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NO. 95827-1

SUPREME COURT OF THE STATE OF WASHINGTON
from the
COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III
NO. 346714

MONICA DIAZ BARRIGA FIGUEROA,

Respondent,

v.

CONSUELO PRIETO MARISCAL,

Petitioner.

**SUPPLEMENTAL BRIEF OF PETITIONER
CONSUELO PRIETO MARISCAL**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. SUPPLEMENTAL STATEMENT OF ISSUES	1
III. SUPPLEMENTAL STATEMENT OF THE CASE.....	2
A. Ms. Diaz’s Son Received PIP Benefits through Ms. Prieto’s Auto Insurer Because He was Struck as a Pedestrian	2
B. The Redacted PIP Application Was Admitted at Trial.....	4
C. History on Appeal	6
IV. SUPPLEMENTAL ARGUMENT.....	6
A. Standard of Review.....	6
B. The Court of Appeals Erroneously Held the PIP Application Constituted Work Product.....	7
1. The PIP application was not prepared in anticipation of litigation.....	8
2. The PIP application was prepared in the normal course of business.....	11
C. The Court of Appeals’ Decision is a Misstatement of the Law	13
1. The Court of Appeals confuses the rationale behind the expectation of confidentiality.....	13
2. Confidentiality alone does not create privilege or immunity	16
D. The Court of Appeals Erroneously Held Admission of the PIP Application at Trial Was Prejudicial Error, Contrary to the Cumulative Evidence Rule.....	18
V. CONCLUSION.....	20

TABLE OF AUTHORITIES

	<u>Page</u>
<u>WASHINGTON CASES</u>	
<i>Arment v. Kmart Corp.</i> , 79 Wn. App. 694, 902 P.2d 1254 (1995).....	20
<i>Cedell v. Farmers Ins. Co. of Washington</i> , 176 Wn.2d 686, 295 P.3d 239 (2013).....	12
<i>Driggs v. Howlett</i> , 193 Wn. App. 875, 371 P.3d 61, review denied, 186 Wn.2d 1007, 380 P.3d 450 (2016) (citing <i>Hoskins v. Reich</i> , 142 Wn. App. 557, 174 P.3d 1250 (2008)).....	18
<i>Guillen v. Pierce County</i> , 144 Wn.2d 696, 31 P.3d 628 (2001), rev'd in part, <i>Pierce County v. Guillen</i> , 537 U.S. 129, 123 S. Ct. 720 (2003).....	8
<i>Hoskins v. Reich</i> , 142 Wn. App. 557, 174 P.3d 1250 (2008)	18
<i>Lindstrom v. Ladenburg</i> , 136 Wn.2d 595, 963 P.2d 869 (1998)	8
<i>Lodis v. Corbis Holdings, Inc.</i> , 172 Wn. App. 835, 292 P.3d 779 (2013).....	7
<i>Richardson v. Government Employees Ins. Co.</i> , 200 Wn. App. 705, 403 P.3d 115 (2017).....	7
<i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 664, 230 P.3d 583 (2010).....	6
<i>State v. Darden</i> , 145 Wn.2d 628, 41 P.3d 1189 (2002).....	17
<i>State v. Eller</i> , 84 Wn.2d 90, 524 P.2d 242 (1974)	18, 19, 20
<i>State v. Harris</i> , 51 Wn. App. 807, 755 P.2d 825 (1988).....	16
<u>WASHINGTON STATUTES</u>	
RCW 48.22	3, 5, 17
<u>WASHINGTON COURT RULES</u>	
CR 26(b).....	7, 8
ER 801(d).....	6

TABLE OF AUTHORITIES

	<u>Page</u>
<u>WASHINGTON RULES AND REGULATIONS</u>	
WAC 246-453.....	15

I. INTRODUCTION

Consuelo Prieto Mariscal, petitioner, asks this Court to reverse the decision below and affirm the judgment of the trial court. The Court of Appeals erroneously replaced the “prepared in anticipation of litigation” standard for work product immunity with a lesser, broader standard that immunizes any document that a party claims was prepared with an “expectation of confidentiality.” This novel and unsupported standard was applied to an application for Personal Injury Protection (“PIP”) benefits, where the plaintiff’s own admissions showed not only that she had no expectation of confidentiality in the document, but also that it was prepared in the ordinary course of business. Compounding its work product error, the Court of Appeals also erroneously concluded that the trial court’s admission of the application at trial was prejudicial error contrary to the cumulative evidence rule.

