Matsyuk v. State Farm Fire & Cas. Co.
consol. w/*Weismann v. Safeco Ins. Co. of Ill.*

No. 84686-3

MADSEN, C.J. (dissenting)—Under the "common fund" equitable basis for an award of attorney fees, attorney fees may be awarded when a litigant preserves or creates a common fund for the benefit of the litigant and others. *See Mahler v. Szucs*, 135 Wn.2d 398, 426-27, 957 P.2d 632 (1998) (citing *Covell v. City of Seattle*, 127 Wn.2d 874, 891, 905 P.2d 324 (1995)). The common fund theory has been applied to require a PIP (personal injury protection) insurer to pay pro rata legal costs incurred by an injured insured to obtain a recovery from the responsible tortfeasor or the tortfeasor's insurer. The underlying theory is that the PIP insurer is benefited by the insured's creation of a common fund that inures to the benefit of the PIP insurer, in that without the "common fund" the PIP insurer would not have this source of reimbursement for the PIP benefits paid.

Here, however, the majority applies the common fund doctrine to cases in which the equitable underpinnings for this category of attorney fee award do not exist. In each of these consolidated cases the tortfeasor's insurer paid PIP benefits pursuant to the

tortfeasor's policy and then paid additional damages under the policy's liability coverage provisions. The so-called "common fund" in each case consisted solely of the insured's additional recovery under the liability coverage provisions, paid by the same insurer that also paid the PIP benefits. There was no creation of a common fund from which the PIP insurer benefited. Indeed, the fact that the majority subtly changes the theory from "common fund" to "equitable sharing" suggests the majority recognizes that it has really created a new equitable basis for attorney fees out of whole cloth. Accordingly, I dissent from the majority's application of the common fund theory.

In addition, I disagree with the majority's conclusion that *Olympic Steamship*[1] attorney fees are proper in the consolidated case of *Weismann v. Safeco Insurance Co. of Illinois*, 157 Wn. App. 168, 236 P.3d 240 (2010). First, the majority fails to follow the legally correct conclusion in *Mahler* that the pro rata attorney fee dispute is not a coverage issue. Second, the majority also erroneously says the pro rata fee dispute is a coverage issue because it involves interpretation of the policy provisions. It does not. I would hold that *Olympic Steamship* attorney fees are not awardable.

Discussion

In each of these cases, the tortfeasor's insurance company paid PIP benefits, constituting special damages, and then paid the insured's additional damages under liability coverage provisions of the tortfeasor's policy.

The United States Supreme Court has explained that it endorsed the common fund

[1] *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991).

theory of attorney fees to further the interests of justice. *Summit Valley Indus. Inc. v. Local 112, United Bhd. Carpenters & Joiners of Am.*, 456 U.S. 717, 721, 102 S. Ct. 2112, 72 L. Ed. 2d 511 (1982) (citing *Cen. R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 5 S. Ct. 387, 28 L. Ed. 915 (1885)). The equitable doctrine of the common fund is "grounded in dictates of public policy—fairness . . . [and] is calculated to achieve equity." *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 326, 88 P.3d 395 (2004) (Sweeney, J.P.T., dissenting) (footnote omitted).

In *Mahler* this equitable doctrine was first applied in this state to attorney fee-sharing reductions from PIP reimbursements. The application in this particular type of case is consistent with the equity theory of the common fund doctrine, which "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980). As we said in *Mahler*, it is inequitable to expect an insured who acts to protect his own interest, and thereby also protects the PIP insurer's interests, to pay for counsel entirely on his own. *Mahler*, 135 Wn.2d at 425 n.17 (quoting 8A John A. Appleman & Jean Appleman, Insurance Law and Practice § 4903.85, at 335 (1981)); *see Hamm*, 151 Wn.2d at 327 (Sweeney, J.P.T., dissenting).

But unless the injured insured obtains recovery of damages from a third party from which the PIP insurer can obtain reimbursement for the PIP benefits paid, there is no common fund. PIP and liability coverages overlap only as to payment of special

damages. When only the tortfeasor's insurer pays PIP benefits and then pays the insured's damages over and above the PIP payment, there is no duplication in benefits paid and no fund that will constitute a source of reimbursement for the PIP benefits paid. Most importantly, the tortfeasor's insurance company does not benefit from recovery from *itself*. There is no "common fund," no possibility of any actual reimbursement for PIP benefits, no benefit to the insurance company as a result of the insured's counsel's efforts, and the insurance company is not unjustly enriched. *See Hamm*, 151 Wn.2d at 327-28 (Sweeney, J.P.T., dissenting).

