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NO. 94771-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRETT DURANT, On Behalf of
Himself and all others similarly situated,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY, a foreign automobile insurance company,

Defendant.

FROM THE U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

BRIEF OF *AMICUS CURIAE*
WASHINGTON SOCIETY OF
INTERVENTIONAL PAIN PHYSICIANS

Thomas Adkins
1814 S. 324th Pl #D
Federal Way, WA 98003
tom@thomasadkinslaw.com
Attorney for *Amicus Curiae*

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Society of Interventional Pain Physicians (WaSIPP) is a not-for-profit organization dedicated to advocating for interventional pain physicians and their patients in Washington. Through its advocacy, educational programs, and publications, WaSIPP promotes the development and practice of safe, high quality, and cost effective interventional pain management techniques for the diagnosis and treatment of pain and related disorders.

Access to such treatment is necessary for patients suffering from all sorts of disorders and pain management issues. Without pain management and interventional pain treatments, many patients may continue to suffer from debilitating pain and be unable to take part in normal activities of daily life intractable.

This amicus brief is intended to address issues that have not been fully discussed by either State Farm's or Mr. Durant's briefs. First, it provides scientific support for and argues that interventional pain management treatment and palliative care are necessary and critical treatments for patients suffering from debilitating and chronic pain¹ and a range of disorders. Second, it identifies numerous ways in which State Farm

¹ "Chronic pain," as used throughout this amicus brief, is not a reference to chronic pain syndrome, but instead is used to refer to chronic, persistent, or intractable pain.

misconstrues Washington law to serve its own purposes. Third, it notes that State Farm cannot rewrite the law with its own policy forms. Last, it emphasizes that State Farm's use of the concept of "maximum medical improvement" ("MMI") to deny valid personal injury protection ("PIP") claims is improper, perverts a standard used in other areas of law, and denies those patients reasonable and necessary treatment to help them recover from potential devastating injuries and disorders.

II. INTRODUCTION

WaSIPP is dedicated to ensuring access to important interventional pain management treatment to patients suffering from disabling pain.

Many insureds pay a premium to ensure they have PIP coverage in case of motor vehicle accidents. PIP benefits that insureds pay for are supposed to help them recover from injuries sustained in those accidents. Accident victims who have suffered debilitating injuries may rely on PIP benefits to help pay for treatment and therapies that allow them to recover and pick up the pieces of their lives. Without access to pain therapies and treatment, many injured victims will continue to suffer from debilitating pain that could have a significant negative impact on their daily life. It is not a recovery for a patient to remain in a persistent state of pain, to suffer setbacks in the range of motion of their limbs, or to be told they must endure

emotional or psychological distress associated with their injuries. This is not and should not be considered “maximum medical improvement.”

Various sorts of interventional pain management treatments and therapies should be considered necessary and reasonable—State Farm should not be permitted to deny PIP claims under the guise that the patient has reached a nebulous definition of “maximum medical improvement.”

The Court should also reject State Farm’s invitations to mischaracterize Washington law, deny State Farm’s attempts to unilaterally rewrite the regulations that govern its actions, and discard State Farm’s perversion of the MMI standard found in Workers’ Compensation law.

III. ISSUES ADDRESSED

WaSIPP addresses four important issues in the following sections: (1) interventional pain management treatment and palliative care are effective, reasonable, and necessary treatments; (2) State Farm repeatedly mischaracterizes WAC 284-30-395; (3) State Farm violates the law when it denies valid PIP claims on the basis of a patient reaching “maximum medical improvement,” and cannot circumvent that law; and (4) State Farm’s use of MMI perverts a concept from the law of Workers’ Compensation.

IV. ARGUMENT

A. Interventional Pain Management Treatments Should Be Considered Reasonable and Necessary.

The use of interventional pain treatment centers and palliative medicine should be considered both reasonable and necessary treatments for injured individuals, many of whom suffer from chronic or incapacitating pain secondary to multiple spinal and other conditions such as disc herniation, discogenic pain, facet joint pain, sacroiliac joint pain, and post-surgery syndrome. The U.S. Supreme Court has recognized the importance of palliative medicine and pain management. Without such treatment, the burden on injured individuals, their families, and society will continue to increase.

1. Chronic Persistent Pain Secondary to Multiple Disorders is Increasingly Prevalent in the Population and If Left Untreated Exacts High Costs on Individuals and Society.

