FILED
SUPREME COURT
STATE OF WASHINGTON
2/26/2018 3:46 PM
BY SUSAN L. CARLSON
CLERK

NO. 94771-6

IN WASHINGTON STATE SUPREME COURT

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

Plaintiffs,

vs.

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

Defendant.

FROM THE US DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

PLAINTIFF'S ANSWER TO *AMICUS CURIAE* BRIEF OF THE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

Tyler K. Firkins
Stephanie Messplay
VAN SICLEN, STOCKS & FIRKINS
721 45th St NE
Auburn, WA 98002
253-859-8899
tfirkins@vansiclen.com

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

I. Introduction..... 1

II. Argument 2

A. State Farm's Use of the MMI Standard is Contrary To both Statutory Language and Public Policy 2

B. PIP Insurance is not Comparable to Either Worker's Compensation or Maintenance and Cure..... 7

III. Conclusion..... 8

TABLE OF AUTHORITIES

Page No

Washington Cases

Fluke Corp. v. Hartford Acc. & Indem. Co., 145 Wn.2d 137, 34 P. 3d 809 (2001) 3

General Ins. Co. v. Emerson, 102 Wn.2d 477, 687 P.2d 1139 (1984) ...3, 4

Kyrkos v. State Farm, 121 Wn.2d 669, 672, 852 P.2d 1078 (1993)2, 3, 5, 6

New Hampshire Indem. Co. v. Budget Rent-A-Car Sys., Inc., 148 Wn.2d 929, 936, 64 P.3d 1239 (2003) 4

Sherry v. Fin. Idem. Co., 160 Wn.2d 611, 620, 160 P.3d 31 (2007) 2

State ex rel. Ralston v. Department of Licenses, 60 Wn.2d 535, 540, 374 P.2d 571 (1962) 4

Wood v. Mut. of Enumclaw Ins. Co., 97 Wn. App. 721, 726, 986 P.2d 833 (1999) 4, 5

Other Jurisdiction:

Alrayashi v. Rouge Steel Co., 702 F. Supp. 1334, 1337 (E.D. Mich. 1989).. 7

Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528, 58 S. Ct. 651, 82 L. Ed. 993 (1938) 7

Etu v. Fairleigh Dickinson Univ. West Indies Lab., Inc., 635 F. Supp. 290, 294 (D. Vrgin Island 1986) 8

Gauthier v. Crosby Marine Serv., Inc., 536 F. Supp. 269, 271 (E.D. La. 1982), *aff'd* 752 F.2d 1085 (5th Cir. 1985) 7

Guevara v. Maritime Overseas Corp., 34 F.3d 1279, 1284 (5th Cir. 1994) 7

Kelly v. Bass Enter. Prod. Co., 17 F. Supp.2d 591, 599 (E.D. La. 1998) ..8

LeBlanc v. B.G.T. Corp., 992 F.2d 394, 400 (1st Cir. 1993) 7

MacPherson v. Buick Motor Co., 217 N.Y. 382, 394, 111 NE 1050, 20155 (1916) 4

Pelotto v. L & N Towing Co., 604 F.2d 396, 400 (5th Ci. 1979) 7

Reyes v. Delta Dallas Alpha Corp., 199 F.3d 626, 629 (2d Cir. 1999) 7

Revised Code of Washington:

RCW 48.22.005(7) 6

RCW 48.22.030 2

RCW 48.22.095 6

RCW 48.22.100 6

Washington Administrative Code:

WAC 284-30-395 .....6, 8

Other:

7 Am.Jur.2d *Automobile Insurance § 31* (1997) 4

Venes, D., & Tabor, C.W. (2017), *Taber's Cyclopedic Medical Dictionary* (Ed. 23) 5

I. INTRODUCTION

Contrary to State Farm's assertions, public policy can and often does provide a basis for striking certain provisions from insurance policies, particularly in the realm of automobile insurance. As Amicus Washington State Association for Justice Foundation points out, the question of whether an insurance policy provision violates public policy is an important part of the *Kyrkos* test for analyzing insurance policy provisions. State Farm's use of "essential in achieving maximum medical improvement" as a basis for denying, terminating, or limiting benefits is inconsistent not only with explicit statutory language, but also with the purpose of mandatory PIP coverage.

