No. 32109-6-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

PATRIOT GENERAL INSURANCE COMPANY, a foreign corporation

Appellant,

v.

JORGE GUTIERREZ and JANE DOE GUTIERREZ, and their marital community, and JAVIER GUTIERREZ,

Respondents.

BRIEF OF RESPONDENT JORGE GUTIERREZ

Walla Walla County Superior Court No. 12-2-00908-3

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I. INTRODUCTION

In this case of first impression, the trial court correctly determined that Javier Gutierrez, son of Jorge Gutierrez[1], was an insured for purposes of underinsured motorist (UIM) coverage under his father's auto insurance policy. The Walla Walla County Superior Court ruled that Patriot General was not permitted to define "insured" more narrowly than the statutory definition in RCW 48.22.005(5), and thus Javier – who fit the statutory definition of "insured" – was entitled to UIM coverage under the policy. This decision was correct because the statutory definition of "insured" is read into the policy, like all provisions of the UIM statute.

This Court could also affirm under two alternate theories. First, the plain language of the policy actually covers Javier. The policy imposed a duty to disclose resident relatives age 14 and over, but did not include any explicit language – as it had in other parts of the policy – explicitly stating those undisclosed relatives were not insured. To the extent this creates an ambiguity about the effect or intent of the language, it should be construed against the insurer as the drafter of the policy. As a result, the duty to disclose

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[1] Because both respondents have the same last name, this brief will refer to them by the first names Jorge and Javier from here on out to avoid confusion.

should be treated like any other duty in an insurance policy, requiring a showing of actual prejudice suffered by the insurer before a breach can be a defense to coverage.

Second, if this Court finds the policy language effectively uninsured Javier, and that insurers are allowed to define who is an insured more narrowly than the statutory definition of insured, the Court could also find that public policy prohibits the exclusion of resident family members who are the innocent victims of a collision, where those family members have no other way to get their own UIM insurance.

II. RESTATEMENT OF THE ISSUES

1. Patriot General issued a policy to respondent Jorge Gutierrez that included UIM insurance. The policy imposed a duty to disclose resident relatives of the named insured over the age of 14. The policy did not state anywhere the failure to disclose those relatives meant those relatives were not considered insureds under the policy. Javier Gutierrez, son of Jorge, lived with his father, but was not disclosed. Does the breach of the duty to disclose mean Javier is uninsured, or is a breach of the duty to disclose treated like any other breach of duty, requiring the insurer to show actual prejudice before avoiding coverage?

2. If the plain language of Patriot General's policy effectively excluded Javier Gutierrez, is Patriot General prohibited from defining who is an insured more narrowly than the UIM statute?

3. If not, does public policy, which calls for broad UIM coverage to protect innocent injured parties, prohibit an insurer from excluding coverage for Javier, who has no other way to get his own UIM insurance?

III. RESTATEMENT OF THE CASE

A. Jorge Bought Insurance Intending To Cover His Children

Respondent Jorge Gutierrez went to insurance agent Tomas Miranda for insurance in 2010, in part because Jorge does not speak or read English. CP 106, ¶ 4. He intended for his entire family to be covered by the insurance, including his son, Javier. *Id.*, ¶ 5. Jorge told Mr. Miranda Javier would be driving the family vehicles. *Id.* The application was in English and Jorge provided the information to Mr. Miranda who entered the information into the form. *Id.*, ¶ 4. Jorge asked for UIM coverage. CP 80. Jorge signed the forms and initialed where Mr. Miranda told him to. CP 106, ¶ 4.

Jorge did not know the insurer required disclosure of all his children age 14 and over. *Id.*, ¶ 5 Jorge did not know he was

agreeing his children would not be covered. *Id.* Jorge believed all his children had coverage, including Javier. *Id.*

B. Javier Gets Injured While Riding As A Passenger In A Car Involved In A Collision.

In January 2011 Javier was riding as a passenger in a friend's vehicle and was injured in a collision. CP 103, ¶ 4. The friend did not have his own liability insurance. And Javier did not have any other automobile insurance, besides the insurance his father bought. CP 107, ¶ 8. He lived at home with his parents and did not own his own vehicle. *Id.*; CP 103, ¶ 5. Javier had no other way to get his own insurance.

Javier – with Jorge's help – alerted Patriot General about the collision and Javier's injuries. CP 106, ¶ 3. Javier made a claim with Patriot General, which it denied. This was the first time Jorge found out the policy required disclosure of any relatives. *Id.*, ¶ 6. Patriot General then sued both Jorge and Javier, asking the Court for a declaration that it owed no coverage to Javier for his injuries. *Id.*, ¶ 3; CP 1-3.