Chronic pain has unfortunately become increasingly common in the United States; and the prevalence of pain in the U.S. population is only likely to continue to increase. National Academy of Sciences: Institute of Medicine, *Relieving Pain in America: A Blueprint for Transforming Prevention, Care, Education, and Research* 62–63 (2011) (hereinafter “*Relieving Pain in America*”). Americans dealing with pain has become an immense issue in the United States that touches on a huge portion of the

population. More than 30 million Americans have pain that persists for weeks to years. Jae Kennedy et al., *Prevalence of Persistent Pain in the US Adult Population: New Data From the 2010 National Health Interview Study*, *The Journal of Pain*, 2014; *Relieving Pain in America* at 1, 19; Laxmaiah Manchikanti, MD et al., *An Update of Comprehensive Evidence-Based Guidelines for Interventional Techniques in Chronic Spinal Pain. Part I: Introduction and General Considerations*, *Pain Physician*, 2013, at S7.

This has resulted in enormous individual and societal economic burdens. The annual national economic cost associated with chronic pain is estimated to be about \$100 billion. Joseph L. Dieleman, PhD et al., *US Spending on Personal Health Care and Public Health, 1996–2013*, 316 *JAMA* 2627, 2631 (2016) (\$87.6 billion of health care spending on low back and neck pain alone).

Inadequately treated pain can lead to a range of adverse effects on a patient, including physiological, psychological, social, and economic effects. In terms of physical effects, severe pain due to a multitude of causes can lead to loss of strength, disturbed sleep, immune impairment, and increased susceptibility to disease. *Relieving Pain in America*, at 32. More specifically, unrelieved pain can result in increased heart rate, systemic vascular resistance, and circulating catecholamines (which place patients at

risk of myocardial ischemia, stroke, bleeding, and other complications). Frank Brennan et al., *Pain Management: A Fundamental Human Right*, *Pain Medicine*, July 2007, at 206 (hereinafter “*Pain Management: A Fundamental Human Right*”).

The negative impacts of pain on patients do not end at the physical effects; patients frequently suffer from adverse psychological effects as well. Individuals who live with chronic pain are four times more likely than those without pain to suffer from depression or anxiety. *Id.* Pain can also lead to fear; anger; and a reduced ability to engage in social relationships or carry out one’s social roles as family members, friends, or employees. *Relieving Pain in America*, at 32.

Pain also can, and frequently does, restrict, limit, or interfere with a patient’s normal activities of daily life, productivity in the workplace, and quality of life. This leaves patients with reduced quality of life, impaired physical function, and extended recovery time. *Id.* By way of example, pain in patients with cancer can interfere with patients’ ability to sleep, eat, concentrate, and interact with others. *Pain Management: A Fundamental Human Right*, at 206.

Beyond the detrimental effects on individuals experiencing chronic or recurring pain, it also inflicts significant economic and societal costs. Those who suffer chronic pain are twice as likely to have difficulty working,

which results in lost workdays or reduced effectiveness at work. *Id.* The cost of these “lost workdays” has been estimated at \$50 to \$70 billion annually in the United States. *Id.* Beyond these costs, the support network for individuals suffering chronic pain will bear an increased burden as well, including the burden of caregiving, costs of medication and health care services, loss of wages, and non-productivity in the home. *Id.*

Additionally, patients who are denied an interventional pain management procedure may be relegated to a life long dependency of pain treatment with opioids. *See, e.g.,* Laxmaiah Manchikanti, MD et al., *An Update of Comprehensive Evidence-Based Guidelines for Interventional Techniques in Chronic Spinal Pain. Part II: Guidance and Recommendations*, Pain Physician, 2013 (discussing studies that show some interventional pain management procedures lead to reduced use of opioids); Laxmaiah Manchikanti, MD et al., *Percutaneous Lumbar Mechanical Disc Decompression Utilizing Dekompressor: An Update of Current Evidence*, Pain Physician, 2013 (same). This leaves those patients vulnerable to all of the attendant risks of opioid use including addiction, physiology aberrations, overdose, and potentially death.

