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Supreme Court No. 95827-1
Court of Appeals, Division III No. 346714

SUPREME COURT OF THE STATE OF WASHINGTON

MONICA DIAZ BARRIGA FIGUEROA, AS PARENT AND
NATURAL GUARDIAN OF BRAYAN MARTINEZ, A MINOR,

Respondent,

vs.

CONSUELO PRIETO MARISCAL,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. INTRODUCTION

The same insurance company provided liability coverage to Defendant-Petitioner Consuelo Prieto Mariscal (“Prieto”) and personal injury protection (“PIP”) coverage to the minor beneficiary of this personal injury action, Brayan Martinez (“Brayan”). In its capacity as liability insurer, the company defended Prieto and stood in an adversarial relationship with Brayan. However, in its capacity as PIP insurer, the company stood in a quasi-fiduciary relationship with Brayan. In its quasi-fiduciary role, the company received an application for benefits prepared by an assistant for a lawyer retained by Brayan’s mother, Plaintiff-Respondent Monica Diaz Barriga Figueroa (“Diaz”).

The PIP application was submitted shortly after the incident that injured Brayan, long before a lawsuit was filed or any discovery was conducted. Ex. 101. Diaz was a monolingual Spanish speaker, RP 125: 13-17, and the assistant only spoke English, RP 476:12-14. Diaz did not have personal knowledge of the incident that injured Brayan, RP 290:1-291:13 & 299:6-17, and she simply signed the blank PIP application form, RP 124:22-125:3 & 299:5. The legal assistant did not have personal knowledge either. She filled out the form based on a description of the incident from a police report, RP 479:3-6, which was in turn based on speculation and hearsay from witnesses who did not actually see the incident, RP 361-62,

365-66, 371-72, 374-77; CP 198, 217 & 304-05. As it turns out, the description of the incident in the police report, and hence the PIP application, was contrary to the physical evidence of the incident, as acknowledged by Prieto's own expert. RP 64-66, 144-62, 413-21.

Defense counsel for Prieto did not obtain the PIP application through discovery and has been coy about the source of the PIP application, declining to say where it was obtained in the superior court and on appeal. The following colloquy took place during oral argument in the Court of Appeals:

- Q. [by the Court] How did you get the PIP application? It's an uncomfortable question perhaps—
- A. [by defense counsel] Yeah.
- Q. But you didn't respond to it in your reply as far as what the plaintiff, or the appellant implies or states and are they correct that somehow you got it outside the discovery, the court's discovery?
- A. Did I get it other than from the plaintiff?
- Q. Well, that's the first question. I might ask you a second question after that.
- A. It did not come from the plaintiff's formal discovery.
- Q. Okay. So, it didn't come through formal discovery either, did it?
- A. No.
- Q. Okay. Was it the same insurance company that represented her that provided PIP coverage for the plaintiff that provided coverage defense for this accident?
- A. Yes, but of course that's not germane—
- Q. I'm not going to ask you any further questions on that. I was just curious.

Oral Argument, at 23:57-24:52 (brackets added).¹ Because only Diaz and the insurer had the PIP application, and because Diaz did not provide the PIP application to defense counsel, the Court of Appeals inferred that defense counsel must have received it directly from the parties' shared insurance company. *See Barriga Figueroa v. Prieto Mariscal*, 3 Wn. App. 2d 139, 143 n.1, 414 P.3d 590, *rev. granted*, 191 Wn. 2d 1004 (2018).

Defense counsel relied extensively on the PIP application to defend the case at trial, and the jury returned a defense verdict. The Court of Appeals ordered a new trial on grounds that the PIP application was confidential work product and that admission of the application was prejudicial error. *See Barriga*, 3 Wn. App. 2d at 147-49. This Court should affirm because the application was submitted in anticipation of litigation against Prieto, in which Diaz sought reimbursement of PIP benefits paid by the insurer. In order to protect the quasi-fiduciary relationship between a PIP insurer and insured, the Court should also take this opportunity to confirm that an insurer may not commingle its liability and PIP adjusting functions or files and that defense counsel may not have ex parte communication with the PIP adjuster or have ex parte access to the PIP file.

