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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, AS PARENT
AND NATURAL GUARDIAN OF BRAYAN MARTINEZ,
A MINOR,

Respondent,

v.

CONSUELO PRIETO MARISCAL,

Petitioner.

**PETITIONER CONSUELO PRIETO MARISCAL'S RESPONSE
TO BRIEF OF AMICUS CURIAE WASHINGTON STATE
ASSOCIATION FOR JUSTICE FOUNDATION**

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I. INTRODUCTION

Pursuant to RAP 10.1(e), petitioner Consuelo Prieto Mariscal respectfully submits this answer to the amicus curiae brief filed by the Washington State Association for Justice Foundation (“WSAJF”).

WSAJF’s brief is remarkable for two reasons: (1) WSAJF asks the Court to establish new torts and remedies against an industry that is not a party to this case, and (2) WSAJF is now diametrically opposed to a position it took just eight years ago. With respect to the former, WSAJF asks the Court to create new liabilities of insurers without insurers being parties to this case. With respect to the latter, WSAJF has done a U-turn from its amicus brief in *Cedell*, where it said that common, everyday claim file material is not entitled to protection as work product.

II. STATEMENT OF THE CASE

Ms. Diaz appealed the trial court’s admission of evidence of a prior inconsistent statement. Ms. Diaz only assigned error to the trial court’s ruling that the statement was not hearsay. The Court of Appeals affirmed the ruling on hearsay, but nonetheless reversed and remanded, holding that the trial court should have extended work product protection to the document containing the statement. *Barriga Figueroa v. Prieto Mariscal*, 3 Wn. App. 2d 139, 414 P.3d 590, *rev. granted*, 191 Wn. 2d 1004 (2018).

The document at issue is a form application for Personal Injury Protection (“PIP”) insurance benefits for Ms. Diaz’s son, Brayan. Because of the scope of the PIP statute, Ms. Diaz was able to apply for PIP benefits for Brayan through Ms. Prieto’s insurer. *See* RCW 48.22.005(5)(b)(ii). Ms. Diaz’s attorneys filled out the application, and submitted it to Ms. Prieto’s insurer, and the insurer paid PIP benefits to Brayan. VRP 12-13. The application form called for a description of the accident. VRP 469-71. The description of the accident provided was inconsistent with descriptions later given by Ms. Diaz and Brayan. CP 1, 2; CP 165-67; CP 12. Ms. Prieto’s counsel offered, and the trial court admitted, a partially redacted version of the form at trial. VRP 120-1; 135.

In its opinion, the Court of Appeals suggested that Ms. Diaz suffered an injustice when it assumed Ms. Prieto’s insurer “commingled” the claim file for the PIP coverage extended to Brayan with the file pertaining to Ms. Prieto’s defense for the lawsuit. *Barriga*, 3 Wn. App. 2d at 148. Ms. Diaz and WSAJF now urge this Court to use this case as a vehicle to articulate new rules about an insurance company’s ability to use ordinary incident facts when it is adjusting claims under multiple coverages. Supp. Brief of Respondent at 15-16; WSAJF Amicus Curiae Brief. Using this case — where the insurer is neither a party, nor alleged to have breached a duty to its insureds — to create insurance bad faith law

would be inappropriate. The proper forum for determining the propriety of claim file “commingling” is a different lawsuit; perhaps the one pending between Ms. Diaz and the insurer, which is stayed pending the outcome of this appeal.¹ And then, only in the narrow scope of the facts presented in that case.

III. SUMMARY OF ARGUMENT

A. **WSAJF’s Brief Should be Disregarded Because this is not the Appropriate Case to Decide the Profound and Far-Reaching Holdings Proposed by WSAJF**

The issue before this Court on appeal is whether a commonplace form constitutes work product in this personal injury case. WSAJF’s brief has nothing to do with issue, and instead attempts to persuade the Court to use this personal injury lawsuit as a vehicle to adopt novel, profound, and far-reaching rules pertaining to the unique relationship between an insured and her insurer. In doing so, WSAJF asks the Court to make new law “in the abstract” that applies only to insurance cases, but that will nonetheless penalize Ms. Prieto in this case.

WSAJF’s amicus brief is focused on this Court’s interest in the rules and remedies pertaining to improper “commingling” of information contained in an insurance claim file. See WSAJF Amicus Brief at 5. In

¹ *Diaz Barriga Figueroa v. State Farm Fire & Cas. Co.*, U.S. Dist. Ct., E.D. Wash., No. 4:17-cv-5057SMJ. See appendices A and B to Ms. Prieto’s Supplemental Brief Regarding Commingling.

fact, WSAJF acknowledges that its brief examines the issue and proposed remedies “in the abstract” because Ms. Prieto’s insurer is not a party in this case. WSAJF Amicus Brief at 5-6. WSAJF’s brief also acknowledges that the “commingling” issue is really one of first impression for the Court, as there are no existing rules and remedies, only what has been proposed to this Court by Ms. Diaz and WSAJF.

Preliminarily, Washington courts do not create rights and obligations based upon suggestions of amicus curiae. *Building Industry Ass’n of Wash. v. McCarthy*, 152 Wn. App. 720, 748-9, 218 P.3d 196 (2009) (court declines to address “new rule” suggested by amici). Rather, “[t]he case must be made by the parties and its course and the issues involved cannot be changed or added to by friends of the court.” *City of Lakewood v. Koenig*, 160 Wn. App. 883, n.2, 250 P.3d 113 (2011). The issue of a new remedy, first raised by WSAJF, should not be considered by this Court. *Noble Manor Co. v. Pierce County*, 113 Wn.2d 269, n.1, 943 P.2d 1378 (1997).