2. Therapies and Treatment Plans to Combat Pain Are Effective and Necessary for Patients Suffering from Severe Pain.

The therapies and treatment that pain clinics and interventional pain treatment centers provide are necessary and invaluable for patients who suffer from ongoing pain as a result of motor vehicle accidents. Studies have shown that patients who receive treatment at pain centers realize consistent benefits. *Relieving Pain in America*, at 123–24. “Even modest benefits could be considered an impressive result given that patients usually are referred to a pain center only after other treatments have failed, and their pain is at a severe and recalcitrant level.” *Id.*

Various meta analyses and studies have confirmed that chiropractic spinal manipulation, massage therapies, acupuncture, rehabilitation therapies, and physical therapy programs result in benefits including significant reductions in pain intensity. *Id.* at 133–35; Herta Flor et al., *Efficacy of multidisciplinary pain treatment centers: a meta-analytic review*, *Pain*, 226–27 (1992). That said, the efficacy of such approaches to treating pain can depend on repeated or consistent therapy and a use of multiple approaches. *See Relieving Pain in America*, at 135. Limiting the therapy sessions a patient may engage in, or the type of treatment available to them, may not be as beneficial as an integrated approach to pain management. *Id.* In that vein, an interdisciplinary approach to pain

treatment has been shown to significantly improve pain severity, interference of pain on lifestyle, and function. Sarah Oslund et al., *Long-term effectiveness of a comprehensive pain management program: strengthening the case for interdisciplinary care*, 22 Baylor University Medical Center Proceedings 211, 213 (2009).

Access to palliative care for patients with severe injuries could also be negatively impacted, in some cases, by the denial of PIP benefits on the basis of State Farm’s “maximum medical improvement” standard. If this were to occur, this would be an unfortunate result that would undoubtedly lead to patients suffering more than is necessary. Studies have shown that home palliative care services can help reduce the symptom burden for patients with advanced illnesses or injuries—in particular for those with cancer. See Barbara Gomes et al., *Effectiveness and cost-effectiveness of home palliative care services for adults with advanced illness and their caregivers*, Cochrane Database of Systematic Reviews 37 (2013).

The U.S. Supreme Court—not just scientific studies—has recognized the importance of proper palliative care. In a set of cases rejecting a constitutional right to assisted suicide, the Court recognized that dying patients have a right to obtain palliative care even if doing so would bring about an earlier death. *Washington v. Glucksberg*, 521 U.S. 702, 747 (1997) (Stevens, J., concurring) (“Encouraging the development and

ensuring the availability of adequate pain treatment is of utmost importance”); *Vacco v. Quill*, 521 U.S. 793, 808 n.11 (1997) (“Just as a State may prohibit assisting suicide while permitting patients to refuse unwanted lifesaving treatment, it may permit palliative care related to that refusal, which may have the foreseen but unintended ‘double effect’ of hastening the patient’s death.”).

This Court should find that interventional pain management treatment and palliative medicine is both reasonable and necessary for patients suffering from severe or continuing pain. In the medical community, the terms “reasonable” and “necessary” as they relate to a patient’s care typically mean “any diagnostic, preventative, or therapeutic service that meets community standards of care.” Donald Venes & C.W. Taber, *Taber’s Cyclopedic Medical Dictionary* (23d ed. 2017). Moreover, a patient should not be found to have reached “maximum medical improvement” and have valid PIP claims denied if interventional pain therapies could help relieve or manage their pain. If a patient continues to suffer from debilitating pain or ongoing pain that prevents them from taking part in normal activities of daily life, the treatments and therapies that can help relieve that pain and help them return to as normal a life as is possible is indispensable to those patients. Indeed, it should only be considered unreasonable to deny patients this necessary treatment.

B. State Farm Repeatedly Mischaracterizes Washington Law and its Denial of PIP Claims Using the MMI Standard Violates Washington Law.

In the face of a regulation that provides the sole grounds for denial, limitation, or termination of medical and hospital services provided by PIP coverage, State Farm resorts to repeatedly mischaracterizing the law.

First, State Farm argues that WAC 284-30-395 is merely a “disclosure regulation.” On the contrary, the regulation itself states that it is designed to “eliminate [and define] unfair acts or practices.” WAC 284-30-395. While it does require insurers to provide an insured with a written explanation of coverage provided by the policy, it was promulgated to do far more than only require disclosure. Critically, it regulates insurers’ ability to deny PIP benefits by delineating the “only grounds for denial, limitation, or termination of medical and hospital services”: those that are not (a) reasonable, (b) necessary, (c) related to the accident, or (d) incurred within three years of the automobile accident. WAC 284-30-395(1).

