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SUPREME COURT
STATE OF WASHINGTON

No. 35864-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JOSEPH M. THOMPSON, an individual,
Respondent,

vs.

PROGRESSIVE DIRECT INSURANCE COMPANY,
Appellant.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Joseph M. Thompson ("Mr. Thompson"), Plaintiff below and Respondent on appeal, petitions the Supreme Court for review of the published decision of the Court of Appeals, Division III, designated in part II, pursuant to RAP 13.4(b)(4).

II. CITATION TO COURT OF APPEALS DECISION

Thompson v. Progressive Direct Ins. Co., ___ Wn.App ___, 438 P.3d 533 (No. 35864-0-III), filed April 9, 2019 ("Decision"), (Fearing, J., concurring) ("Concurrence"). A copy is in Appendix A. Order denying Motion to Reconsider filed May 9, 2019. A copy is in Appendix B.

III. ISSUES PRESENTED FOR REVIEW

1. Should this Court accept review, on the basis of substantial public interest, the Court of Appeals holding that allows insurance companies to exclude guest passengers from UIM coverage when such exclusion violates Washington's public policy of full compensation to collision victims and discriminates against our most vulnerable citizens?
2. Should this Court accept review, on the basis of substantial public interest, the Court of Appeals holding that The UIM Statute requires UIM coverage to come from a separate vehicle than liability

coverage ("the 2-car rule") when such holding misinterprets the language of The UIM Statute?

3. Should this Court accept review, on the basis of substantial public interest, the issue of whether The Definition Statute abrogated the 2-car rule when this is a case of first impression involving statutory interpretation?

IV. STATEMENT OF THE CASE

On or about May 9, 2015, Joseph M. Thompson was injured in a single-vehicle automobile collision. CP 11, ¶ 2. Mr. Thompson was a Guest Passenger (a permissive-non-family-member passenger) in a vehicle driven by Stacey M. Haney. *Id.*, ¶ 4. Both Ms. Haney and her vehicle were insured under a policy of automobile insurance issued by Progressive Direct Insurance Company ("Progressive"). CP 95, ¶ 4. Progressive has agreed, for purposes of these proceedings, that Ms. Haney was solely responsible for this collision. CP 82, ¶ 1.

The Progressive insurance policy issued to Ms. Haney included both liability and underinsured motorist (UIM) coverage. CP 11, ¶ 1. Following the collision, Progressive paid Mr. Thompson the limits of the liability policy. CP 95, ¶ 5. Mr. Thompson then made a claim under the UIM coverage of Ms. Haney's policy. *Id.*, ¶ 5.

Progressive denied Mr. Thompson's UIM claim, stating that it agreed he was an "insured person" as defined by both The Definition Statute (RCW 48.22.005(5)(b)(i)) and Ms. Haney's policy; however, he was excluded from UIM coverage as Ms. Haney's vehicle did not meet the policy definition of "Underinsured Motor Vehicle", which contained an exclusion for guest passengers. CP 20, ¶ 6. Mr. Thompson responded that Progressive was required to provide UIM coverage as he was an "insured person" and was occupying an "underinsured motor vehicle" as those terms are clearly defined by statute and Progressive was prohibited by law from restricting coverage beyond the minimum coverage required by statute. CP 20-21, ¶ 7.

As Progressive continued to refuse Mr. Thompson's UIM claim, he filed a declaratory action seeking a determination that he was entitled to UIM coverage and benefits under Washington law. CP 3-6. The trial court granted Mr. Thompson's subsequent motion for summary judgment, agreeing that Progressive was required to provide Mr. Thompson UIM coverage, and could not erode required coverage with exclusionary policy clauses. CP 134, RP 2-3. The trial court also granted Mr. Thompson attorney fees and expenses pursuant to *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). CP 134. Progressive appealed both decisions. CP 205-211.

On appeal, Progressive asserted that the language of its policy excluded UIM coverage to guest passengers in single vehicle collisions; it also asserted that *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 794 P.2d 1259 (1990) held that neither public policy nor RCW 48.22.030 ("The UIM Statute") requires UIM carriers to provide coverage to guest passengers in single car collisions, and that The Definition Statute did not abrogate *Blackburn*. Amended Brief of Appellant at 9-25. Mr. Thompson, in response, argued that The Definition Statute (which was enacted 3 years after the *Blackburn* decision and defined guest passengers as "Insured") requires UIM carriers to insure guest passengers. Brief of Respondent Joseph M. Thompson at 4-12. He also argued that the exclusion of guest passengers is in conflict with the public policy behind UIM insurance – full compensation for victims of automobile collisions. *Id.* at 10-12.