In contrast, in *Mahler*, *Winters v. State Farm Mutual Automobile Insurance Co.*, 144 Wn.2d 869, 885, 31 P.3d 1164, 63 P.3d 764 (2001), and *Safeco Insurance Co. v. Woodley*, 150 Wn.2d 765, 771–72, 82 P.3d 660 (2004), the insureds recovered moneys from third parties, thus creating a common fund from which the PIP insurer could recoup payments made. In *Mahler*, a common fund was created solely from a third party recovery; in *Winters*, a common fund was created from a combination of UIM (uninsured or underinsured motorist) proceeds and a third party recovery; and in *Woodley*, there was again a combination of a third party recovery and UIM proceeds. *Hamm*, 151 Wn.2d at 330 (Sweeney, J.P.T., dissenting). There is no similar situation in the present case.

The majority, however, believes it is appropriate to treat the insurer as if it is two separate sources of funds, maintaining that the PIP coverage and the liability coverage are distinct policies even if provided by the same insurer. Majority at 11-12. The majority analogizes the present cases to *Winters* and *Hamm*, cases in which the insured received

PIP benefits and UIM coverage. But the cases are not comparable.

In *Hamm*, the court reasoned that even though the same insurer paid PIP and UIM benefits, in its position as the UIM insurer the company stood in the shoes of the tortfeasor. *Hamm*, 151 Wn.2d at 308 ("[f]or purposes of UIM coverage, the insurance carrier is said to stand in the shoes of the tortfeasor, and payments made by the UIM carrier are treated as if they were made by the tortfeasor"). In this role the carrier was treated as distinct from the carrier in its role as PIP insurer.[2]

Even if one agrees with the analysis in *Hamm*, there is no comparable basis for treating the tortfeasor's insurer providing both PIP and liability coverage as if it were two entities. The PIP insurer and the liability insurer are the same entity standing only in the role of the tortfeasor's insurer. The insurer represents no other person or entity. This is unlike the situation in *Hamm*, where the insurer was the injured insured's own insurance company for PIP coverage but was effectively the tortfeasor insofar as UIM coverage was concerned. The same is true of the UIM coverage in *Winters*, although in *Winters* the insured also recovered some funds directly from the underinsured tortfeasor's liability insurance.

[2] I did not join the court's treatment of the insurer in *Hamm* as if it were two distinct sources of compensation for the injured insured. We are dealing in equity in these pro-rata-legal-fee cases, and the factual certainty is that only one insurer was involved in *Hamm*, just as there is only one insurer in the consolidated cases presently before us. Judge Pro Tem Sweeney provided a number of reasons why the insurer in *Hamm* should not have been required to pay a share of the injured insured's legal fees, but one of the most striking is that the insurance company was in essence the *losing* party in the arbitration proceeding there. *Hamm*, 151 Wn.2d at 327 (Sweeney, J.P.T., dissenting). The PIP benefits were never at issue and did not require the efforts of an attorney. *Id*. The only dispute was the UIM coverage, and on this question, the insurer lost. *Id*.

When the tortfeasor's insurer pays PIP benefits and then pays additional damages under the liability coverage when it is legally compelled to do so, the insurance company is not unjustly enriched as a result of the insured's counsel's legal efforts in obtaining the additional payment. There is no common fund from which the insurer benefits.

Finally, on this issue, as I explained in *Hamm*, the question is not whether an identically injured plaintiff entitled to the same PIP and liability proceeds ends up with the same amount of dollars in his or her pocket after paying attorney fees. If a "common fund" equitable ground for an award of attorney fees is the recognized ground in equity for an attorney fee award in these cases, as it is, then there must actually be a common fund from which the PIP insurer benefits. There is none in these cases. "[O]nly *one* insurance company has paid all the funds . . . and it has not benefited by any funds obtained from any other source. The insurance company can hardly be said to have benefited from its own payments" when it is the only one making any payment. *Hamm*, 151 Wn.2d at 322 (Madsen, J., concurring in dissent).

The majority misapplies the common fund doctrine.

Next, I turn to the issue of *Olympic Steamship* attorney fees in *Weismann*. We held in *Mahler* that a dispute about whether the insurer must pay a proportionate share of attorney fees in order to effect a right to reimbursement for PIP benefits paid is not a coverage dispute. *Mahler*, 135 Wn.2d at 431-32. In such cases, the issue is the value of the right of reimbursement, not whether the insurer has a right to be reimbursed for PIP benefits paid. *Id*. at 432. *Olympic Steamship* fees are not awardable under such

circumstances, as the court correctly determined in *Mahler*.