¹ Available at:
https://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a03&docketDate=20180131.

II. ISSUES PRESENTED FOR REVIEW

1. Is an application for PIP benefits nondiscoverable and inadmissible work product when it is prepared in anticipation of litigation against a tortfeasor who caused the PIP insured's injuries, from whom the insured seeks reimbursement of the PIP benefits?
2. Is it prejudicial error for defense counsel to obtain the insured's PIP application on an ex parte basis from the insurer, and make extensive use of the application in opening and closing and while questioning witnesses?

III. SUPPLEMENTAL STATEMENT OF THE CASE

A. Facts.

The Court of Appeals correctly noted that the information on the PIP application was “taken from a police officer’s speculation, unsupported by any eyewitness, and inconsistent with the physical evidence.” *Barriga*, 3 Wn. App. 2d at 148. Nonetheless, counsel for Prieto wrongly insinuates that the PIP application was based on a statement by Brayan, and that Brayan subsequently gave a second, inconsistent statement regarding the circumstances of his injury. Pet. for Rev., at 1. In actuality, Brayan has consistently stated that he rode his bike down the street to a community mail box, performed a turnaround maneuver, and returned to his home. On his last trip to the mail box and back, his shoelace got tangled in the bike chain, and he could no longer control the bicycle. He ended up at rest, kneeling in the road on the side of a parked car, and the minivan driven by Prieto approached and ran over his leg. RP 317-320.

B. Procedural history.

Defense counsel referred to the PIP application in opening statement, and Diaz objected. Supp. RP 12:12-16:2. Diaz then moved to exclude any reference to the PIP application during trial, based in part on the fact that “first-party insurance is not supposed to share the PIP file with defense without permission of plaintiff.” RP 120:2-4; *accord Barriga*, 3 Wn. App. 2d at 143 (quoting objection). The superior court denied the motion, RP 135:5-10, and a version of the PIP application redacted to eliminate insurance information was admitted into evidence, RP 288:11-289:5; Ex. 101.²

The PIP application was used by defense counsel to cross examine Diaz, RP 299:2-17, and an accident reconstructionist retained on her behalf, RP 220:18-223:3. It served a basis for the opinions of an accident reconstructionist retained on behalf of the defense. RP 395:19-397:6 & 406:16-23. It was also emphasized by defense counsel in closing argument. RP 612:20-613:8. After the jury returned a defense verdict, the superior court denied Diaz’s motion for a new trial based in part on admission of the PIP application. CP 550-51, 553, 555-556 (motion); CP 592 (order).

² The redaction of insurance information prevented Diaz from fully explaining the circumstances under which the PIP application was submitted.

Diaz appealed on multiple grounds, including grounds that admission of the PIP application was contrary to the work product protection. App. Br., at 1 (assignment of error 1); *id.* at 3 (issues pertaining to assignment of error 1); *id.* at 12 (summary of argument); *id.* at 17-18 (argument). The Court of Appeals reversed on this basis and did not reach the other issues raised by Diaz. *Barriga*, 3 Wn. App. 2d at 147-49.

IV. SUPPLEMENTAL ARGUMENT

A. Overview of the quasi-fiduciary relationship between a PIP insurer and insured.

Unlike the adversary relationship that exists between a liability insurer and a third-party claimant, *see Green v. Holm*, 28 Wn. App. 135, 137, 622 P.2d 869 (1981), there is a quasi-fiduciary relationship between a PIP insurer and its insured. In *Tank v. State Farm Fire & Cas. Co.*, 105 Wn. 2d 381, 385–86, 715 P.2d 1133 (1986), the Washington Supreme Court described the nature and traced the sources of an insurer's duty of good faith toward first-party insureds as follows:

The duty to act in good faith or liability for acting in bad faith generally refers to the same obligation. *Tyler v. Grange Ins. Ass'n*, 3 Wash.App. 167, 173, 473 P.2d 193 (1970). Indeed, we have used those terms interchangeably. *See Murray v. Mossman*, 56 Wash.2d 909, 355 P.2d 985 (1960). However, regardless of whether a good faith duty in the realm of insurance is cast in the affirmative or the negative, the source of the duty is the same. That source is the fiduciary relationship existing between the insurer and insured. Such a relationship exists not only as a result of the contract between insurer and insured, but because of the high stakes involved for both parties to an insurance contract and the elevated level of trust

underlying insureds' dependence on their insurers. This fiduciary relationship, as the basis of an insurer's duty of good faith, implies more than the "honesty and lawfulness of purpose" which comprises a standard definition of good faith. It implies "a broad obligation of fair dealing", *Tyler*, at 173, and a responsibility to give "equal consideration" to the insured's interests. *Tyler*, at 177. Thus, an insurance company's duty of good faith rises to an even higher level than that of honesty and lawfulness of purpose toward its policyholders: an insurer must deal fairly with an insured, giving equal consideration *in all matters* to the insured's interests.

The duty of good faith has been imposed on the insurance industry in this state by a long line of judicial decisions. *See, e.g., Burnham v. Commercial Cas. Ins. Co.*, 10 Wash.2d 624, 117 P.2d 644 (1941); *Evans v. Continental Cas. Co.*, 40 Wash.2d 614, 245 P.2d 470 (1952); *Van Dyke v. White*, 55 Wash.2d 601, 349 P.2d 430 (1960); *Murray v. Mossman*, 56 Wash.2d 909, 355 P.2d 985 (1960); *Waite v. Aetna Cas. & Sur. Co.*, 77 Wash.2d 850, 467 P.2d 847 (1970); *Hamilton v. State Farm Ins. Co.*, 83 Wash.2d 787, 523 P.2d 193 (1974); *Levy v. North Am. Co. for Life & Health Ins.*, 90 Wash.2d 846, 586 P.2d 845 (1978); *Tyler v. Grange Ins. Ass'n*, 3 Wash.App. 167, 473 P.2d 193 (1970); *Weber v. Biddle*, 4 Wash.App. 519, 483 P.2d 155 (1971); *Briscoe v. Travelers Indem. Co.*, 18 Wash.App. 662, 571 P.2d 226 (1977); *Rice v. Life Ins. Co.*, 25 Wash.App. 479, 609 P.2d 1387 (1980); *Gould v. Mutual Life Ins. Co.*, 37 Wash.App. 756, 683 P.2d 207 (1984).

Not only have the courts imposed on insurers a duty of good faith, the Legislature has imposed it as well. RCW 48.01.030 provides, in relevant part:

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.

In addition, the Insurance Commissioner, pursuant to legislative authority under RCW 48.30.010, has promulgated regulations defining specific acts and practices which constitute a breach of an insurer's duty of good faith. *See* Washington Administrative Code 284-30-300 *et seq.*

(Formatting & citations in original.)

Although the foregoing quotation from *Tank* describes duty of good faith as arising out of the "fiduciary relationship" between insurer and insured, the relationship differs from a true fiduciary relationship, as later explained by the Court in *Butler v. Safeco Ins. Co.*, 118 Wn. 2d 383, 389, 823 P.2d 499, 503 (1992):

It is clear from the language of *Tank*, however, that the fiduciary relationship between an insurer and an insured is not a true fiduciary relationship. *Tank* holds that an insurer must give "equal consideration" to the insured's interests. (Italics ours.) 105 Wash.2d at 385–86, 715 P.2d 1133. Under a "true" fiduciary relationship, however, the insurer would have to place the insured's interests above its own. Cf. *Esmieu v. Schrag*, 88 Wash.2d 490, 563 P.2d 203 (1977); *Tucker v. Brown*, 20 Wash.2d 740, 150 P.2d 604 (1944); *Wilkins v. Lasater*, 46 Wash.App. 766, 733 P.2d 221 (1987). Thus, the *Tank* holding indicates that something less than a true fiduciary relationship exists between the insurer and the insured.

(Emphasis & citations in original.)