The Court of Appeals majority reversed the superior court's summary judgment order and remanded for entry of judgment in favor of Progressive. Decision at 12. It ruled that Mr. Thompson's public policy argument was foreclosed by the binding precedent of *Millers Casualty Ins. Co. v. Briggs*, 100 Wn.2d 1, 665 P.2d 891 (1983) and *Blackburn*, which held that the single-vehicle-guest-passenger exclusion was permissible. *Id.* at 7-8. The majority implicitly agreed with Mr. Thompson that The Definition Statute's definition of "Insured" applies to The UIM Statute

when it stated, "[a]ll RCW 48.22.005(5) did was to codify the essential definition of "insured" utilized by the Supreme Court in *Blackburn*." *Id.* at 9. However, with that same statement, the majority indicated its disagreement with Mr. Thompson's assertion that The Definition Statute abrogates *Millers* and *Blackburn*. However, perhaps most importantly, the concurrence stated its belief that the *Blackburn* case was wrongly decided because it contravenes Washington's public policy of full compensation to automobile collision victims. *Id.* at 1. Thus, indicating its agreement with Mr. Thompson that it is time for this Court to reexamine the *Millers* and *Blackburn* decisions.

Mr. Thompson filed a motion for reconsideration with the Court of Appeals arguing, first, that its decision was erroneous because The Definition Statute did not adopt the different "classes" of insured ("named insured" and "other insureds") discussed in *Blackburn*, but rather, it simply defines all covered persons as "Insured". Motion to Reconsider at 3-5. Second, he argued that, because the term "covered persons" in The UIM Statute was redefined by the enactment of The Definition Statute (3 years post-Blackburn), the meaning of The UIM Statute changed, requiring UIM coverage to all "Insured" people. *Id.* at 5-6. The Court of Appeals denied Mr. Thompson's motion for reconsideration. Order Denying Motion to Reconsider at 1.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The Single-Vehicle-Guest-Passenger UIM Exclusion Substantially Affects the Public Interest Because it Violates Washington's Strong Public Policy of Full Compensation to Collision Victims and Discriminates Against our Most Vulnerable Citizens.

a. The *Millers* and the *Blackburn* decisions contravene the strong public policy behind The UIM Statute.

In the 1983 *Millers* decision, this Court ruled that a UIM carrier's exclusion of coverage to guest passengers in a single-vehicle collision, where the carrier's liability policy applies (what this brief refers to as "the single-vehicle-guest-passenger exclusion"), does not violate the public policy behind The UIM Statute. *Millers*, 100 Wn.2d at 8-9. Seven years later, this Court affirmed the holding of *Millers* in the *Blackburn* case. However, Justice Dore authored a dissent in *Blackburn*, joined by Justice Smith, stating, "[s]ince this court decided *Millers*, however, our cases under RCW 48.22.030 [The UIM Statute] have consistently given primary consideration to the fact that the Legislature intended to provide full compensation to accident victims. As a result, *Millers* has turned out to be an indefensible anomaly in our case law." *Blackburn*, 115 Wn.2d at 102. The dissent is quite compelling considering that Justice Dore was one of the concurring justices in the *Millers* opinion. This *mea culpa*, alone, provides good reason for this Court to review the public policy (and the

statutory interpretation) behind the single-vehicle-guest-passenger exclusion. However, the flawed logic behind the *Millers* decision and the *Blackburn* majority make review by this Court even more necessary.

The *Blackburn* dissent provides a nice history of Washington's strong public policy for full compensation for victims of automobile collisions, starting with the old UNinsured motorist statute, the precursor of our present UNDERinsured motorist statute (RCW 48.22.030). The public policy behind the old statute was stated in *Touchette v. Northwestern Mut. Ins. Co.,* 80 Wn.2d 327, 494 P.2d 479 (1972):

> It was enacted to expand insurance protection for the public in using the public streets, highways and walkways and at the same time cut down the incidence and consequences of risk from the careless and insolvent drivers. The statute is both a public safety and a financial security measure. Recognizing the inevitable drain upon the public treasury through accidents caused by insolvent motor vehicle drivers who will not or cannot provide financial recompense for those whom they have negligently injured, and contemplating the correlated financial distress following in the wake of automobile accidents and the financial loss suffered personally by the people of this state, the legislature for many sound reasons and in the exercise of the police power took this action to increase and broaden generally the public's protection against automobile accidents.
>
> *Touchette,* at 332.