There is no existing Washington law prohibiting an insurer from “commingling” information in a claim file that relates to claims made under multiple coverages provided by the same policy. Regardless, WSAJF asks this court to make such law, even though it does not relate to the facts, parties, or issues in this case. First, WSAJF asks the Court to

declare that failing to maintain separate PIP and liability insurance files is *per se* bad faith and a *per se* violation of the Consumer Protection Act.

Second, it asks the Court to impose a rebuttable presumption of harm in favor of the insured where an insurer does not separate PIP and liability insurance files. Third, it asks the Court to create new remedies for this form of *per se* bad faith, which include a blanket exclusion of the PIP file from the liability case (foreclosing all further evidentiary decisions as to the discoverability and admissibility of this information) and a new trial against the liability insured. Fourth, it asks the Court to declare that the damages for the new *per se* bad faith and Consumer Protection Act claims are the consequential damages caused by the “commingling,” or the attorney fees and expenses associated with a second trial. WSAJF asks the Court to impose all of this “in the abstract” upon insurance companies that are not parties to this case. More importantly, WSAJF asks the Court to penalize Ms. Prieto by ordering a new trial, even though the long-standing law of this jurisdiction fully supports the evidentiary decision of the trial court.

As Ms. Prieto stressed in her response to the Court’s request for supplemental briefing, this is simply not the appropriate case to address issues of insurance law, especially those that fix the rights and duties of non-parties. In fact, if the Court were to decide these significant issues of

insurance law and articulate new insurance law rules at this juncture, it would effectively foreclose all judicial discretion and due process of the parties in the stayed litigation, where Ms. Diaz is actually suing Ms. Prieto's insurer for bad faith.² WSAJF's brief should be disregarded because it does not pertain to any of the issues germane to this appeal.

B. WSAJF's Position is Disingenuous, as Affirming the Court of Appeals Effectively Nullifies this Court's Holding in *Cedell*

The Court should also disregard WSAJF's brief because it directly contradicts the position that WSAJF urged this Court to take in *Cedell v. Farmers Insurance Company of Washington*, 176 Wn. 2d 686, 295 P.3d 239 (2013). In 2011, WSAJF filed its Amicus Curiae Brief on the Merits in *Cedell*. See *Cedell v. Farmers Insurance Company of Washington*, 2011 WL 3918407 (Wash. August 23, 2011). Then, WSAJF argued a position supporting Ms. Prieto's position here, which is that material prepared in the regular course of business is not considered work product. WSAJF argued for the full and unfettered discoverability of an insurer's claim file in the first party context, even when attorneys were involved. Curiously, WSAJF now supports Ms. Diaz's request to apply work product immunity to basic, routine, administrative claim file information.

² *Diaz Barriga Figueroa v. State Farm Fire & Cas. Co.*, U.S. Dist. Ct., E.D. Wash., No. 4:17-cv-5057SMJ. See Appendices A and B to Ms. Prieto's Supplemental Brief Regarding Commingling.

In *Cedell*, this Court held that there is no presumption of attorney-client privilege or work product immunity automatically attaching to the claims adjusting process. *Cedell*, 176 Wn.2d at 698-99. This holding should apply to the PIP application in this case. This is because, as Judge Korsmo said in his dissent, the document in question was a “run-of-the-mill” piece of paper work. *Id.* at 152. As Judge Korsmo aptly observed, “a routine claim form such as this one (‘please pay the emergency room for treating my so who was hit by a car’) is processed in the normal course of business, not in anticipation of litigation.” *Id.* Nonetheless, the Court of Appeals majority held below that the run-of-the-mill PIP application should have been afforded work product immunity in this personal injury case. *Barriga*, 3 Wn. App. 2d at 148. If this Court affirms the Court of Appeals, then its holding in *Cedell* would become a nullity, as even the most innocuous claim material prepared in the regular course of business could receive work product protection without qualifying as such under the long-established test.

Certainly, it would run afoul of the clearly articulated and well-established precedent of this Court to hold that the PIP application constitutes work product in one context, but not the other. The rule that material prepared in the regular course of business is not work product must be applied uniformly. Accordingly, the Court should disregard the

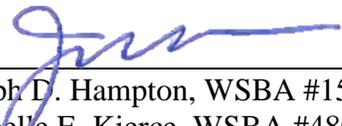
result-driven arguments of WSAJF here and, instead, honor the universal rule for which WSAJF advocated previously: “material prepared in the regular course of business, even when prepared by a lawyer, is not considered work product.” *Cedell*, 2011 WL 3918407 at *10 (citing *Morgan v. Federal Way*, 166 Wn.2d 747, 754-55, 213 P.3d 596 (2009)).

IV. CONCLUSION

The Court should disregard the amicus curiae brief of WSAJF as it pertains only to issues beyond the scope of this appeal. Further, WSAJF brief urges the court to take positions contrary to well-established precedent. Ms. Prieto, however, urges the Court to decide this case on its merits.

RESPECTFULLY SUBMITTED this 26th day of February, 2019.

BETTS, PATTERSON & MINES, P.S.

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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 February 26, 2019, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Petitioner Consuelo Prieto Mariscal’s Response To Brief Of Amicus Curiae Washington State Association For Justice Foundation; and**
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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 26th day of February, 2019.

Valerie D. Marsh
Valerie D. Marsh

BETTS, PATTERSON & MINES, P.S.

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