Next, State Farm wrongly claims that WAC 284-30-395 is intended to balance “cost-containment to the overall PIP system.” This purpose can be found nowhere in this WAC. The WAC’s title states it is for “prompt, fair and equitable settlements applicable to automobile personal injury protection insurance.” WAC 284-30-395. This is a far cry from a goal of “cost-containment to the overall PIP system.” From the context of the WAC

as a whole, the reference to “equitable settlements” has nothing to do with “cost-containment,” and everything to do with protecting consumers from improper and abusive denials of valid PIP claims. Surely no one would deny that a goal of keeping costs down is a desirable one—but not to the detriment of patients who are suffering from incapacitating injuries that could be alleviated from interventional pain management therapies and palliative care that State Farm would otherwise deny.

That said, State Farm is correct that the WAC has a goal of “prompt and adequate compensation to accident victims.” Not only are these words found in the title of the WAC (“Standards for prompt, fair . . . settlements”), but courts examining the WAC have found this purpose to be evident. *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 787, 16 P.3d 574 (2001) (stating PIP coverage is “essentially no-fault coverage for medical expenses arising from bodily injuries sustained in an automobile accident”); *Sadler v. State Farm Mut. Auto. Ins. Co.*, No. C07-995Z, 2008 WL 4371661, at *10 (W.D. Wash. Sept. 22, 2008) (the purpose of PIP coverage is “to provide for speedy payment of medical bills and compensation for lost income for accident victims.”). This purpose further evidences the intent, discussed above, of this WAC to provide protections to injured consumers, contrary to State Farm’s policy of denying them much-needed PIP benefits for pain treatment.

C. State Farm Cannot Bypass the Law By Defining A Valid Ground for Denial of PIP Claims to Include an Improper Ground.

State Farm erroneously argues that just because its policy form “defines ‘necessary’ in terms of MMI,” its use of MMI to deny valid PIP claims is proper because it is merely defining “necessary” treatment to be treatment prior to a patient reaching MMI. However, this argument makes little sense in the context of insurance regulations.

State Farm should not be permitted to circumvent the requirements of WAC 284-30-395 by defining a term that is a proper ground for denial of PIP claims—“necessary” medical and hospital services—to include an improper ground. For instance, if State Farm chose to include in its definition of “necessary” that the claimant must be male or white, this would not, by virtue of State Farm’s own definition, make a denial on such bases legal under WAC 284-30-395. Such a definition of “necessary” would not be permissible and would be a violation of law, just as a definition of “necessary” that permits denials when a patient has reached MMI should not be permissible (MMI being noticeably absent from WAC 284-30-395).

State Farm cannot unilaterally define the governing law or regulations with its own policy form. To allow it to do so would be to allow State Farm to regulate itself; which should not be permitted any more than a fox should be permitted to guard a henhouse. The RCW and the WAC

define the relevant law. And the WAC does not state that an insurer may base a denial of PIP benefits on an insured reaching “maximum medical improvement.” WAC 284-30-395(1).

D. State Farm’s Reference to Workers’ Compensation is Also Unavailing of its Position.

State Farm is attempting to engraft a provision from Workers’ Compensation law into their motor vehicle insurance policies. By doing so, they pervert the purpose of the Workers’ Compensation concept to have the effect of denying payments to all injured parties—precisely the opposite of the effect that MMI has in Workers’ Compensation law. Where MMI is intended to be a gateway to benefits in the context of Workers’ Compensation law, State Farm attempts to use it to slam the door on its own insureds.

Maximum medical improvement is not an appropriate standard in the context of motor vehicle liability insurance. MMI is a concept which is primarily found in Workers’ Compensation. Workers’ Compensation is a comprehensive statutory and regulatory system which includes references to “maximum medical improvement” as a basis for determining the amount of benefits which must be provided to a disabled claimant. *See* WAC 296-20-01002. The phrase, “maximum medical improvement” should have

meaning only within the context of that complex statutory and regulatory system.

MMI does not mean that no further medical, palliative, or rehabilitative care is needed. To the contrary, a person who is injured in a motor vehicle collision and who has reached a plateau in their recovery often requires on-going care to maintain that level of improvement or to deal with the deficits which remain (severe pain, limitation of motion, emotional or psychological distress) that are a direct result of the collision. As State Farm distorts the concept of MMI, it would mean that effective treatment is no longer available to the injured person to improve or maintain their condition or alleviate the effects of that condition.

In the context of Workers' Compensation, MMI is a gateway to payment to an injured party. The Washington Department of Labor and Industries refers to the use of MMI when it defines "proper and necessary" treatment for purposes of Workers' Compensation benefits. WAC 296-20-01002.