Patriot General moved for summary judgment on the issue of coverage. CP 4-15. It argued that (1) Javier was not insured under the policy, CP 8-9, and (2) the UIM statute does not mandate

any particular class of people be covered because the definition section contained in RCW 48.22.005 did not apply to the UIM statute, CP 9-14.

Javier and Jorge both separately opposed the motion. CP 86-104; 105-128. The Walla Walla Superior Court Commissioner Michael Mitchell denied the motion. CP 160-63. Specifically, the Commissioner ruled that Patriot General could not contractually narrow the definition of "insured" contained in RCW 48.22.005(5), which is read into the policy. CP 162. Because Javier qualifies as an insured under the statutory definition, he qualifies for UIM insurance under Patriot General's policy. *Id.*

Patriot General moved to revise the Commissioner's order. CP 164-170. Javier and Jorge opposed the motion. CP 171-78; CP 179-217. Walla Walla Superior Court Judge Scott Wolfram denied the motion. CP 223-226.

Patriot General filed its motion for discretionary review. Both Jorge and Javier agreed the issue of whether there is coverage for Javier was an issue involving a controlling question of law and there was no precedential case law governing the issue. The Court of Appeals granted Patriot General's Motion for Discretionary Review. CP 248-49.

IV. ARGUMENT

This brief will address the issues a little out of order because if the Court decides the policy language does not do what Patriot General claims – and actually does cover Javier – there is no need to reach the other, broader issues. The Court may affirm on any grounds supported by the record, even grounds the trial court did not rely on. *Deep Water Brewing, LLC v. Fairway Resources, Ltd.*, 170 Wn. App. 1, 11, 282 P.3d 146 (2012).

Patriot General glosses over the issue of what the effect is of the language in the definition of "relative." It devotes just one paragraph to the issue. Br. of Pet'r, at 10. But because this is a threshold issue, it deserves more scrutiny. When examined closely, the definition of "relative" has the effect of insuring all resident relatives, while also imposing a duty to disclose those relatives. Patriot General's argument requires reading a fourth sentence in to the definition of relative: "Any relative age 14 or older who is not listed on the application or endorsed on the policy is not considered an insured." Because the language does not explicitly uninsured Javier, any breach of the duty to disclose must be treated like any other breach of a duty imposed in an insurance policy. An insurer may not escape coverage for the breach of a duty, without first

showing actual prejudice from the breach. Patriot General did not attempt to show any prejudice, so coverage exists for Javier.

If the Court finds the definition of "relative" effectively meant Javier was not insured, then it must confront the issue of whether Patriot General can contract around the statutory definition of insured in RCW 48.22.005(5). The UIM statute is to be broadly construed to protect innocent victims of collisions. All of the insurance statutes in RCW 48.22 are required to be read into all automobile insurance policies. This includes the definition of "insured" in RCW 48.22.005(5). Javier fits under the definition of "insured" in the statute, so he is entitled to UIM coverage. The trial court did not err.

Finally, the Court could also affirm the trial court on the basis that the exclusion of Javier from coverage violates public policy. Patriot General made no showing that Javier presented any kind of increased risk. Plus Javier had no other way to get automobile insurance because he lived at home with his parents and did not own a vehicle. As a result, his only way to get UIM insurance was

through his parents' policy. The exclusion should be invalidated and the trial court affirmed.[2]

A. The Plain Language Of The Policy Insures Javier

Patriot General claims that Javier was never an insured to begin with. But a careful reading of the policy shows that Patriot General's analysis is flawed.

The construction of an insurance policy is a question of law. *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984). Patriot General correctly noted the proper framework for the analysis of whether there is coverage: (1) the insured must first establish that the loss falls within the scope of the policy, and (2) then the insurer must show that the loss is excluded by specific policy language. *Diamaco, Inc. v. Aetna Cas. & Sur. Co.*, 97 Wn. App. 335, 337, 983 P.2d 707 (1999).

Insurance policies are construed as contracts. *Austl. Unlimited, Inc. v. Hartford Cas. Ins. Co.*, 147 Wn. App. 758, 765, 198 P.3d 514 (2008). The purpose of insurance is to insure, so courts should use the construction that provides coverage, rather than one that eliminates coverage. *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99

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[2] All of these arguments are sufficiently developed in the record for the Court to consider them and affirm based on any of them.