II. SUPPLEMENTAL STATEMENT OF ISSUES

Per this Court’s September 5, 2018 Order granting Ms. Prieto’s petition for review and denying review of the issues raised in Respondent’s answer to the petition for review, the only issues are:

1. Whether the Court of Appeals erred in concluding an application for benefits qualified as work product even though it was not

prepared in anticipation of litigation, contained no confidential information, and was prepared in the normal course of business; and

2. Whether the Court of Appeals erred in concluding the admission of the application at trial was prejudicial error where the same evidence was admitted from other sources and plaintiff below presented refuting evidence.

III. SUPPLEMENTAL STATEMENT OF THE CASE

In addition to the comprehensive statement of the case set forth in the Petition for Review, Ms. Prieto submits the following supplemental statement of the case.

A. Ms. Diaz's Son Received PIP Benefits through Ms. Prieto's Auto Insurer Because He was Struck as a Pedestrian

On October 23, 2013, Ms. Diaz's son, Brayan Martinez, was apparently struck by Ms. Prieto's car while riding his bike on a residential street in Pasco, Washington. After interviewing Ms. Prieto, her teenage daughter who was a passenger in the car, and possibly a neighbor, the police prepared a report stating that Brayan had ridden his bike from between two parked cars and into the roadway immediately prior to being struck by Ms. Prieto's minivan. CP 304-5.

On November 21, 2013, Ms. Diaz signed a blank form application for PIP benefits for Brayan at her lawyer's office. Ms. Diaz had no

relationship with the PIP insurer at the time she signed the blank form, but was able to make a PIP claim for Brayan upon Ms. Prieto's policy simply because Brayan was struck as a pedestrian. *See* RCW 48.22.005(5)(b)(ii); VRP 120-1. The parties did not have the same insurance company as the Court of Appeals incorrectly inferred. Decision at 4, n.1.¹

After obtaining Ms. Diaz's signature on the blank application, a legal assistant filled out the form. To describe the accident, the assistant simply copied from the police report. VRP 469-71. This is Ms. Diaz's counsel's regular practice. VRP 478. The assistant wrote in the following:

Vehicle was traveling on North Cedar when child on a bike rode into road. There were 2 parked cars on the road creating a blinde [sic] spot for the driver. Child was struck and had right leg ran over.

Ms. Diaz's attorneys submitted the form to Ms. Prieto's insurer, and the insurer paid PIP benefits. VRP 12-13. Ms. Diaz and the assistant testified

¹ Contrary to the Court of Appeals' statement in its decision below, counsel for Ms. Prieto did not say that the parties "had the same insurance company." (See January 31, 2018 Recording of Oral Argument at 24:33, <http://www.courts.wa.gov/content/OralArgAudio/a03/20180131/346714.wma>). Rather, the court asked if the same insurance company provided both the PIP and liability coverages, which is true. There is no evidence Ms. Diaz had any applicable insurance of her own, only that her lawyers took advantage of the statutory requirement that benefits be extended to a pedestrian (regardless of fault), and made a claim upon Ms. Prieto's insurer.

that the accident description in the PIP application was not Ms. Diaz's testimony. VRP 299; VRP 469-70.