Significantly, in the Workers' Compensation context, a person who is left with residual medical limitations or needs after reaching MMI is entitled to further compensation for her permanent disability. WAC 296-20-19000. Thus, a person who makes a Workers' Compensation claim is not

left without a remedy for continuing conditions. This is the opposite effect of the use of MMI which State Farm incorrectly urges this Court to adopt.

Once a permanent partial disability rating is made in Workers' Compensation law, the injured worker is paid according to the Department of Labor and Industries' Permanent Partial Disability Category Awards. The amount of such payments can be substantial. For example, for a permanent partial cervical disability, the compensation can be up to \$70,419, depending upon the rating. Washington State Department of Labor and Industries, *Permanent Partial Disability Category Awards for Dates of Injury from July 1, 2017 through June 30, 2018*, available at <http://lni.wa.gov/ClaimsIns/Files/SelfIns/ClaimMgt/2017PpdSched.pdf>.

In contrast, State Farm attempts to take the MMI concept, turn it on its head, and use it to deny PIP payments to claimants in motor vehicle collision cases.

For example, an insured who is so severely injured in a motor vehicle crash that her condition is expected never to improve but, instead, to continue to decline, would have reached "maximum medical improvement" immediately. Such a person would benefit only from "palliative care" or "end of life care." However, since the insured's condition would not be expected to improve—she would already have reached maximum medical improvement from the moment she was

stabilized in a hospital—State Farm would, under its interpretation of its insurance policy, be able to deny payment for such palliative care. This is one example of the absurdity of State Farm’s position which would lead to ridiculous and untenable results.

Additionally, State Farm does not even define MMI in its policies. Rather, the phrase can mean whatever they want it to mean. They are just words that can be used to deny coverage. Unlike Workers’ Compensation claims, in which an injured party is often entitled to additional benefits once MMI is reached, State Farm flips this concept on its head and uses it to *deny coverage* to such claimants. What is a gateway to compensation in the context of Workers’ Compensation becomes a wall to payments in the hands of State Farm.

State Farm’s position in this case would place persons injured in a motor vehicle collision in a less favorable position than those injured at work—in spite of WAC language which prevents them from doing so by specifically *not* including MMI language. WAC 284-30-395. State Farm is substituting its judgment of what is “reasonable” and “necessary” for that of the treating medical care provider and of the legislature. State Farm is attempting to argue that it alone can determine what is “reasonable and necessary” for the treatment of one of its insureds. This yields to the absurd result that allows the insurer to substitute its judgment for that of the treating

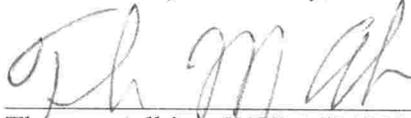
physician and to escape responsibility for paying for treatment which is reasonable and necessary to alleviate the pain that was caused by the collision.

If the legislature or the Insurance Commissioner had intended to use a standard that involved “maximum medical improvement” it could have done so. It did not. State Farm cannot override this legislative and regulatory framework.

V. CONCLUSION

This Court should find that interventional pain management therapy and treatment is both necessary and reasonable for victims of motor vehicle accidents who suffer serious injuries and end up battling ongoing and devastating pain. Holding otherwise would allow State Farm to deny these injured individuals’ PIP claims and, if they cannot afford the necessary treatment themselves, condemn them to a life of devastating pain.

DATED this 24th day of January, 2018.



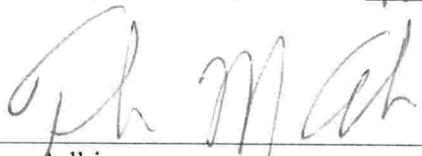
Thomas Adkins, WSBA#21223
Attorney for Amicus Curiae
Washington Society of Interventional Pain Physicians

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| Frank Falzetta Jennifer Hoffman David Dworsky Sheppard Mullin Richter & Hampton 333 S. Hope St., 43 rd Floor Los Angeles, CA 90071 ffalzetta@sheppardmullin.com jhoffman@sheppardmullin.com ddworsky@sheppardmullin.com | [X] Via ECF |
| Tyler K. Firkins David Nauheim Van Siclén, Stocks & Firkins 721 45 th St NE Auburn, WA 98002 tfirkins@vansiclen.com davidnauheim@gmail.com | [X] Via ECF |

DATED this 24th day of January, 2018 at Federal Way
Washington.



Thomas Adkins

ADKINS LAW PLLC

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- laura.young@lewisbrisbois.com
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