Wn.2d 65, 69, 659 P.2d 509 (1983), modified on other grounds, 101 Wn.2d 830, 683 P.2d 186 (1984). The policy should be interpreted as it would be understood by the average person purchasing insurance. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 733, 837 P.2d 1000 (1992). If there is ambiguity, it should be strictly construed against the insurance company and in favor of the insured. *George v. Farmers Ins. Co. of Wash.*, 106 Wn. App. 430, 439, 23 P.3d 552 (2001).

Patriot General confuses the issue of who is an insured with the duties imposed on insureds by the policy. And it asks this Court to add language into the definition of "relative" that does not currently exist. Further, it provided no evidence it suffered actual prejudice from any breach of the duty to disclose relatives over the age of 14. The trial court's decision was correct.

1. Javier fits the definition of "relative" in the policy, and his insured status is not negated by the late notice to plaintiff that he was driving

Patriot General argues that the Javier was never an insured to begin with because he was not disclosed to the insurer prior to the collision. Its argument is essentially that there is no coverage for resident relatives if those relatives are not disclosed. But the policy does not say that. The provision requiring disclosure of all relatives

age 14 and older has no bearing on whether Javier is actually insured, as a careful reading of the policy language demonstrates.

The insuring language is found on page 1 of the policy. CP 57. There the policy states (bold in the original):

> In return for **your** premium payment and subject to the terms and conditions of this policy, **we** will insure **you** for the coverages up to the limits of liability for which a premium is shown on the Declarations Page of this policy.

So if Javier fits under the definition of "you," he becomes an insured, and then the burden shifts to the insurer to show an exclusion applies.

"You" is defined on page 2 of the policy:

> **"You"** and **"your"** mean the person shown as the named insured on the Declarations Page and that person's spouse if residing in the same household. **You and your** also means any **relative** of that person if they reside in the same household, providing they or their spouse do not own a **motor vehicle**.

CP 58 (bold in original) (emphasis added). Relative is then defined as:

> **"Relative"** means a person living in **your** household related to **you** by blood, marriage or adoption, including a ward or foster child. **Relative** includes a minor under your guardianship who lives in **your** household. Any **relative** who is age fourteen (14) or older must be listed on the application or endorsed on the policy prior to a car accident or loss.

CP 58 (bold in original) (emphasis added).

The first two sentences of the definition of relative cover who is an insured. The third sentence simply imposes a duty of disclosure on

the insureds. This language, by its plain terms, brings Javier under the umbrella (no pun intended) of being an insured.[3] He is Jorge's son, living with Jorge. While the policy requires disclosure of relatives age 14 and older, that provision has no effect on Javier's insured status. It is presumably a mechanism for the insurer to keep tabs on everyone who might be an insured. And it is no different than any other policy provision requiring the insureds to do something, such as notifying the insurer of an accident, CP 57, cooperating with the insurer's investigation, CP 57, complete any forms requested by the insurer, CP 58, or submit a sworn proof of loss, CP 58. While any alleged breach of the notice provision can ultimately affect whether there is coverage for Javier's loss, it does not affect whether he was ever an insured in the first place.

Patriot General is in effect asking this Court to add new language to the definition of "relative." Right now the definition reads:

> "**Relative**" means a person living in **your** household related to **you** by blood, marriage or adoption, including a ward or foster child. **Relative** includes a minor under your guardianship who lives in **your** household. Any **relative** who is age fourteen (14) or older must be listed on the application or endorsed on the policy prior to a car accident or loss.

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[3] Plaintiff makes no allegation that Javier owned a vehicle as a reason for why coverage should be denied.

Patriot General would like this Court to add a new fourth sentence: "Any relative age 14 or older who is not listed on the application or endorsed on the policy is not considered an insured."

Contrast the language in the definition of "relative" to other parts of the policy where Patriot General had no trouble making explicitly clear who is not an insured. For example, in the UIM Coverage portion of its policy, Patriot General explicitly stated:

> No person shall be considered an **insured person** if that person uses a **motor vehicle** without permission of the owner.

CP 62 (bold in original). Patriot General made clear who it was not insuring. Yet no such similar explicit language was used in the definition of "relative," even though Patriot General continues to insist that is what it meant by its language.

Thus, the effect of the language is not to take away an undisclosed relative's insured status. It simply imposed a duty of disclosure for the insureds that are covered. While this might seem like a distinction without a difference, the consequences for Javier are far different. If he is in fact not insured at all, then only something external to the policy, such as the UIM statute or public policy, can ensure he is covered. If he is insured, and all the Court

is left to deal with is what happens for a breach of the duty to disclose, he has coverage unless Patriot General can prove actual prejudice.