The duty of good faith described in *Tank*, which requires an insurer to give equal consideration to the insured's interests, has been described as a "quasi-fiduciary" obligation. *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn. 2d 784, 793, 16 P.3d 574 (2001). It is not confined to circumstances involving the insurer's duty to defend, and includes PIP coverage. *See id.*, 142 Wn. 2d at 793-95 & n.2 (relying on *Tank*).

The insurer's quasi-fiduciary duty is grounded in the common law, based on "the high stakes involved" and "the elevated level of trust

underlying insureds' dependence on their insurers.” *Tank*, 105 Wn. 2d at 385. The nature of this relationship is not altered in the PIP context simply because coverage extends to pedestrians who did not purchase the coverage, such as Brayan in this case. *See* RCW 48.22.005(5)(b)(ii) (defining “insured” for purposes of PIP coverage to include pedestrians); *see also Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn. 2d 643, 654 & n.4, 272 P.3d 802 (2012) (rejecting any differential treatment of a PIP insured passenger who is a “third-party beneficiary” rather than the direct purchaser of insurance; disapproving *Young v. Teti*, 104 Wn. App. 721, 16 P.3d 1275 (2001)).

The insurer's quasi-fiduciary duty is also independently grounded in statutes and regulations governing the insurance industry, which require “that all persons be actuated by good faith, abstain from deception, and practice honesty and equity *in all insurance matters*.” *Tank*, 105 Wn. 2d at 386 (quoting RCW 48.01.030; emphasis added). The plain language of this statutory duty encompasses PIP coverage, and the relevant statutes and regulations do not limit the duty in the PIP context. *See* RCW 48.22.005 & 48.22.085-.100; Ch. 284-30 WAC.

The insured has a corresponding duty toward the PIP insurer. *See Mahler v. Szucs*, 135 Wn. 2d 398, 414, 957 P.2d 632, 641 (1998) (stating “[b]oth insurer and insured, having entered into an insurance contract, are bound by the common law duty of good faith and fair dealing, as well as the statutory duty “to practice honesty and equity in all insurance matters,” citing RCW 48.01.030). Accordingly, where the insured pursues a claim against a tortfeasor, the insured must also pursue the insurer’s right to obtain reimbursement of PIP benefits paid from the tortfeasor. *See id.*, 135 Wn. 2d at 414-15 & n.7 (indicating insurer may not pursue subrogation directly when the insured sues the tortfeasor and disapproving the splitting of insured’s and insurer’s claims). Subject to the requirement of providing full compensation for the insured, the insured may not knowingly prejudice the right of the insurer to obtain such reimbursement. *See id.* at 417-18.

With a proper understanding of the relationship between a PIP insurer and insured, it is now possible to address the issues presented on review.

B. Based on the quasi-fiduciary between a PIP insurer and insured, an application for PIP benefits should be considered work product because it is submitted in anticipation of litigation against a tortfeasor, from whom the insured seeks reimbursement of PIP benefits paid by the insurer.

There is a qualified protection against discovery and admissibility of work product, which is defined as “documents and tangible things ...

prepared in anticipation of litigation ... by or for another party or by or for that party's representative. CR 26(b)(4) (ellipses added). A party's representative specifically includes that party's "insurer." *Id.* In this case, there is no dispute that the PIP application was prepared by a party for that party's insurer. The dispute focuses on whether the PIP application qualifies as work product because it was submitted in anticipation of litigation.

This Court has noted that it is often difficult to determine whether material was prepared in anticipation of litigation "since an insurance company's ordinary course of business entails litigation." *Heidebrink v. Moriwaki*, 104 Wn. 2d 392, 399, 706 P.2d 212 (1985). "[D]etermination of whether material was prepared in the anticipation of litigation in a particular case, and thus qualifies as work product, requires examination of the specific parties and their expectations." *Harris v. Drake*, 152 Wn. 2d 480, 487, 99 P.3d 872 (2004) (citing *Heidebrink*, 104 Wn. 2d at 400; brackets added).