B. The Redacted PIP Application Was Admitted at Trial

On May 6, 2014, Ms. Diaz filed this suit, alleging the accident occurred while Brayan "was riding a bicycle[.]" CP 1, 2. During a visit to the scene in January 2015, Brayan told his accident reconstruction expert he would do a U-turn maneuver in the road in front of an orange pickup parked along the curb, consistent with the description in the PIP application. CP 165-67. Brayan later testified in his deposition that his leg was run over while he was trying to untangle his shoelace from his bike chain. CP 2, 12, 379-86. On January 24, 2016, Ms. Diaz amended her complaint to state Brayan was not riding a bicycle when he was struck, reciting this inconsistent testimony. CP 12.

The case was tried in June 2016. VRP 1. On the second day of trial, outside the presence of the jury, Ms. Diaz raised with the trial court the admissibility of the PIP application after Ms. Prieto had referred to it during opening statements. Ms. Diaz argued the application contained hearsay and was a "privileged document" and moved to exclude further references to the application. VRP 120. Ms. Diaz never argued that the PIP application was work product, prepared in anticipation of litigation, or contained confidential information. The trial court denied the motion to

exclude, finding the application was not a privileged document. VRP 135. The application was redacted per Ms. Diaz's motion *in limine* regarding insurance, based on the collateral source rule. Before the application was admitted, Ms. Diaz's expert testified as to Brayan's original story of the accident (CP 166-67) and was questioned as to his opinion on whether that scenario was consistent with physical evidence (CP 206-207; 222).

The jury returned a defense verdict on liability. VRP 627. Ms. Diaz moved for judgment notwithstanding the verdict and for a new trial. CP 540-58. For the first time, she argued the PIP application should not have been admitted because the accident description it contained was made with an expectation of confidentiality and *Harris v. Drake*, 152 Wn.2d 480, 99 P.3d 872 (2004), compelled its exclusion. VRP July 11, 2016, 5-7. But, there is nothing in the trial court record that suggests Ms. Diaz, or Brayan, or their lawyers had an "expectation of confidentiality" or, more importantly, that the application was prepared in anticipation of litigation. See VRP 119-24 (colloquy re PIP), 124-30 (Diaz testimony) 469-70 (legal assistant testimony). Indeed, the application was made to Ms. Prieto's insurer pursuant to RCW 48.22.005(5)(b)(ii).

The trial court denied Ms. Diaz's motion, but did not make findings as to whether the PIP application was work product, only that the

PIP application was admissible under the rules of evidence because it contained a prior inconsistent statement. VRP July 11, 2016, 8-12, 14. Ms. Diaz appealed, assigning error only to the court's hearsay ruling. Decision at 10, n.6.

C. History on Appeal

The Court of Appeals reversed, holding the trial court erred by failing to extend work product protection to the PIP application because Ms. Diaz had a "reasonable expectation that her PIP application would be kept confidential."² Decision at 11. Further, the court held the admission of the application was prejudicial error. Decision at 12. This Court granted Ms. Prieto's Petition for Review and denied review of the issues raised in Ms. Diaz's Answer.

IV. SUPPLEMENTAL ARGUMENT

A. Standard of Review

Though the Court of Appeals did not identify the applicable standard of review in its decision below, a trial court's decision as to the admissibility of evidence is reviewed under an abuse of discretion standard. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668, 230 P.3d 583

² The Court of Appeals held the PIP application was not hearsay as an admission by a party opponent under ER 801(d)(2)(iv). Decision at 1.

(2010); *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 857, 292 P.3d 779 (2013).

B. The Court of Appeals Erroneously Held the PIP Application Constituted Work Product

The Court of Appeals failed to engage in a proper work product analysis before holding the PIP application was protected. The court did not analyze whether the document was prepared in anticipation of litigation, nor did it look at the specific parties and their expectations as required by *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212 (1985). Had the court properly analyzed these issues, it would not have held the application was work product.

CR 26(b)(4) sets forth the general rule governing work product, which is that documents *prepared in anticipation of litigation* are discoverable upon a showing of substantial need. (Emphasis added); *See also, e.g., Richardson v. Gov't Employees Ins. Co.*, 200 Wn. App. 705, 712, 403 P.3d 115 (2017). The work product doctrine provides a qualified immunity from discovery. *Harris*, 152 Wn.2d at 486. Only the mental impressions, notes, and strategies of an attorney enjoy a nearly absolute immunity. *Soter v. Cowles Pub. Co.*, 131 Wn. App. 882, 893, 130 P.3d 840 (2006), *aff'd*, 162 Wn.2d 716, 174 P.3d 60 (2007).