To the extent the definition of "relative" is ambiguous – because there are two different interpretations of the meaning of the term "relative" – then that ambiguity must be resolved in favor of coverage. *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 340, 738 P.2d 251 (1987). Either way, Javier is considered an insured under the policy.

2. To avoid coverage for the breach of the duty to disclose, Patriot General was required – and failed – to show actual prejudice

Because Javier is an insured, the burden shifts to the insurer to point to some reason why Javier is not covered. Patriot General raised just one – the breach of the duty to disclose Jorge's relatives age 14 and older. Thus the question becomes, what is the legal effect of any alleged breach of disclosure requirement? Implicitly, Patriot General argues that because defendants failed to timely disclose, there is no coverage for Javier's injuries, period. In other words, Patriot General is arguing that the disclosure of resident relatives age 14 and older is a condition precedent to recovering under the policy. But "condition precedent" reasoning in insurance policies has been rejected by

Washington courts for almost 40 years.

In situations involving disputes about whether a policy provision has been breached, Washington courts require insurers to prove they were actually prejudiced by the alleged breach of an insured's duty before an insurer can escape liability. *See Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 377, 535 P.2d 816 (1975). In *Salzberg*, the insurer claimed the policyholder breached the cooperation clause, which according to the policy language was a condition precedent to receiving benefits. By failing to cooperate, the insurer argued the insured was not entitled to recover anything. The court rejected that approach and instead required the insurer to prove it was prejudiced by a breach before being relieved of liability. *Id.* at 376.

In refusing to impose traditional contract principles on insurance policies, the court pointed to the strong public policy considerations at play in insurance policies:

> insurance policies, in fact, are simply unlike traditional contracts, i.e., they are not purely private affairs but abound with public policy considerations, one of which is that the risk-spreading theory of such policies should operate to afford to affected members of the public – frequently innocent third persons – the maximum protection possible consonant with fairness to the insurer. It is manifest that this public policy consideration would be diminished, discounted, or denied if the insurer were relieved of its responsibilities although it is not prejudiced by the insured's actions or conduct ....

> Such relief, absent a showing of prejudice, would be tantamount to a questionable windfall for the insurer at the expense of the public.

Id. at 376-77.

This prejudice analysis has been applied to virtually every kind of policy provision imposing a duty. *See, e.g., Canron, Inc. v. Federal Ins. Co.*, 82 Wn. App. 480, 485, 918 P.2d 937 (1996) (late notice of the claim); *Tran v. State Farm Fire and Cas. Co.*, 136 Wn.2d 214, 961 P.2d 358 (1998) (breach of the cooperation clause); *Pub. Util. Dist. No. 1 of Klickitat Cnty. V. Int'l Ins. Co.*, 124 Wn.2d 789, 803-04, 881 P.2d 1020 (1994) (breach of cooperation, notice and no-settlement clauses); *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 427, 983 P.2d 1155 (1999) (late tender).

The actual prejudice requirement was very recently reaffirmed by our Supreme Court when it was applied to the policy provision requiring insureds to submit to examinations under oath. *Staples v. Allstate Ins. Co.*, 176 Wn.2d 404, 417-18, 295 P.3d 201 (2013). The court stated:

> We have required a showing of prejudice in nearly all other contexts to prevent insurers from receiving windfalls at the expense of the public and to avoid hinging relief on a discredited legalistic distinction. The same concerns apply equally to the [examination under oath] requirement.

Id. at 418.

Just as prejudice must be shown with other duties imposed by the policy, Patriot General was required to demonstrate – and did not – actual prejudice for a breach of duty to disclose resident relatives age 14 and over. In its opening brief, Patriot General failed to even address this argument, even though it was briefed and argued by Jorge below. CP 116-119. It would be inappropriate for Patriot General to save its argument on this issue for reply, as neither Jorge nor Javier would have the opportunity to respond to it.

But more significantly, Patriot General never made any effort to present any evidence of actual harm at the trial court level.[4] The party claiming prejudice has the burden of proof on that issue:

> A claim of actual prejudice requires "affirmative proof of an advantage lost or disadvantage suffered as a result of the [breach], which has an identifiable detrimental effect on the insurer's ability to evaluate or present defenses to coverage or liability.

Staples, 176 Wn.2d at 419. In other words, a party needs to put forth particularized proof and cannot rely on general or vague allegations of harm. Because Patriot General never presented this issue to the trial court, it cannot now argue it was actually

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[4] Jorge's declaration affirmatively stated that Patriot General never sought back premiums from him for Javier's coverage. CP 107, ¶ 7.

prejudiced. Arguments and evidence not presented to the trial court are waived on appeal. *Brundridge v. Fluor Federal Svcs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008). So the trial court could be affirmed on this basis.