The public policies behind PIP are also what makes worker's compensation and federal maritime standards inappropriate for inclusion in automobile insurance policies. As Amicus articulates, there are clear purposes served by worker's compensation and PIP, and those purposes are vastly different from each other. Maritime law's maintenance and cure is comparable to worker's compensation and not at all akin to automobile insurance. State Farm's attempted use of worker's compensation and maritime law to justify its unlawful policy provision are unavailing.

II. ARGUMENT

A. State Farm's use of the MMI standard is contrary to both statutory language and public policy.

Amicus argues that defining "necessary" by use of the MMI standard constitutes an impermissible policy exclusion pursuant to *Kyrkos v. State Farm*, 121 Wn.2d 669, 672, 852 P.2d 1078 (1993), because it violates public policy. State Farm, in its earlier briefing, argued that provisions in an insurance policy that are not UIM exclusions cannot be invalidated on public policy grounds. Amicus is correct.

Kyrkos involved a UIM policy that defined "underinsured motor vehicle" as any motor vehicle not insured at the time of the accident, except those owned and operated by either a self-insurer or the government. 121 Wn.2d at 672. The insured argued that this exclusionary definition was prohibited by RCW 48.22.030, which mandates the provision of UIM coverage. The Supreme Court recognized that some exclusions may be permitted to limit UIM coverage, but only if (1) the exclusion did not conflict with the express language of the statute and (2) if the exclusion was not contrary to the statute's declared public policy. *Id.* at 674.[1] In that case,

---

[1] Although the *Kyrkos* test has not been applied in PIP coverage cases, UIM and PIP are sufficiently similar as to warrant the case's application here. "UIM and PIP insurance are both creatures of public policy: coverages that every insurer writing automobile policies within the state must, by law, offer their insureds." *Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 620, 160 P.3d 31 (2007).

the Court struck the government-owned vehicles exclusion from State Farm's UIM policy, because the provision was contrary to the public policy of ensuring that negligently injured persons are compensated even where the negligent party was un- or underinsured, so as not to drain public resources. *Id.* at 675-76.

The cases cited by State Farm are distinguishable from *Kyrkos* because in none of those cases could an applicable clear public policy be articulated. *Fluke Corp. v. Hartford Acc. & Indem. Co.*, 145 Wn.2d 137, 34 P.3d 809 (2001), involved an insurance company seeking to have its own umbrella liability policy invalidated on public policy grounds. However, the Court declined to do so because the insurance company could not identify any statutes or case law articulating an applicable public policy. *Id.* at 145 ("In sum, Hartford can identify no public policy clearly expressed in Washington statutes or case law that would justify overriding the policy's explicit coverage for malicious prosecution."). *General Ins. Co. v. Emerson*, 102 Wn.2d 477, 687 P.2d 1139 (1984), similarly involved a litigant's failure to identify an applicable public policy. Notably, the Court in *Emerson* distinguished homeowner's insurance policies from automobile insurance policies, for which the legislature has clearly articulated a strong public policy:

The use, operation and regulation of automobiles on public

> highways has been of long-standing concern to the courts and legislatures. In 1916, Justice Cardozo observed that a lower court might have been justified in ruling as a matter of law that "the car was a dangerous thing." *MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 394, 111 N.E. 1050, 1055 (1916). This court noted that "The automobile is a useful machine in our society, but it can also be a deadly weapon." *State ex rel. Ralston v. Department of Licenses,* 60 Wn.2d 535, 540, 374 P.2d 571 (1962). There we recognized widespread regulation concerning the automobile. While we are not unmindful that serious and costly accidents occur in the home, and that innocent victims may be left without meaningful compensation in the absence of insurance, we do not perceive the same level of concern for financial compensation by negligent homeowners as exists for negligent automobile owners and users.

Emerson, 102 Wn.2d at 483. Finally, in *New Hampshire Indem. Co. v. Budget Rent-A-Car Sys., Inc.*, 148 Wn.2d 929, 936, 64 P.3d 1239 (2003), the Court held that the public policy favoring the compensation of crash victims did not apply to a dispute between two insurance companies over which had to pay first.