1. The PIP application was not prepared in anticipation of litigation

The court below failed to establish or even consider whether the PIP application was prepared in anticipation of litigation, which is the first step in determining whether the work product attaches to a particular document. CR 26(b)(4); *Heidebrink*, 104 Wn.2d at 396; *Soter*, 131 Wn. App. at 893. A party invoking the work product protection has the burden to show the materials indeed qualify as work product. *Lindstrom v. Ladenburg*, 136 Wn.2d 595, 612, 963 P.2d 869 (1998); *see also Guillen v. Pierce County*, 144 Wn.2d 696, 716, 31 P.3d 628 (2001), *rev'd in part, Pierce County v. Guillen*, 537 U.S. 129, 123 S. Ct. 720 (2003) (burden of showing a privilege applies in any given situation rests entirely upon the entity asserting the privilege).

Under *Heidebrink*, a court must examine the specific parties and their expectations to determine whether material was prepared in anticipation of litigation. *Heidebrink*, 104 Wn.2d at 400. Here, the record is clear that the PIP application was not prepared in anticipation because Ms. Diaz signed the application while it was blank. There is no suggestion in the record, and no reasonable basis upon which to conclude, that Ms. Diaz could have anticipated litigation over PIP payments before she even submitted the initial application for PIP benefits. Further, it was

an unremarkable form application for no-fault insurance, seeking only basic information that could not jeopardize Brayan's PIP claim.

The assistant who later prepared the application could not have completed the form in anticipation of litigation or with the expectation of confidentiality either, because she merely summarized the description of the accident already contained in the police report. VRP 469-71. Further, Ms. Diaz argued below that "the statements in the PIP application were never intended to be adopted as they were hearsay statements in the police report, nor meant as an admission of how the collision occurred." Brief of Appellant Diaz at 21.³ The circumstances surrounding the PIP application are markedly different from those of *Heidebrink* or *Harris*, where this Court found work product protection attached.

In *Heidebrink*, an investigator hired by Mr. Moriwaki's liability insurance carrier recorded his statement after an accident he allegedly caused on the adjacent roadway, injuring Mrs. Heidebrink. *Heidebrink*, 104 Wn.2d. at 394. The investigator was essentially doing the to-be-appointed lawyer's leg work for her. The Heidebrinks sued and sought discovery of the statement. In looking at the specific parties and their expectations as to the statement, this Court observed that the case involved

³ That is her lawyer's briefing, not her testimony. Nonetheless, Ms. Diaz signed it in blank, so she had no expectation over the content.

statements by a defendant in a third-party liability situation, where litigation was to be expected following an automobile accident. *Id.* at 400. Therefore, this Court held that the statement was protected from discovery under what is now CR 26(b)(4). *Id.* at 401.

In *Harris*, Harris made a PIP claim after being rear-ended by Drake, and Harris's insurer required him to submit to an IME with Dr. Brandt Bede for the purpose of defending against a claim for further PIP benefits. *Harris*, 152 Wn.2d at 484. Before trial, Drake designated Dr. Bede as a witness and listed his IME reports as exhibits. Harris later filed a motion *in limine* to exclude Dr. Bede's testimony and asserted work product protection over the reports on behalf of his insurance company. *Id.* at 485. The court granted Harris's motion to exclude the doctor because the reports were the work product of Harris's insurance company. *Id.* This Court engaged in a proper work product analysis, holding that the IME was conducted by the PIP insurer in **its** anticipation of PIP arbitration or litigation and qualified as the insurer's work product under *Heidebrink*. *Harris*, 152 Wn.2d at 487-89. Because the PIP insurer did not waive **its** work product immunity, the evidence was inadmissible.