Nor could it have asserted actual harm. As the *Staples* Court noted, the harm it is concerned with is something affecting "the insurer's ability to evaluate or present defenses to coverage or liability." *Staples*, 176 Wn.2d at 419. Here, no such harm of this type could exist because there have been no allegations that Jorge and Javier have done anything to impede the plaintiff's coverage investigation or liability investigation, to the extent any investigation occurred. There has been no allegation that the policyholders refused to turn over documents and other information and refused to answer questions, such as in *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 218-21, 961 P.2d 358 (1998). Nor has there been any allegation that defendants did anything to delay the claim and that delay somehow caused evidence to be lost, as in *Sears, Roebuck and Co. v. Hartford Accident & Indem. Co.*, 50 Wn.2d 443, 453, 313 P.2d 347 (1957). The trial court did not err.

B. Neither The UIM Statute Nor Public Policy Permit Patriot General To Contract Around The Definition of Insured in RCW 48.22.005

No Washington appellate court has yet had the opportunity to decide in a precedential opinion whether an insurer is allowed to contract around the definition of "insured" in RCW 48.22.005(5). Patriot General argues that it may insure whoever it wants with its UIM policies, so long as it insures the same class of people as in the liability portion of the policy. Br. of Pet'r, at 10-11. Respondent does not deny that this is a long-standing rule. But Patriot General's argument misses the equally important rule that all the insurance statutes in RCW 48.22 are read into the policies and may not be contracted around. *Eurick v. Pemco Ins. Co.*, 108 Wn.2d at 342 (noting that RCW 48.22 restricts the limitations of coverage an insurer can put on UIM policies); *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 252 n.39, 850 P.2d 1298 (1993); *Torgerson v. State Farm Mut. Auto. Ins. Co.*, 91 Wn. App. 952, 957, 957 P.2d 1283 (1998).

As courts have noted, our state has a comprehensive UIM scheme. *Jain v. State Farm Mut. Auto. Ins. Co.*, 130 Wn.2d 688, 694, 926 P.2d 923 (1996). The UIM statute has been around in some form since 1967. When the Legislature first enacted it, it was just the UNinsured motorist statute. Its purpose was to be a financial security

measure to cut down on the risk to innocent victims of careless and insolvent drivers. *Touchette v. Northwestern Mut. Ins. Co.*, 80 Wn.2d 327, 332, 494 P.2d 479 (1972); *Finney v. Farmers Ins. Co. of Wash.*, 92 Wn.2d 748, 751, 600 P.2d 1272 (1979). In order to effectuate its purposes, the statute was liberally and broadly construed. *Id.*

When the Legislature amended the statute in 1980 to include UNDERinsured motorists, nothing about those underlying policies changed. *Mut. of Enumclaw Ins. Co. v. Wiscomb*, 97 Wn.2d. 203, 208, 643 P.2d 441 (1982). Our courts continue to liberally construe the UIM statute to uphold the legislative mandate of broad UIM coverage to protect innocent injured parties. *Greengo v. Public Employees Mut. Ins. Co.*, 135 Wn.2d 799, 806, 959 P.2d 657 (1998). The Legislature was so concerned with ensuring UIM coverage to protect innocent injured people, it requires insurers to offer UIM insurance unless the insured "specifically and unequivocally" rejects the coverage in writing. RCW 48.22.030(4); *First Nat'l Ins. Co. of Am. v. Perala*, 32 Wn. App. 527, 531, 648 P.2d 472 (1982).

As a result of the Legislature's intent to ensure broad UIM coverage is provided, insurers are limited in what they can and cannot do with their UIM policies: "because the legislature has mandated automobile UIM ... be offered, exclusions that are valid

in other forms of insurance may be void and unenforceable in automobile coverage." *Sherry v. Financial Indemnity Co.*, 160 Wn.2d 611, 620, 160 P.3d 31 (2007).

The courts regularly read insurance regulatory statutes into the insurance policies. *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 85-86, 794 P.2d 1259 (1990). To fulfill the mandate of broad UIM coverage, the courts routinely void any provision in a policy which is (1) inconsistent with the UIM statute, (2) is not authorized by the statute, or (3) that thwarts the broad purpose of the statute. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 251, 850 P.2d 1298 (1993). Thus, any UIM policy provision that provides fewer benefits or protects a smaller class of insureds than those mandated by the UIM statute are automatically void.