When the legislature expanded the UNinsured motorist statute to include UNDERinsured motorists in 1980, the public policy of the old statute carried over. *Britton v. Safeco Ins. Co. of Am.,* 104 Wn.2d 518, 530-

31, 707 P.2d 125 (1985). "It is important to recognize, however, that the purpose of the UIM statute is not just the same as that of its predecessor; it is even broader . . . By extending first party coverage to victims injured by motorists with *insufficient* liability coverage, the Legislature made the accident victim's recovery of *both* third party coverage and first party coverage an *object* of the statute. Rather than merely setting a floor of coverage, the UIM statute adopted the broader goal of full compensation for victims of automobile accidents" as recognized in *Elovich v. Nationwide Ins. Co.,* 104 Wn.2d 543, 550, 707 P.2d 1319 (1985) and repeated in *Hamilton v. Farmers Ins. Co.,* 107 Wn.2d 721, 727, 733 P.2d 213 (1987). *Blackburn,* 115 Wn.2d at 99-100 (Dore, F., dissenting).

This Court should accept review because *Millers* and the *Blackburn* majority "should be overruled primarily because, unlike *Britton, Elovich* and *Hamilton,* [*Millers* and *Blackburn* fail] to give the public policy in favor of full compensation the controlling weight to which it is entitled." *Id.* at 101.

b. *Millers* and *Blackburn*'s public policy findings are founded on flawed logic.

The *Millers* court (and the *Blackburn* majority) cite to a law review comment listing three differences between UIM coverage and liability coverage which purportedly justify the public policy behind allowing the

single-vehicle-guest-passenger exclusion:

> First, . . . the injured party has not paid a premium for coverage to this insurer. Thus, there is no danger the insurer will gain a windfall if it is not forced to pay under both provisions of the policy. Second, unlike uninsured motorist coverage, the honoring of this kind of exclusion in underinsured motorist coverage does not leave the injured party completely without compensation. He has already received some compensation pursuant to the liability coverage of the policy. Third, assuming the injured party has automobile insurance of his own, he should be able to collect additional amounts as a result of that policy's underinsured motorist coverage.

Id. at 91, citing *Millers,* at 7 (quoting Comment, *Washington's Underinsured Motorist Statute: Balancing the Interests of Insurers and Insured,* 55 Wash. L. Rev. 819, 827 (1980)).

As the *Blackburn* dissent points out, "it is clear that none of these distinctions can justify the liability coverage exclusion." *Id.* at 102. The first distinction wrongfully focuses on the insurance company rather than the victim. Just because an insurance company does not "gain a windfall" through its behavior, does not justify violating public policy and excluding an insured victim from coverage. The correct analysis focuses on the victim and whether he is fully compensated. In the case at hand, Progressive's exclusion of guest passengers (such as Mr. Thompson) violates the public policy of full compensation to victims of auto collisions, the Court should invalidate the provision regardless of whether the Progressive is unjustly enriched. He should be granted coverage because he wasn't fully compensated. If this has an effect on insurance risk, then insurance

companies will adjust rates accordingly. The purpose of insurance is to spread risk, and insurance companies employ actuaries to do these calculations.

The second distinction flies in the face of the public policy of full compensation to victims.

> As noted above, the former uninsured motorist scheme protected only against at-fault motorists who were completely uninsured. Receiving some liability coverage precluded any first party insurance recovery. The UIM statute fundamentally altered that scheme, providing both types of coverage in the interest of ensuring full compensation. *Millers'* suggestion that a victim's receiving "some" liability coverage can justify his not recovering UIM benefits amounts to saying we should return to "the bad old days". On the contrary, **the Legislature has mandated UIM coverage *precisely* because "some" compensation under a liability policy is not enough. This court unambiguously rejected the notion of offsetting liability and UIM benefits in *Elovich*.**

Id. at 103 (emphasis added).