In *Heidebrink*, the Court held that statements by an insured to a liability insurer are work product because the "insured is contractually obligated to cooperate with the insurance company," which "creates a reasonable expectation that the contents of statements made by the insured will not be revealed to the opposing party" and assists the insurer in obtaining counsel to represent the insured. 104 Wn. 2d at 400. In *Harris*,

the Court similarly held that “[i]t is just as reasonable an expectation for a PIP insured to expect medical information to be held confidential as it is for a liability insured to expect that accident information given to the liability insurer will be kept confidential.” 152 Wn. 2d at 488 (brackets added).

Following *Harris*, the Court of Appeals below held that:

Like *Harris*, in the present case, Ms. Diaz had a contractual obligation to cooperate with her insurer, which included an obligation to complete the PIP application. She therefore had a reasonable expectation that her PIP application would be kept confidential and not be shared with opposing counsel. It would work an injustice to permit Ms. Prieto to surreptitiously obtain Ms. Diaz's PIP application and use it against Ms. Diaz simply because the two shared the same insurance company. The injustice is more pronounced given that the description of the accident in the PIP application was taken from a police officer's speculation, unsupported by any eyewitness, and inconsistent with the physical evidence. We hold that the trial court erred when it declined to give work product protections to the PIP application.

Barriga, 3 Wn. App. 2d at 148.

In *Harris*, the Court further stated that “[e]specially medical information, which is generally regarded as confidential, should be subject to an expectation of protection from disclosure to the tortfeasor” in *Harris*. *Id.* (brackets added). While the Court merely said that protection from disclosure is “especially” warranted when medical information is at issue—rather than “exclusively” warranted—the statement could be read as suggesting that the scope of the work product protection might vary depending on the type of information submitted to the insurer.

However, in the PIP context there is an additional, independent reason for considering information submitted to the insurer to be work product, regardless of whether it is “medical” or otherwise “generally regarded as confidential”:

We recognize that the relationship between an insured and his or her insurer is sometimes adversarial, while at other times the interests of the insured and insurer are aligned. This dual relationship requires close examination, evaluating the specific positions of the insurer and insured in each instance. *See, e.g., Ellwein v. Hartford Co.*, 142 Wash.2d 766, 781, 15 P.3d 640 (2001) (quoting *Hendren v. Allstate Ins. Co.*, 100 N.M. 506, 672 P.2d 1137, 1141 (Ct.App.1983) (stating that the insurer may not overreach the insured, and the insured expects to be treated fairly and in good faith despite an adversarial posture)), *overruled on other grounds by Smith v. Safeco Ins. Co.*, 150 Wash.2d 478, 78 P.3d 1274 (2003); *Fisher v. Allstate Ins. Co.*, 136 Wash.2d 240, 249, 961 P.2d 350 (1998) (UIM is adversarial by nature and thus gives rise to an inevitable conflict between the UIM carrier and the UIM insured). Indeed, *Heidebrink* requires examination of the relationship of the parties in each case.

In examining the relationship between the insured and the insurer in this case, we note that Harris's and USAA's interests are aligned. USAA [i.e., the PIP insurer] specifically authorized Harris [i.e., the PIP insured] to represent USAA's subrogation interests in the litigation with Drake. USAA is interested in recouping its PIP payments, and Harris is interested in seeking compensation for his injuries. In this case, the Court of Appeals' determination that the work product privilege should attach in anticipation of PIP litigation or arbitration seems better reasoned than Drake's position that confidentiality cannot be expected. Therefore, we hold that the PIP insurer's IME may properly be considered work product protected.

Harris, 152 Wn. 2d at 489 (formatting & citations in original; brackets added). This rationale is not tied to the nature of the information submitted to the PIP insurer. Instead, it is based on the anticipation of litigation against

the tortfeasor, in which the insured seeks to obtain reimbursement of PIP benefits paid by the insurer. This rationale applies with full force in this case, and bolsters the decision of the Court of Appeals below that the PIP application is work product.³

Ultimately, application of the work product protection is a matter of judicial policy to maintain “certain restraints on bad faith, irrelevant and privileged inquiries” and help “ensure the just and fair resolution of disputes.” *Heidebrink*, 104 Wn. 2d at 400-01. These policies would be undermined if a PIP application is not deemed to be work product under the circumstances present in this case.⁴

C. Prieto fails to recognize the significance of the quasi-fiduciary relationship between a PIP insurer and insured, which is undermined by unilateral ex parte disclosure and use of a PIP application in the defense of a liability claim.