1. The UIM statute requires coverage for "insureds" as defined in RCW 48.22.005(5) which encompasses Javier

Patriot General's asks this Court to ignore the plain, clear meaning of the UIM statute and its corresponding definition section. Its argument renders certain parts of the UIM statute superfluous and leads to absurd results. In construing statutes, courts must carry out the intent of the legislature. *State v. Alvarez*, 128 Wn.2d 1, 11, 904 P.2d 754 (1995). If the language of a statute is clear on its face, then

that plain meaning must be given effect and courts are to assume the Legislature meant exactly what it said. *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). Where definitions are provided by the legislature, courts are bound to apply those. *Schrom v. Bd. for Volunteer Fire Fighters*, 153 Wn.2d 19, 27, 100 P.3d 814 (2004).

In interpreting statutes, words must not be read in isolation. *State v. Lilyblad*, 163 Wn.2d 1, 9, 177 P.3d 686 (2008). Courts must attempt to give effect to every word, clause and sentence of a statute, so that no portion is rendered meaningless or superfluous. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). In addition, courts must avoid unlikely or absurd results. *Id.* It is only if a statute is susceptible to more than one reasonable interpretation legislative history may be consulted. *Id*

The definitions contained in RCW 48.22.005 plainly apply to the UIM statute and therefore to Patriot General's policy. As the opening lines of RCW 48.22.005 plainly state: "the definitions in this section apply throughout this chapter," unless the context "clearly requires otherwise." RCW 48.22.005. The UIM statute is RCW 48.22.030, part of the chapter. Simply put, the definitions in RCW 48.22.005 apply to the UIM statute. As a result, to the extent the provision requiring notice of relatives age 14 and over is an exclusion barring coverage for

Javier, it is void.

In an attempt to get out from the obvious result, Patriot General concocts a strained argument that section 2 of the UIM statute, RCW 48.22.030, uses the term "named insured" and "persons insured thereunder" but not "insured." So therefore, its argument goes, the statutory definition in RCW 48.22.005 (5) does not apply in this situation. Thus, it is only required to cover the named insured (Jorge) and persons insured thereunder. This argument makes no sense and is also belied by looking at the entirety of the UIM statute, not just one portion.[5]

While Section 2 of the UIM statute is not artfully worded, the operative portion is:

> No new policy ... shall be issued ... unless coverage is provided ... for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles ....

RCW 48.22.030(2). In other words, coverage has to be provided for all persons insured in the policy.

The term "named insured" appears in the exception to the rule:

> ... except ... while operating or occupying a motor vehicle owned or available for the regular use by the named

[5] Jorge fully agrees with Javier's discussion of "persons insured thereunder" is just the plural form of "insured," and thus means the same thing. Br. of Respondent Javier Gutierrez, 19-22.

> insured or any family member, and which is not insured under the liability coverage of the policy.

Id. UIM insurers do not need to provide coverage for injuries received in vehicles not insured in the policy but are owned by or available for the regular use of the named insured or a family member.

Other portions of the UIM statute used the term "insured," in addition to "named insured." For example, Section 3 sets the parameters for the amount of UIM insurance to be offered:

> ... coverage required under subsection (2) of this section shall be in the same amount as the insured's third party liability coverage unless the insured rejects all or part of the coverage as provided in subsection (4) of this section.

RCW 48.22.030(3) (emphasis added). It would not make sense for the UIM statute to apply to only a "named insured," and "persons insured thereunder," but then use "insured" in other portions of the statute when setting the rules for how much coverage must be provided. Because all sections of a statute must be read in conjunction with one another and harmonized, Patriot General's analysis is fatally flawed.

Next, Patriot General argues the Legislature intended RCW 48.22.005 to apply to only the PIP statutes, citing legislative history. But in making this argument, Patriot General ignores the plain language of RCW 48.22.005 and an important rule of statutory interpretation: legislative history is only considered if there is an

ambiguity. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

The Legislature made its intentions clear by the opening language of RCW 48.22.005: "the definitions in this section apply throughout this chapter," unless the context "clearly requires otherwise." RCW 48.22.005. By making the definitions applicable to the entire chapter, the Legislature plainly intended the definitions to apply to the entirety of Title 48, Chapter 22, including the UIM statute at RCW 48.22.030. If it intended the definitions to apply to only the PIP statutes, it would have said so specifically. But it did not.

Patriot General tries to manufacture an ambiguity by saying the Legislature used both of the terms "insured" and "persons insured thereunder," so those must be two different things, and we must consult legislative history to figure out the difference. This argument ignores that the simplest answer is that "persons insured thereunder" is the plural of "insured."