As Amicus correctly asserts, this is a case where a clear public policy has been articulated and is applicable to the dispute at hand. The legislature's purpose in mandating PIP coverage was "'to remedy the long recognized and serious problem of the tort system's inability to rapidly, adequately, and fairly compensate victims of automobile accidents.'" *Wood v. Mut. of Enumclaw Ins. Co.*, 97 Wn. App. 721, 726, 986 P.2d 833 (1999) (quoting 7 Am.Jur.2d *Automobile Insurance* § 31 (1997)).

Any reasonable insured would understand that fair and adequate compensation would include any treatment deemed necessary by their treating physician. As Amicus notes, "necessary" as the term is commonly understood in the world of medicine, is not limited to only those services that will achieve maximum medical improvement. Instead, "necessary" is most commonly understood by the medical community to mean "any diagnostic, preventative, or therapeutic service that meets community standards of care." Venes, D., & Taber, C.W. (2017), Taber's Cyclopedic Medical Dictionary (Ed. 23). State Farm's use of the MMI standard is inconsistent with this understanding, and thus inconsistent with the purpose of mandatory PIP coverage.

State Farm's argument that *Kyrkos* applies only to "exclusions" is similarly unavailing. Firstly, this argument is premised on the false contention that MMI is how State Farm defines "necessary," a factual assertion thoroughly debunked in Plaintiff's earlier briefing. *See* Reply Brief at 3-6. Second, nothing in *Kyrkos* limits its application solely to what might be termed an "exclusion." The test has since been utilized to evaluate other types of policy provisions, including for example a provision offsetting UIM benefits by PIP recovery. *See Wood*, 97 Wn. App. at 726. In sum, State Farm can articulate no good reason not to consider public policy concerns in determining the legality of its use of the MMI standard.

Furthermore, State Farm's use of the MMI standard does not pass the first part of the *Kyrkos* test. Unlike the UIM statute, which is sometimes ambiguous about whether an exclusion is permissible, *see Kyrkos*, 121 Wn.2d at 673 (discussing "the situation where an exclusion is neither permitted nor foreclosed by the UIM statute"), WAC 284-30-395 is clear that there are only four permissible bases upon which PIP coverage may be denied, terminated, or limited:

> Within a reasonable time after receipt of actual notice of an insured's intent to file a personal injury protection medical and hospital benefits claim, and in every case prior to denying, limiting, or terminating an insured's medical and hospital benefits, an insurer shall provide an insured with a written explanation of the coverage provided by the policy, including a notice that the insurer may deny, limit, or terminate benefits if the insurer determines that the medical and hospital services:
>
> (a) Are not reasonable;
> (b) Are not necessary;
> (c) Are not related to the accident; or
> (d) Are not incurred within three years of the automobile accident.
>
> ***These are the only grounds for denial, limitation, or termination of medical and hospital services permitted*** pursuant to RCW 48.22.005(7), 48.22.095, or 48.22.100.

(emphasis added). Thus, even setting public policy aside, State Farm's use of the MMI standard is unlawful, and this Court must answer the first certified question with a resounding Yes.

B. PIP insurance is not comparable to either worker's compensation or maintenance and cure.

Amicus also asserts that the MMI standard as used in the worker's compensation system is inappropriate for use in PIP policies, because worker's compensation is not and was not designed to be functionally equivalent to insurance. Plaintiff agrees, and additionally notes that "maintenance and cure" in federal maritime law, which also uses the MMI standard, was also not designed to be functionally equivalent to insurance. "A seaman's right to maintenance and cure is implicit in the contractual relationship between the seaman and his employer..." *Pelotto v. L & N Towing Co.*, 604 F.2d 396, 400 (5th Cir. 1979). The purpose of maintenance and cure was to induce men "'to accept employment in an arduous and perilous service'" and to induce shipowners to protect the safety of seamen in their employ. *Gauthier v. Crosby Marine Serv., Inc.*, 536 F. Supp. 269, 271 (E.D. La. 1982), *aff'd,* 752 F.2d 1085 (5th Cir. 1985) (quoting *Calmar S. S. Corporation v. Taylor*, 303 U.S. 525, 528, 58 S. Ct. 651, 82 L. Ed. 993 (1938)). As numerous courts have noted, maintenance and cure is maritime law's functional equivalent of worker's compensation. *Reyes v. Delta Dallas Alpha Corp.,* 199 F.3d 626, 629 (2d Cir.1999); *Guevara v. Maritime Overseas Corp.,* 34 F.3d 1279, 1284 (5th Cir.1994); *LeBlanc v. B.G.T. Corp.,* 992 F.2d 394, 400 (1st Cir. 1993); *Alrayashi v. Rouge Steel Co.,* 702