The third point in the law review comment is the most pernicious. It assumes that innocent victims have UIM coverage of their own. Not only does this fail to justify the denial of benefits, but more importantly, it discriminates against the most vulnerable citizens of our state – the blind, the disabled, the children, the elderly, and any other citizen who is not capable of driving a motor vehicle. These citizens do not have the opportunity to purchase UIM coverage and are reliant on the driver's policy whenever they travel on our roadways. Some people can get their

own UIM coverage and some can't. This distinction, which *Millers* and the *Blackburn* majority use as a justification to exclude guest passengers from UIM coverage, actually justifies the opposite - inclusion. While Mr. Thompson may have had the option to purchase his own UIM coverage, this Court should accept review of the guest passenger exclusion for the millions of Washingtonians who don't have that option.

2. This Court Should Review the Single-Vehicle-Guest-Passenger Exclusion Because it is Based on the 2-Car Rule, which Misinterprets the Language of The UIM Statute

The single-vehicle-guest-passenger exclusion was erroneously created in two steps. First, the *Millers* court misinterpreted The UIM Statute as requiring two distinct vehicles ("the 2-car rule"). Under this reasoning, insurance companies could draft policies that exclude UIM coverage to *all* passengers in single-vehicle collisions. Second, *Tissell v. Liberty Mut. Ins. Co.*, 115 Wn.2d 107, 111-114, 795 P.2d 126 (1990) determined that the 2-car rule's exclusion of family members was invalid as against public policy. This created a "class" of insureds that were non-excludable – class 1 insureds (the named insured and family members), and a "class" of insureds who were excludable – class 2 insureds (other insureds [i.e. guest passengers]).

a. *Millers* misinterpreted the language of The UIM Statute and erroneously created the 2-car rule.

The UIM Statute says:

> No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage, suffered by any person arising out of the ownership, maintenance, or use of **motor vehicle** shall be issued with respect to any **motor vehicle** ... in this state unless coverage is provided therein or supplemental thereto 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) (emphasis added).

The *Millers* court held that, because The UIM Statute refers to "motor vehicle" and "underinsured motor vehicles", it contemplates two separate vehicles – a vehicle with liability coverage and a vehicle with UIM coverage. *Millers* at 6. This created the 2-car rule, which denied UIM benefits to passengers if they recovered against the liability portion of the same policy. On its own, the 2-car rule would allow insurance companies to exclude *any and all* passengers in single-vehicle collisions.

Millers' 2-car rule is rooted in a misreading of the plain language of The UIM Statute. While it is true that a vehicle with liability coverage *can be* different from a vehicle with UIM coverage, **the language does not require two distinct vehicles**. In order for the 2-car rule to exist, The UIM Statute would have to require 2 cars; however; "a single vehicle *can be* both insured for liability purposes and underinsured for UIM purposes,

there is no reason to conclude from the words of the statute alone that the Legislature contemplated two distinct policies on two distinct cars." *Blackburn* at 97 (Dore, F., dissenting).

Further, "*Millers* was decided soon after the passage of the UIM statute, before this court had developed a solid body of precedent to guide its interpretation." *Blackburn* at 102 (Dore, F., dissenting). The *Millers* court relied on *Breaux v. Government Employees Ins. Co.*, 369 So.2d 1335 (La. 1979) for its interpretation of the Louisana UIM statute which appeared to be similar to our own. While the Louisana UIM statute's wording was *almost* identical to ours, the last line of the Lousiana statute read, "...persons insured thereunder who are legally entitled to recover damages from owners or operators of ***uninsured*** **or** ***underinsured*** motor vehicles[.]" La. Rev. Stat. Ann. § 22:1406(D)(1)(a)(i) (West Supp. 1990) (emphasis added). Our statute only refers to underinsured motor vehicles. RCW 48.22.005(2). This distinction is important because a single vehicle *cannot be* both insured for liability purposes and uninsured at the same time. Thus, the Louisiana court correctly ruled that its statute required two distinct vehicles; however, our statute does not. Consequently, *Millers* and *Blackburn* erroneously relied on *Breaux* and misinterpreted Washington's UIM Statute. This Court should allow review to evaluate the plain language of The UIM Statute and eliminate the 2-car rule.

b. *Tissell* whittled away at the 2-Car Rule

Under the *Millers*' 2-car rule, insurance companies could draft policies that exclude UIM coverage to *all* passengers in single-vehicle collisions. However, *Tissell* (which was decided on the same day as *Blackburn*), held that, despite the 2-car rule, the exclusion of family members in single-vehicle collisions was invalid as against public policy. *Tissell* at 111-114. As *Blackburn* put it, named insureds and family are "class 1" and can't be excluded in single vehicle collisions; guest passengers are "class 2" and can be excluded, under the 2-car rule, in single-vehicle collisions where the liability policy applies. *Blackburn* at 89-91. While *Tissell* whittled away at the 2-car rule, guest passengers (such as Mr. Thompson) are still victims. This Court should review *Millers* misreading of The UIM Statute and eliminate the 2-car rule, which is the foundation for the single-vehicle-guest-passenger exclusion.