The facts in this record do not suggest that the PIP application was prepared in anticipation of litigation. Unlike a liability insured's statements about how he caused an accident, Ms. Diaz never intended that

this PIP application be adopted as a statement to her own insurer of how the accident actually occurred or that it be protected from disclosure. In fact, she and her lawyers knew that it would be provided to Ms. Prieto's insurer. There is no evidence to the contrary.

2. The PIP application was prepared in the normal course of business

Work product protection does not extend to documents that are prepared in the "ordinary course of business." *Heidebrink*, 104 Wn.2d at 400. This test "prevents parties from exploiting the work product rule by adopting routine practices whereby all documents appear to be prepared in anticipation of litigation." *Soter*, 131 Wn. App. at 896 (internal quotations omitted). Courts also consider the specific parties involved and their expectations, as *Heidebrink* requires, to determine whether a document was prepared in the ordinary course of business. *Id.*

The Court of Appeals did not consider whether the PIP application was prepared in the "ordinary course of business," despite overwhelming evidence that the test applied. Ms. Diaz essentially concedes this below by arguing "the statement provided on the PIP application was merely a formality that contractually needed to be provided in order to obtain PIP benefits" Brief of Appellant Diaz at 20. She further admitted that the PIP application is "normally filled out very early in the process," and that

“the statements in the PIP application were never intended to be adopted” *Id.* at 21. Moreover, Ms. Diaz argued before the Court of Appeals that her attorney’s office instructed her to sign the blank forms at the intake appointment.⁴ These admissions reveal Ms. Diaz’s expectations and demonstrate that the application was an innocuous, routine piece of paperwork prepared and submitted without care or concern as to accuracy or privacy, in order to open a PIP claim. In the first-party property insurance context, for example, such routine procedures do not create work product. *See Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 295 P.3d 239 (2013) (no privilege or work product in the claims adjusting process). Had the court used this test, it would have concluded the application was merely prepared in the ordinary course of business.

This Court has held that an investigation report prepared by an attorney when no litigation was anticipated was prepared in the ordinary course of business. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 213 P.3d 596 (2009). In *Morgan*, the City’s antiharassment policy required investigation into any potential claim. *Id.* This Court held that the report was neither prepared in anticipation of litigation nor protected by the work

⁴ See January 31, 2018 Recording of Oral Argument at 8:35, <http://www.courts.wa.gov/content/OralArgAudio/a03/20180131/346714.wma>].

product doctrine because it was done pursuant to policy and for a remedial purpose. *Id.*

Here, the application was a routine, procedural requirement prepared only in the normal course of PIP claim processing business. The court failed to recognize that this test applied, especially without any indication that the application was prepared in anticipation of litigation.

C. The Court of Appeals' Decision is a Misstatement of the Law

In holding that the PIP application was protected work product simply because it found (without factual basis) that Ms. Diaz had a reasonable expectation of confidentiality, the court below misattributed the effect of such an expectation and relaxed the standard for work product immunity. Even if Ms. Diaz had demonstrated an expectation of confidentiality (which she did not), attachment of work product immunity does not follow because confidentiality is not the determinative criterion.

1. The Court of Appeals confuses the rationale behind the expectation of confidentiality

The Court of Appeals' finding that Ms. Diaz had an "expectation of confidentiality" in this case lacks factual foundation and is incongruent with the rationale for attaching work product in *Heidebrink* and *Harris*. In *Heidebrink*, the defendant insured was speaking to an investigator hired by his liability insurer for the purpose of determining the cause of the accident. He had a reasonable expectation that he would be sued and that

his statement would be shared with the defense lawyer retained to represent him in such suit. *Heidebrink*, 104 Wn.2d at 396. In this context, statements are protected to encourage honesty and transparency as if the insured is speaking to his lawyer.