F.Supp. 1334, 1338 (E.D.Mich.1989); *Kelly v. Bass Enter. Prod. Co.,* 17 F.Supp.2d 591, 599 (E.D.La.1998); *Etu v. Fairleigh Dickinson Univ. West Indies Lab., Inc.,* 635 F.Supp. 290, 294 (D.V.I. 1986). Analogy to maintenance and cure is thus inappropriate for the same reasons as analogy to worker's compensation. These systems serve vastly different purposes than PIP coverage and should not factor into this Court's consideration.

III. CONCLUSION

Plaintiff Class agrees with Amicus Washington State Association for Justice Foundation that State Farm's use of the maximum medical improvement standard is contrary to both the clear language of WAC 284-30-395 and public policy.

DATED this 26th day of February, 2018.

/s/ Tyler K. Firkins

Tyler K. Firkins, WSBA #20964
Stephanie Messplay, WSBA#47017
David Nauheim, WSBA #41880
Attorneys for Plaintiff Brett Durant and all other similarly situated people
721 45th St. NE
Auburn, WA 98002
tfirkins@vansiclen.com
(253) 859-8899

CERTIFICATE OF SERVICE

I certify that I served a copy of the forgoing documents on the following individuals specified below on February 26, 2018. Service was made by the means specified below.

Gregory Worden Laura Hawes Young Gregory.Worden@lewisbrisbois.com Laura.Young@lewisbrisbois.com	[X] Via ECF
Frank Falzetta Jennifer Hoffman David Dworsky ffalzetta@sheppardmullin.com jhoffman@sheppardmullin.com ddworsky@sheppardmullin.com	[X] Via ECF
Thomas Adkins Tom@ThomasAdkins-law.com	[X] Via ECF
Dan Huntington Valerie Mcomie danhuntington@richter-wimberly.com Valeriemccomie@gmail.com	[X] Via ECF
Marta DeLeon martad@atg.wa.gov	[X] Via ECF

s/Diana M. Butler

Diana M. Butler, Paralegal

VAN SICLEN STOCKS & FIRKINS

February 26, 2018 - 3:46 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94771-6
Appellate Court Case Title:	Brett Durant v. State Farm Mutual Automobile Insurance Company

The following documents have been uploaded:

- 947716_Briefs_20180226154513SC963919_7618.pdf
  This File Contains:
  Briefs - Answer to Amicus Curiae
  The Original File Name was durant answer to wsaj brief.pdf

A copy of the uploaded files will be sent to:

- jhoffman@sheppardmullin.com
- Gregory.Worden@lewisbrisbois.com
- Julie.Feser@atg.wa.gov
- Tom@ThomasAdkins-law.com
- bonitaf@richter-wimberley.com
- colette.saunders@lewisbrisbois.com
- danhuntington@richter-wimberley.com
- davidnauheim@gmail.com
- ddworsky@sheppardmullin.com
- ffalzetta@sheppardmullin.com
- laura.young@lewisbrisbois.com
- martad@atg.wa.gov
- valeriemcomie@gmail.com
- vicki.milbrad@lewisbrisbois.com

Comments:

Sender Name: Diana Butler - Email: diana@vansiclen.com
Filing on Behalf of: Tyler K. Firkins - Email: tfirkins@vansiclen.com (Alternate Email: diana@vansiclen.com)

Address:
721 45th St NE
Auburn, WA, 98002
Phone: (253) 220-8803

Note: The Filing Id is 20180226154513SC963919