3. The Definition Statute Abrogated the 2-Car Rule and Created a Single Class of Non-Excludable "Insureds"

a. The Definition Statute applies to The UIM Statute

The legislature enacted The Definition Statute in 1993, 3 years after *Blackburn* was decided. 1993 Wash. Laws ch. 242. The very first line of RCW 48.22.005 ("The Definition Statute") states, "[u]nless the context clearly requires otherwise, the definitions in this section apply throughout

the chapter." The UIM Statute is RCW 48.22.030, part of the same chapter as The Definition Statute. Thus, The Definition Statute explicitly applies to The UIM Statute.

b. The Definition Statute changed the meaning of "Underinsured motor vehicle" making it clear that it *can* be the same vehicle as the vehicle with liability coverage, thus, abrogating the 2-car requirement

The Definition Statute states:

> (5) **"Insured" means**:
> (a) The named insured or a person who is a resident of the named insured's household ...; **or**
> (b) A person who sustains bodily injury caused by accident while:
> (i) **Occupying or using the insured automobile with the permission of the named insured...**
>
> RCW 48.22.005(5) (emphasis added).

Ms. Haney's insurance policy mirrors the language of The Definition Statute, defining "insured person" to include "any person occupying, but not operating, a covered auto." CP 40. Progressive does not dispute that Mr. Thompson qualified as an "Insured" for purposes of UIM coverage.

As the *Blackburn* majority points out, "insured" and "covered person" are synonymous. "In insurance contracts, UIM endorsements prescribe who is entitled to seek indemnification by specifically defining the term 'insured' or 'covered person.'" *Blackburn* at 88. A guest passenger is defined as an "Insured" (or "covered person") under The Definition Statute. Substituting the term "guest passenger" in for "covered

person" into the language of The Definition Statute, it defines "Underinsured motor vehicle" as follows:

> A motor vehicle...with respect to which the sum of the limits of liability under all...insurance policies applicable to a [guest passenger] ...is less than the applicable damages which the [guest passenger] is legally entitled to recover.

RCW 48.22.030(1).

While RCW 48.22.030(2) does discuss the term "motor vehicle" and the term "underinsured motor vehicles," this proper reading of the statutory definition of "Underinsured motor vehicle" makes is quite clear that such a vehicle *can* be the same vehicle as the vehicle that is insured for purposes of liability. If the two vehicles *can* be the same, there is no 2-car requirement; and without the 2-car requirement, no passengers may be excluded from UIM coverage. As guest passengers are statutorily defined as "Insured", insurance companies should not be able to chip away at statutory coverage with back-door exclusionary clauses. *Touchette*, 80 Wn.2d at 335.

Millers misinterpreted The UIM Statute as requiring two distinct vehicles. Even if *Millers'* interpretation had been correct, the enactment of The Definition Statute, as applied to The UIM Statute, changed the meaning of "Underinsured motor vehicle" abrogating any 2-car requirement. In light of this legislative change, this Court should accept

review of this case to quash the 2-car requirement.

c. The Definition Statute codified public policy creating one class of non-excludable "Insureds"

The Court of Appeals erroneously held that The Definition Statute (RCW 48.22.005(5)) "differentiates" between a "named insured" and an "other insured" creating different classes of insured consistent with *Blackburn* and *Millers*. Decision at 9. The Definition Statute, enacted in 1993 (after the *Millers* and *Blackburn* opinions), provides no such differentiation. RCW 48.22.005(5). Instead, the statute states that named insureds **or** guest passengers are defined as "Insured". *Id.* The plain language of The Definition Statute defines the multiple pathways for becoming "Insured", **without** creating separate classes. *Id.*