Similarly, in *Harris*, the insured receiving PIP benefits from his own auto insurer was required to submit to an IME so the insurer could determine whether he was entitled to further benefits. *Harris*, 152 Wn.2d at 488. Because the IME was performed at the insurer's request to determine entitlement to ongoing benefits (in anticipation of PIP litigation), the insurer – the holder of the immunity – asserted work product. This prohibited the IME-related evidence from being admitted in the case over the insured's objection. Notably, medical opinions, as opposed to organic evidence, were at issue.

Here, Ms. Diaz does not hold any immunity and there is no factual basis to support the court's conclusion that she had an expectation of confidentiality. The description of the accident on the application had no natural sensitivity, as compared to medical information, which was a concern in *Harris*. The statement also did not create a new potential vulnerability for the insured, as in *Heidebrink*, because it was just a reiteration of the police report. There was no testimony from Ms. Diaz that she felt the information provided on the application was confidential.

Quite the opposite, both she and her lawyer concede she did not personally complete the application that simply adopted the police report narrative. Even a casual reading of the application shows that no person providing the information would reasonably consider it to be confidential, or that it was being given to someone entrusted with non-disclosure.

The lack of expected confidentiality here is analogous to other situations that would not implicate work product. For example, submitting an application for PIP benefits to another's insurer under the pedestrian statute is no different than people applying for charity care at a hospital to receive medical benefits when they have no applicable insurance of their own. *See* WAC 246-453-020(5); WAC 246-453-030. Before providing medical services under charity care, hospitals can require an application process and request further information from applicants to determine their eligibility for care. An applicant's expectation of confidentiality, if any, would not create work product immunity over the charity care application because confidentiality is not the determinative criterion for work product.

The record does not show Ms. Diaz had an expectation of confidentiality and it is unreasonable to attribute such an expectation to her where she was applying for benefits to Ms. Prieto's insurer. The lower court misunderstood the relevance behind an "expectation of

confidentiality” and, in doing so, disregarded the guidance of this Court’s prior decisions and misstated the work product doctrine.

2. Confidentiality alone does not create privilege or immunity

By holding the PIP application was work product without determining whether it had been prepared in anticipation of litigation, the court relaxed the standard for how the immunity attaches. An expectation of confidentiality is common to all privilege claims, but has never itself been deemed sufficient to justify a privilege claim. *State v. Harris*, 51 Wn. App. 807, 813, 755 P.2d 825 (1988) (“[s]trong confidentiality requirements do not necessarily create a testimonial privilege”). Indeed, an expectation of confidentiality is only one of four factors this Court considers in deciding whether to recognize a privilege. *State v. Maxon*, 110 Wn.2d 564, 572, 756 P.2d 1297 (1988). This is because “[the] exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.” *Maxon*, 110 Wn.2d at 569 (quoting *United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 3108, 41 L. Ed. 2d 1039 (1974)).

In *Maxon*, this Court considered recognizing a parent/child privilege where a child discussed pending murder charges against him with his parents. While this Court held that “defendant probably spoke to

his parents about the murder charge in the belief that his conversation would not be disclosed,” it declined to recognize a privilege because doing so was not “necessary to maintain the relationship between parents and children.” *Maxon*, 110 Wn.2d at 572–73, 756 P.2d at 1301. Though *Maxon* arose in the context of an alleged privilege, its teaching is also applicable to the lower court’s finding of work product immunity based on a mere expectation of confidentiality.

Confidentiality of a PIP application is not necessary to maintain the relationship between the PIP insured and the PIP insurer. There is no legitimate concern that people will be discouraged from applying for PIP benefits if the application might later be admissible. Indeed, pursuant to RCW 48.22.055(5)(b)(ii), all Ms. Diaz’s lawyers had to write was “Brayan was a pedestrian and struck by Ms. Prieto’s car.”