But more to the point, the ambiguity Patriot General claims to be addressing is not the one it actually addresses. It claims to want to figure out what the difference is between "insured" and "persons insured thereunder." But in reality, it dives into the question whether the definition section was intended to apply to the UIM statute. Patriot

General is trying to make an end-run around the clear statutory language applying the statutory definitions to the UIM statute, in violation of the rule that legislative history is only referred to when there is an ambiguity.

Plaintiff cites many cases that it claims stand for the proposition that it is allowed to provide UIM insurance to whomever it wants. But those cases are inapposite. Many involved policies that were issued before the Legislature implemented the definition of "insured" in 1993.[6] None of the cases appear to deal with the issue of whether the definition of "insured" in RCW 48.22.005 can be contracted around because none of the parties ever raised the issue. In fact, there do not appear to be any published cases analyzing whether an insurer can provide UIM insurance to a lesser class of insureds than provided in the definition of "insured" in RCW 48.22.005.

In addition, the factual settings of some of the cases relied upon by plaintiff are very different than here. For example, the policy in *Vasquez* v. *American Fire & Casualty Co.*, 174 Wn. App. 132, 133,

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[6] *See, e.g., Smith v. Cont'l Cass Co.*, 128 Wn.2d 73, 904 P.2d 749 (1995) (involved a policy written in 1990 and an automobile collision occurring in 1990); *Federated Am. Ins. Co. v. Raynes*, 88 Wn.2d 439, 563 P.2d 815 (1977) (decided well before 1993); *Touchette v. Nw. Mut. Ins. Co.*, 80 Wn.2d 327, 494 P.2d 479 (1972) (decided well before 1993); *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 549 P.2d 9 (1976) (decided well before 1993); *Dairyland Ins. Co. v. Uhls*, 41 Wn. App. 49, 702 P.2d 1214 (1985) (decided well before 1993)

298 P.3d 94 (2013) was a commercial policy. That case involved the issue of whether an employee who was running a personal errand and was hit in a crosswalk was an insured under the commercial policy. The court held he was not and part of its reasoning was that to adopt the plaintiff's interpretation would turn a business auto policy into a personal policy. *Id.* at 98. There was no argument in that case that the definition of "insured" under RCW 48.22.005 (5) applied. The policy at issue here is a personal policy and does not involve employees or a commercial setting.

In addition, unlike Javier, the passenger injured in *Financial Indemnity Co. v. Keomaneethong* was not related to the named insured and was not living with the named insured. 85 Wn. App. 350, 351, 931 P.2d 168 (1997). The plaintiff also apparently never raised the argument that the policy conflicts with the definition of "insured" in RCW 48.22.005, so the Court of Appeals never addressed it.

Patriot General misleadingly claims that there is no authority supporting Jorge and Javier's arguments about the statutory definitions – but that argument both misses the point and is wrong.

This is an issue that no Washington appellate court has addressed in a precedential opinion, so that is not surprising.[7]

Further, the definitions in RCW 48.22.005 have been relied upon by at least three appellate courts, including this Court, when construing the UIM statute. *Am. States Ins. Co. v. Bolin*, 122 Wn. App. 717, 721, 94 P.3d (2004) (definition of "automobile" in RCW 48.22.005(1)(b)); *Daley v. Allstate Ins. Co.*, 86 Wn. App. 346, 355, 936 P.2d 1185 (1997), rev'd on other grounds 135 Wn.2d 777, 958 P.2d 990 (1998) (definition of "bodily injury" in RCW 48.22.005(2)); *Cherry v. Truck Ins. Exch.*, 77 Wn. App. 557, 563 n. 3, 892 P.2d 768 (1995) (noting RCW 48.22.005 distinguishes between "named insureds and other insureds)). Accordingly, the trial court should be affirmed.

2. Public policy prohibits exclusion of relatives age 14 and over from UIM coverage

Our Supreme Court has invalidated provisions that exclude UIM coverage for family members who are injured as passengers. *Tissell v. Liberty Mut. Ins. Co.*, 115 Wn.2d 107, 111-112, 795 P.2d 126 (1990). In *Tissell*, the insurer excluded coverage for family members who were passengers while the named insured was driving.

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The court invalidated both provisions and focused on public policy of broad UIM coverage and full compensation for innocent injured parties. *Id.* at 111. The court was particularly troubled by the fact that the exclusion barred coverage for family members who had no other way to procure UIM insurance. *Id.*

The same concern underlies the decision in *Wiscomb*. That case involved the family or household exclusion. In invalidating that exclusion the court reasoned:

> The family or household exclusion ... is directed at a class of innocent victims who have no control over the vehicle's operation and who cannot be said to increase the nature of the insurer's risk. An exclusion which denies coverage when certain victims are injured is violative of public policy.