There is no acknowledgement of the quasi-fiduciary relationship between a PIP insurer and insured in Prieto’s briefing. Under the equal consideration rule of *Tank* the insurer is obligated to maintain the confidentiality of work product such as the PIP application. The insurer’s

³ Work product generated in anticipation of litigation against the tortfeasor is distinguished from work product generated by an insurer “for the purpose of defending against a claim for further PIP benefits,” which was also referenced in *Harris*, 152 Wn. 2d at 488. The latter type of work product may raise issues that are not present in this case.

⁴ Although the qualified protection for work product protection may be overcome by a showing of “substantial need,” CR 26(b)(4), there is no claim of substantial need in this case. *See Heidebrink*, 104 Wn. 2d at 401 (citing federal case law with approval for the proposition that “the substantial need standard is not met if the discovering party merely wants to be sure nothing has been overlooked or hopes to unearth damaging admissions”).

unilateral ex parte disclosure of the PIP application violates the equal consideration rule by elevating its own interest in minimizing or avoiding a judgment against its liability insured over the interest of its PIP insured in obtaining full compensation for their injuries. Defense counsel's subsequent use of the PIP application under these circumstances constitutes bad faith conduct and subverts the just and fair resolution of disputes that the work product protection is designed to promote.

D. The Court should confirm that an insurer may not commingle its liability and PIP coverages and that defense counsel may not have ex parte communication with the PIP adjuster or ex parte access to the PIP file.

In *Matsyuk*, 173 Wn. 2d at 655-56, this Court noted that PIP and liability coverages are “separate” and “distinct,” even when provided by the same insurer:

Winters [*v. State Farm Mut. Auto. Ins. Co.*, 144 Wn. 2d 869, 882, 31 P.3d 1164, 1171 (2001)] and *Hamm* [*v. State Farm Mut. Auto. Ins. Co.*, 151 Wn. 2d 303, 308, 88 P.3d 395, 396 (2004)] recognize that PIP and UIM policies are distinct policies, even when provided by the same insurer. The same is true of liability coverage. Each policy is a separate silo, so to speak. Each offers discrete coverage, fulfills a particular need of the insured, and is based on a separate premium. See *Rones v. Safeco Ins. Co. of Am.*, 119 Wn. 2d 650, 654-55, 835 P.2d 1036 (1992) (liability insurance); *Blackburn v. Safeco Ins. Co.*, 115 Wn. 2d 82, 88-92, 794 P.2d 1259 (1990) (liability and UIM); *Keenan v. Indus. Indem.*, 108 Wn. 2d 314, 322, 738 P.2d 270 (1987) (UIM and PIP), *overruled on other grounds by Price v. Farmers Ins. Co. of Wash.*, 133 Wn. 2d 490, 946 P.2d 388 (1997).

(Brackets added.)

Commingling PIP and liability functions and files is incompatible with the nature of the insurer's relationship to Brayan under these separate and distinct coverages, i.e., quasi-fiduciary with respect to PIP coverage and adversarial with respect to liability coverage. This Court has previously expressed strong disapproval of commingling the insurer's files with respect to uninsured/underinsured motorist (UIM) and liability coverages. *See Ellwein*, 142 Wn. 2d at 782 (stating "we find it particularly troubling that the insurer may "commingle" the liability representation file with the UIM file"). The grounds for disapproval are even stronger in the PIP context because the insurer does not stand in the shoes of the tortfeasor as it does with respect to UIM coverage. *See id.* at 779-81 (indicating UIM insurer may assert defenses available to the tortfeasor, while requiring UIM insurer to honor insureds' reasonable expectation that they will be dealt with fairly).