The *Blackburn* majority was specifically looking for legislative guidance to shape its holding with regard to public policy. It stated, "[t]he legislative intent and the extent of the coverage mandated by the UIM statute have been difficult to determine." *Blackburn* at 87. In the absence of The Definition Statute's guidance, the *Blackburn* court relied on the *Millers*' 2-car rule and faulty analysis of public policy. *Id.* at 89-94. With the enactment of The Definition Statute, the legislature provided the guidance that the *Blackburn* court was seeking – guest passengers are "Insured". RCW 48.22.005(5)(b)(i). These parameters are not opaque nor

open to erosion by exclusionary clauses. *Kenworthy v. Pennsylvania General Ins. Co.*, 113 Wn.2d 309, 313, 779 P.2d 257 (1989). Moreover, the breadth of this legislatively-mandated coverage aligns with the public policy behind UIM insurance: full compensation for victims of automobile collisions.

Millers misinterpreted The UIM Statute and created the 2-car rule. *Tissell* whittled it down with it's holding that the family member exclusion violates public policy. When the legislature enacted The Definition Statute, not only did it abrogate the 2-car rule, it also codified the public policy that guest passengers are members of a single class of non-excludable "Insured". In light of this subsequent legislative guidance, this Court should allow review to reevaluate *Millers* and *Blackburn*, and prohibit the single-vehicle-guest-passenger exclusion.

d. This is a case of first impression regarding statutory interpretation

Mr. Thompson knows of no precedent, since the enactment of The Definition Statute in 1993, which has specifically addressed whether the definition of "Insured" in The Definition Statute can be contracted around as a matter of public policy. Nor has any case gone through the proper steps of statutory interpretation to determine whether The Definition Statute's definition of "Insured" is read into The UIM Statute. *Smith v.*

Cont'l Cas. Co. (128 Wn.2d 73, 904 P.2d 749 (1995)) and *Vasquez v. American Fire & Cas. Co.* (174 Wn.App. 132, 298 P.3d 94 (2013)) both dealt with an insurer's ability to limit the definition of "insured"; however, only in the context of commercial policies. Further, no argument was made in those cases that The Definition Statute's definition of "Insured" applied – The Definition Statute wasn't even mentioned. In contrast, at least two other cases have read The Definition Statute's definitions into The UIM Statute. *Cherry v. Truck Ins. Exch.* (77 Wn.App. 557, 892 P.2d 768 (1995)) and *Daley v. Allstate Ins. Co.* (86 Wn. App. 346, 936 P.2d 1185 (1997)) both read definitions from The Definition Statute directly into The UIM Statute (with *Cherry* actually applying the definition of "Insured").

In short, while cases have applied The Definition Statute to The UIM Statute, this is a case of first impression. No court has gone through the proper steps of statutory interpretation. This issue was brought before the Court of Appeals in *Patriot General Ins. Co. v. Gutierrez* (186 Wn.App. 103, 344 P.3d 1277 (2015)), however, the court decided that case on narrower grounds, specifically noting "we do not address the application of RCW 48.22.005." *Id.* at 109. Because this is a case of first impression involving the erosion of a statute with broad application, it substantially impacts the public interest and this Court should allow review.

V. CONCLUSION

The Court of Appeals decision allowing the single-vehicle-guest-passenger UIM exclusion violates Washington's strong public policy of full compensation for victims of automobile collisions and discriminates against our most vulnerable citizens. The foundation of this exclusion is based on a misinterpretation of the language of the UIM statute. Further, this holding ignores the fact that the legislature abrogated this exclusion with the enactment of The Definition Statute. As this exclusion substantially affects the public interest, we ask this Court for review.

DATED: June 10, 2019.

Respectfully Submitted,

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APPENDIX A

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

JOSEPH M. THOMPSON, an individual,	)	No. 35864-0-III
	)	
Respondent,	)	
	)	
v.	)	
	)	PUBLISHED OPINION
PROGRESSIVE DIRECT INSURANCE COMPANY,	)	
	)	
Appellant.	)	

PENNELL, J. — Under Washington's casualty insurance code, chapter 48.22 RCW, a guest passenger injured in an automobile accident is considered a third-party "insured,"[1] and is eligible to make a claim for underinsured motorist (UIM) benefits through the policy covering the vehicle in which he or she was a passenger. But the mere fact that a guest passenger qualifies as an "insured" does not mean the passenger is automatically entitled to UIM benefits. The long-standing rule in Washington is that a third-party guest