Further, in declining to recognize a new parent/child privilege in *Maxon*, this Court emphasized that “creating a privilege is warranted only if the resulting public good transcends the normally predominant principle of using all rational means for ascertaining the truth.” *Id.* at 576; *see also State v. Darden*, 145 Wn.2d 628, 41 P.3d 1189 (2002) (declining to recognize a new privilege absent basis of authority from Washington statutes or common law). This rationale is equally applicable to Ms. Diaz’s work product claim in this case. Requiring courts to find that a

document was prepared in anticipation of litigation is a necessary prerequisite to attaching work product for a reason – privileges interfere with the search for the truth. This Court should reinstate the proper standard for attaching work product immunity.

D. The Court of Appeals Erroneously Held Admission of the PIP Application at Trial Was Prejudicial Error, Contrary to the Cumulative Evidence Rule

The court erred in holding the admission of the PIP application was prejudicial error because the evidence was cumulative, and admission of cumulative evidence is harmless. *Driggs v. Howlett*, 193 Wn. App. 875, 903, 371 P.3d 61, *review denied*, 186 Wn.2d 1007, 380 P.3d 450 (2016) (citing *Hoskins v. Reich*, 142 Wn. App. 557, 570, 174 P.3d 1250 (2008)). Even if admission of the PIP application was improper, which it was not, “improper admission of evidence constitutes harmless error if the evidence is cumulative or of only minor significance in reference to the evidence as a whole.” *Hoskins*, 142 Wn. App. at 570; *State v. Eller*, 84 Wn.2d 90, 98, 524 P.2d 242 (1974).

In *Eller*, this Court held the denial of Eller’s motion for a continuance to permit service of compulsory process upon a witness he considered material to contradict testimony that he participated in a certain drug deal was harmless. Considering evidence already offered by the defendant at trial, including his admissions, and the record as a whole, this

Court held that any evidence that could have been offered by the missing witness would be merely cumulative to evidence available and adduced at trial. *Eller*, 84 Wn.2d at 98.

Here, the statement as to how the accident happened, as stated in the PIP application, was cumulative of the trial testimony of Ms. Diaz's own accident reconstruction expert. During their visit to the scene in January 2015, Brayan told the expert he would do a U-turn maneuver in the road in front of the orange pickup. CP 165-67. Before the PIP application was admitted, the expert testified as to Brayan's "explanation of how he rode that day, prior to being hit." CP 167. Therefore, the record at trial contains undisputed evidence that Brayan himself told his expert he rode into the street prior to being hit. The PIP application is merely cumulative of this evidence available and adduced at trial.

Further, the description of the accident in the application could not have had any significant or qualitative impact at trial because the same testimony came from Ms. Diaz's own expert, whose credibility was not at issue. In *Driggs*, for example, the court held the exclusion of expert opinions was prejudicial because the jury perceived the expert lacked opinions on the central issues and the defendants attacked the credibility of the plaintiff's other expert. *Driggs*, 193 Wn. App. at 904-5. No such

issues exist here, where Ms. Diaz's expert testified as to what Brayan initially told him.

Just as in *Eller*, the application was merely cumulative of the two versions of events already presented to the jury through Ms. Diaz's expert. The court, therefore, erred in failing to recognize that the admission of the PIP application was cumulative and harmless in this case.

V. CONCLUSION

The decision of the Court of Appeals must be reversed because it misstates and misapplies the work product doctrine. Though work product protection does not attach to this PIP application under the correct standard, the trial court's admission of the PIP application was harmless error because it was cumulative evidence.

Ms. Prieto asks this Court to uphold the judgment of the trial court, including the award of attorney fees under MAR 7.3, pursuant to *Arment v. Kmart Corp.*, 79 Wn. App. 694, 700, 902 P.2d 1254 (1995).

RESPECTFULLY SUBMITTED this 12th day of December,
2018.

BETTS, PATTERSON & MINES, P.S.

By: 
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Attorneys for Consuelo Prieto Mariscal

CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on December 12, 2018, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Supplemental Brief Of Petitioner Consuelo Prieto Mariscal; and**
- **Certificate of Service.**

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

DATED this 12th day of December, 2018.

Valerie D. Marsh
Valerie D. Marsh

BETTS, PATTERSON & MINES, P.S.

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