The majority says, however, that *Olympic Steamship* fees were awarded in *Woodley*, and because *Woodley* is a later case, it should control on the basis that it overruled *Mahler* sub silentio.

I agree that a subsequent case can overrule a prior one sub silentio, but I think the principle deserves some care in its application because the real question is whether the first or the subsequent case should be followed as having properly stated the law. I believe the explanation given in *Woodley* for allowing *Olympic Steamship* fees actually discloses why they should *not* have been awarded. The court in *Woodley* said that the case involved the insured's "right to receive the full benefit of her PIP and UIM coverages" and that because the insured would not receive the full benefit of her coverage if the insurer was not required to pay a pro rata share of attorney fees, the dispute is more like a dispute over vindication of policy provisions to which the insured is entitled. *Woodley*, 150 Wn.2d at 774. But the "*full benefit* of her . . . coverages" in *Woodley*, *id*. (emphasis added), was about the amount of money the insured ultimately received and not a question of whether she had coverage or what type of coverage she had. There was simply no question that the injured party was entitled to PIP and UIM coverage.

I believe that *Mahler* contains the better analysis and that the court should apply it rather than *Woodley*. Indeed, this case presents the opportunity to correct the misstep taken in *Woodley*.

In *Weismann*, no dispute exists that *if* a common fund was created by the insured's

counsel from which the insurer may be reimbursed for PIP benefits paid, then Safeco would be entitled to reimbursement only as reduced by a pro rata share of reasonable attorney fees paid by the insured to obtain a recovery. But whether a common fund is created is not a coverage question under the policy provisions. It is a question wholly outside the coverage questions.

If a common fund is created, the sole question then is the value of the insurer's reimbursement right, i.e., how much the PIP insurer is entitled to as reimbursement after paying a portion of the insured's attorney fees. This is not a coverage question, either, as *Mahler* properly explains. Accordingly, even assuming that a common fund was created and that Safeco is obligated to pay a pro rata share of the attorney fees expended to create it, no coverage question arises, contrary to the majority's position. *Olympic Steamship* attorney fees are not appropriate.

The majority also says that *Olympic Steamship* fees are appropriate because the question here is "one involving interpretation of the insurance policy." Majority at 16. The majority points out that when an insured must bring a suit against its own insurer to obtain an interpretation of the insurance policy, it is a coverage dispute. Majority at 17 (citing *Colo. Structures, Inc. v. Ins. Co. of the W.*, 161 Wn.2d 577, 606, 167 P.3d 1125 (2007)).

But the pro rata attorney fee issue is not a question of interpreting the insurance policy, as the majority itself correctly states. "'[T]he rule requiring a pro rata sharing of legal expenses is based on equitable principles and not on construction of specific policy

language.'" Majority at 6 (alteration in original) (quoting *Hamm*, 151 Wn.2d at 320). The majority is incorrect, as well as inconsistent, when it says that the pro rata sharing issue involves construction of policy terms.

Lastly, on the issue of *Olympic Steamship* attorney fees, the majority does not discuss the matter, but presumably there can be no duplication of fees—after all, the majority is already directing that the insurance company pay a pro rata share of attorney fees incurred by the insured to obtain liability benefits under the Safeco policy. The insurer should not have to pay twice for the same legal work.

Conclusion

The majority applies the equitable "common fund" theory as the basis for requiring the PIP insurers in these cases to pay a pro rata share of the attorney fees incurred by the insureds to create so-called "common funds" from which the insurers benefit. But in each case, the tortfeasor's insurance company, acting *only* on behalf of the tortfeasor, provided both the PIP and liability coverage. There was no common fund created as a result of the insured's incurrence of legal fees and the insurer was certainly not unjustly enriched by being legally compelled to pay the additional damages. The only "fund" was the amount that the insurer itself paid, and the insurer did not benefit from the insured's success in obtaining the recovery paid by the insurer itself.

In any case, *Olympic Steamship* attorney fees are inappropriate in Ms. Weismann's case. The dispute over whether Safeco must share legal fees on a pro rata basis based upon the common fund doctrine is not a coverage question as claimed. Further, the issue

does not involve construction of the insurance policy, contrary to the majority's view. Finally, given that the majority nevertheless requires Safeco to pay pro rata legal costs of Ms. Weismann's recovery *and also* pay *Olympic Steamship* attorney fees, care should be taken to ensure that imposition of these two types of attorney fees do not result in Safeco paying the same legal expenses twice.

I would affirm the holdings of the Court of Appeals in these cases, for the reasons stated in this opinion. I dissent from the majority opinion.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice James M. Johnson

Gerry L. Alexander, Justice Pro Tem.