[1] A "named insured" is the "individual named in the declarations of the policy and includes his [or her] spouse if a resident of the same household." RCW 48.22.005(9). Specific to the facts of this case, the host driver is the "named insured." For readability and consistency purposes, we refer to the host driver as the "named insured" and the guest passenger as an "insured person." Clerk's Papers at 37, 40.

passenger can be excluded from UIM coverage if that passenger has already been compensated through the named insured's liability coverage. This rule has been codified in a somewhat convoluted manner by a vehicle-based (as opposed to a person-based) exclusion, providing that a vehicle insured for liability purposes can, by definition, be excluded from also being a source of UIM benefits to third parties.

Here, Joseph Thompson was injured as a third-party guest passenger in a vehicle insured through Progressive Direct Insurance Company. Progressive tendered the limits of its third-party liability coverage to Mr. Thompson. However, Progressive denied Mr. Thompson's claim for UIM benefits based on the terms of its policy, which excluded UIM benefits to guest passengers for injuries arising from the negligent operation of its named insured's vehicle. Because Progressive's denial of coverage was consistent with the terms of its policy, public policy, and state law, we uphold Progressive's benefit decision. The superior court's judgment to the contrary is reversed.

FACTS

Joseph Thompson was injured in a single-vehicle accident while traveling as a guest passenger in a vehicle driven by Stacie Haney. Ms. Haney was the "[n]amed insured" under an automobile insurance policy (the Policy) issued by Progressive, and the vehicle driven by Ms. Haney met the definition of a "[c]overed auto" under the general

terms of the Policy. Clerk's Papers (CP) at 24, 31. Mr. Thompson was not a named insured under the Policy, and he was not a relative of Ms. Haney, but he met the statutory and policy definition of an "insured" and "insured person." RCW 48.22.005(5)(b)(i); CP at 37, 40. Progressive agreed, for purposes of these proceedings, that its named insured was solely responsible for the accident giving rise to Mr. Thompson's claims.

The Policy issued to Ms. Haney included both liability coverage, for bodily injury and property damage to others, and UIM coverage. Progressive tendered to Mr. Thompson the $100,000 liability limits of the Policy for his bodily injuries sustained in the accident. Because Mr. Thompson alleged that this liability payment did not fully compensate him for the damages resulting from these injuries, he subsequently initiated a claim under the UIM portion of the Policy.

In relevant part, the UIM portion of the Progressive Policy defines an "[i]nsured person" as including "any person **occupying**, but not operating, a **covered auto**." CP at 40 (bolded terms are defined terms in the Policy). The Policy defined an "[u]nderinsured motor vehicle" as "a land motor vehicle or trailer of any type:"

> a. to which no bodily injury liability bond or policy applies at the time of the **accident**;
> b. to which a bodily injury liability bond or policy applies at the time of the **accident**, but the bonding or insuring company:
>   (i) denies coverage; or
>   (ii) is or becomes insolvent;

c. that is a hit-and-run vehicle whose owner and operator cannot be identified and which strikes:
   (i) **you** or a **relative**;
   (ii) a vehicle that **you** or a **relative** are **occupying**; or
   (iii) a **covered auto**;
d. that is a **phantom vehicle**; or
e. to which a liability bond or policy applies at the time of the **accident**, but the sum of all applicable limits of liability under all applicable bonds and policies is less than the damages that the **insured person** is legally entitled to recover.

Id. at 41. The UIM portion of the Policy also excludes certain vehicles from the definition of an "underinsured motor vehicle." *Id.* In relevant part, this exclusion states:

> An "**underinsured motor vehicle**" does not include any vehicle or equipment:
> a. owned by **you** or a **relative** or furnished or available for the regular use of **you** or a **relative**. However, this exclusion to the definition of **underinsured motor vehicle** does not apply to a **covered auto** with respect to **bodily injury** to **you** or a **relative**;
>
> . . . .
>
> f. that is a **covered auto.** However, this limitation on the definition of **underinsured motor vehicle** does not apply to a **covered auto** with respect to bodily injury to **you** or a **relative.**

Id. The UIM coverage agreement within the Policy states that Progressive:

> will pay for damages that an **insured person** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** because of **bodily injury**:
> 1. sustained by that **insured person**;
> 2. caused by an **accident**; and
> 3. arising out of the ownership, maintenance, or use of an **underinsured motor vehicle.**

Id. at 40. The Policy has general provisions that define a "relative" as someone who resides with the named insured, is related to the named insured "by blood, marriage, or adoption, and includes a ward, stepchild, or foster child," and the named insured's "unmarried dependent children temporarily away from [the named insured's] home" so long as they expect to continue to reside in the named insured's home. *Id.* at 32.