The circumstances present in this case reveal that the Court's prior disapproval of commingling an insurer's separate functions are insufficient. The Court should take this opportunity to hold that defense counsel may not have ex parte communication with the PIP adjuster or ex parte access to the PIP file. The Court has adopted a rule prohibiting ex parte contact between defense counsel and the plaintiffs' treating health care providers to protect the fiduciary relationship between the plaintiffs and their providers. *See Youngs v. Peacehealth*, 179 Wn. 2d 645, 659, 316 P.3d 1035, 1042 (2014)

(noting the prohibition against ex parte contact between defense counsel and treating health care providers “protects the doctor-patient fiduciary relationship”). A similar rule should be adopted in this context to protect the quasi-fiduciary relationship between a PIP insurer and insured.

E. The superior court’s admission of the PIP application was prejudicial error, given defense counsel’s use of the application in opening and closing and while questioning witnesses.

The Court of Appeals properly determined that the admission of the PIP application was prejudicial error because counsel for Prieto “repeatedly claimed throughout trial that Bryan was hit after he rode his bicycle between two parked cars and into the road ... in opening, during examination of several witnesses, and throughout her closing argument.” *Barriga*, 3 Wn. App. 2d at 148-49 (ellipses added). This claim “was based almost entirely on the PIP application.” *Id.* at 149. In response, Prieto does not take issue with the Court of Appeals analysis regarding the centrality of the PIP application. *See* Pet. for Rev., at 18-19. Instead, she claims that the appellate court “failed to apply the cumulative evidence rule[.]” *Id.* at 19 (brackets added). However, in actuality, the court considered and rejected a cumulative evidence argument, *even though it was not raised by Prieto*:

An argument can be made that the error in admitting the PIP application was not prejudicial because the same evidence was admitted from the police report and at least one medical record. Had Ms. Prieto made this argument, we would have rejected it.

First, the trial court refused to admit the police report as substantive evidence. Second, the police report was not read into the record or admitted into evidence. Third, Ms. Prieto focused almost entirely on the PIP application, not the police report or the medical records. Viewing the evidence as a whole, we believe that the improper admission of the PIP application was prejudicial.

Barriga, 3 Wn. App. at 149. Given the centrality of the PIP application to Prieto's defense, the Court of Appeals properly concluded that erroneous admission of the application was prejudicial.⁵

F. In the event of reversal, this Court should remand for consideration of the assignments of error not addressed by the Court of Appeals.

In her opening brief, Diaz raised a number of issues on appeal in addition to the superior court's erroneous admission of the PIP application. App. Br., at 1-4. Given its determination that admission of the PIP application was reversible error, the Court of Appeals declined to consider the remaining issues. *Barriga*, 3 Wn. App. at 149. In response to Prieto's petition for review, Diaz asked this Court to review the remaining issues. Ans. to Pet. for Rev., at 7-9. However, this Court declined to accept review of these issues. *Barriga*, 191 Wn. 2d 1004. If the Court reverses the Court of Appeals, then it should remand for a decision on the other issues raised

⁵ In the petition for review, Prieto also claims that the PIP application was cumulative of the testimony of the accident reconstructionist. Pet. for Rev., at 19. However, no fair reading of the testimony supports this claim. Prieto refers to a different issue involving the location where Brayan was riding his bike well before Prieto ran over his leg. This has nothing to do with the description of the incident in the PIP application, and the accident reconstructionist "wasn't too concerned about that because it really had no effect on [his] findings of the area of impact that is located out there." RP 216-17 (brackets added).

by Diaz. *See Salas v. Hi-Tech Erectors*, 168 Wn. 2d 664, 673, 230 P.3d 583, 587 (2010).

V. CONCLUSION

Based on the foregoing, Diaz asks the Court to affirm the Court of Appeals and remand the case to the superior court for a new trial. If, and only if, the Court reverses the Court of Appeals, then Diaz asks the Court to remand the case to the Court of Appeals to consider the remaining issues raised on appeal.

Respectfully submitted this 12th day of December, 2018.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

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