Wiscomb, 97 Wn.2d at 209. The court went on to explain that the exclusion affects third parties who are in no position to contract for their own insurance coverage. *Id.* at 211. For example, the exclusion applies to both children of the named insured as well as adults who cannot have their own insurance. *Id.* at 211-12. This inappropriately undermines the important public policy of our state's comprehensive UIM scheme.

This Court has also invalidated other clauses in the non-UIM portion of the policy where the exclusion "does not have any relationship to the increased risk faced by the insurer or denies

coverage to innocent victims without good reason." *Mendoza v. Rivera-Chavez*, 88 Wn. App. 261, 266, 945 P.2d 232 (1997) aff'd 140 Wn.2d 659, 999 P.2d 29. In that case, this Court invalidated the "migrant worker" exclusion because the insurer did not present any evidence migrant workers presented an increased risk. *Id.* at 267. This Court also recognized it broadly impacts families, including children and other innocent victims, who may be hurt in an accident and have no other source of insurance to turn to. *Id.*

Similarly, the case here involves a provision that under Patriot General's version excludes coverage for Javier, who as a passenger in a vehicle he had no control over and who had no other UIM insurance available to him. Under Patriot General's theory, the exclusion applies to everyone 14 or older, regardless of whether they represent any increased risk[8] and regardless of whether they have the ability to get UIM insurance elsewhere. This provision is against public policy, especially considering Patriot General's policy amounted to a "take it or leave it" adhesion

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[8] Patriot General made no allegation nor presented any evidence below to show that Javier presented some kind of increased risk, requiring higher premiums. Nor did it seek any additional premiums for Javier once it found out Javier was driving. CP 107, ¶ 7. As a result, this is waiver of these arguments.

contract in an area – UIM insurance – imbued with the public interest.

C. Jorge Gutierrez Is Entitled To An Award of Attorney Fees and Costs Under *Olympic Steamship* For Having Been Forced To Litigate This Coverage Issue

Pursuant to RAP 18.1, Jorge Gutierrez respectfully requests that this Court award him his attorney's fees and costs for having been sued, forced to hire a lawyer, and litigate this coverage issue. In *Olympic Steamship v. Centennial Insurance Company*, 117 Wn.2d 37, 53, 811 P.2d 673 (1991) (emphasis added), the Supreme Court held an award of fees is mandatory in situations like this:

> An award of attorney fees is **required** in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of [the] insurance contract, regardless of whether the insurer's duty to defend is at issue.

This equitable rule recognized the broad disparity in bargaining power between an insured and an insurance company. *Id.* at 52. Whenever an insurance company refuses to honor its contract, that conduct imposes a burden on the insured who then has to compel the insurance company to act as it should have under the policy. *Id.* at 53. The threat of an attorney fee award therefore is designed to encourage the prompt payment of claims. *Id.* The *Olympic*

Steamship rule was expressly extended to cover insureds who are forced to sue to receive the benefit of their UIM policies. *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 28-29, 904 P.2d 731 (1995).

Here, Jorge Gutierrez was compelled to litigate this coverage issue when Patriot General sued him, forced him to find a lawyer under threat of a default, and then forced him to defend against Patriot General's summary judgment through the trial court and now at the Court of Appeals. He did all of this to obtain the benefit of UIM coverage for his son, who was injured more than three years ago, still needs treatment to this day, and has not been able to get it because he cannot afford it. Because Jorge was forced to litigate the issue of UIM coverage for Javier, this Court should award Jorge (and Javier) his attorney's fees and costs.

RESPECTFULLY SUBMITTED this 12th day of May, 2014.

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DECLARATION OF SERVICE

The undersigned hereby declares I am over the age of 18 and under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in a manner noted below a true and correct copy of the foregoing on the parties mentioned below as indicated:

Patrick Paulich Thorsrud Cane & Paulich 1300 Puget Sound Plaza 1325 Fouth Ave Seattle, WA 98101 ppaulich@tcplaw.com Peter Hess Hess Law Office 415 N. Second Ave Walla Walla, WA 99362 peter@hesslawoffice.com	[XXX] E-Mail [ ] U.S. Mail [ ] Electronic Filing [ ] Legal Messenger [ ] FedEx

Dated this 12th day of May, 2014 at Bellevue, Washington.

Kendra Short, Legal Assistant