance contract. See *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 69, 164 P.3d 454 (2007), citing *Olympic Steamship*,

117 Wn.2d at 53, 811 P.2d 673; *Lenzi v. Redland Ins. Co.*, 140 Wn.2d 267, 281-82, 996 P.2d 603 (2000) (court awarded *Olympic Steamship* fees on appeal).

V. CONCLUSION

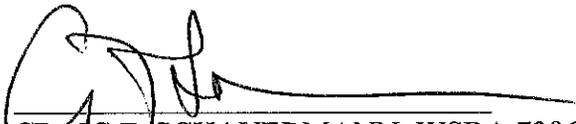
Young v. Teti was decided before *Winters* and *Hamm* changed the landscape of PIP reimbursement. Although not mentioned by name in the later cases, *Young* was effectively over-ruled by their logic. *Hamm*, especially, leaves no doubt that Safeco is obligated to reduce its PIP reimbursement right to account for its share of Ms. Weismann's fees and costs, and therefore it must accordingly reduce the offset it is attempting to take from the liability settlement. The trial court's decision granting summary judgment to the Respondent should be affirmed. *Olympic Steamship* fees were appropriate under *Woodley*. The trial court's

decision granting those fees at the trial court level should also be affirmed
and additional fees and costs should be awarded on appeal.

DATED this 3 day of September, 2009.



SCOTT A. STAPLES, WSBA 39325
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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct. I hereby declare that I caused to be served a true copy of the within and foregoing document RESPONDENT'S BRIEF upon the following attorney(s) of record at the address(es) shown on the 3rd day of September, 2009:

M. Colleen Barrett Gregory S. Worden Barrett & Worden, P.S. 2101 Fourth Avenue, Suite 700 Seattle, WA 98121	<input type="checkbox"/> U.S. Mail, First Class, Postage Paid <input type="checkbox"/> Vancouver Legal Messengers <input checked="" type="checkbox"/> Federal Express <input type="checkbox"/> FAX
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Linda Malattia
Date signed: Sept. 3, 2009
Place signed: 1700 East Fourth Plain Blvd.
Vancouver, Washington

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