In correspondence denying Mr. Thompson's UIM claim, Progressive stated that while Mr. Thompson was an "insured person" as defined by the Policy and RCW 48.22.005(5)(b)(i), he was excluded from UIM coverage under its Policy because his injuries and damages were not sustained by the operation of an "underinsured motor vehicle." *Id.* at 65; RCW 48.22.030(1). Progressive explained that Ms. Haney's vehicle did not meet the policy definition of an "underinsured motor vehicle" as it was a "covered auto" under the Policy. CP at 66. Progressive also stated its Policy was "in compliance with the statute [RCW 48.22.005 and RCW 48.22.030] on all points including on who an 'insured person' is, and more importantly what an 'underinsured motor vehicle' is." *Id.*

Mr. Thompson initiated a declaratory judgment action in superior court, seeking a determination that he was entitled to UIM coverage and benefits under the Policy. The superior court granted summary judgment in favor of Mr. Thompson, holding that

UIM coverage was required because Mr. Thompson met the "definition of 'insured' under RCW 48.22.005," CP at 209, and Progressive could not use its Policy to erode the statutory definition. Mr. Thompson was also awarded attorney fees and costs.

Progressive appeals the order granting Mr. Thompson's motion for summary judgment and the final judgment establishing attorney fees and costs.

ANALYSIS

The parties agree that under the terms of Progressive's Policy, Mr. Thompson was excluded from UIM coverage. While Mr. Thompson fell under the definition of an "insured person," CP at 40, he was not injured through the operation of a qualifying vehicle. Specifically, the vehicle giving rise to Mr. Thompson's injuries was covered by the Policy and Mr. Thompson was not the named insured or a relative of the named insured. As previously noted, UIM benefits are typically triggered in the context of liability involving a third-party vehicle, not a vehicle covered by the same policy. The only exception is when the named insured or a family member of the named insured is the person seeking UIM benefits.

Recognizing that the terms of Progressive's Policy do not afford him UIM coverage, Mr. Thompson argues that excluding the named insured's vehicle from coverage as an "underinsured motor vehicle" violates state law and public policy.

As a result, he claims the exclusion must be struck. *Bohme v. Pemco Mut. Ins. Co.*, 127 Wn.2d 409, 412, 899 P.2d 787 (1995) (A UIM exclusion must be struck if it conflicts with state statute or public policy.). Our review of this legal claim is de novo. *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 682, 801 P.2d 207 (1990), *overruled on other grounds by Butzberger v. Foster*, 151 Wn.2d 396, 89 P.3d 689 (2004).

Mr. Thompson's public policy argument is foreclosed by binding precedent. In *Blackburn v. Safeco Insurance Co.*, 115 Wn.2d 82, 794 P.2d 1259 (1990) and *Millers Casualty Insurance Co. of Texas v. Briggs*, 100 Wn.2d 1, 665 P.2d 891 (1983) our Supreme Court approved of UIM exclusions for third-party guest passengers. As recognized by the court, liability insurance exists for the protection of an individual, such as Mr. Thompson, who is a third party to an insurance contract and who has sustained injuries based on a named insured's negligence. *Millers*, 100 Wn.2d at 8. But UIM coverage is fundamentally different. UIM coverage is meant to protect the named insured "and others from damages caused by *another* vehicle which is underinsured." *Id.* (emphasis added). A third party has "the option of contracting with an insurance company for" their own UIM coverage. *Blackburn*, 115 Wn.2d at 89. But public policy does not require an insurance company to provide UIM benefits to an individual who has opted not to obtain UIM protection. *See Fleming v. Grange Ins. Ass'n*, 73 Wn. App. 570,

576, 870 P.2d 323 (1994) ("[W]hile the public policy underlying Washington's UIM statute is to maximize the protection afforded by insurance coverage, it does not require insurance companies to provide the coverage for free.") (citing *Blackburn*, 115 Wn.2d at 88). *See also Vasquez v. Am. Fire & Cas. Co.*, 174 Wn. App. 132, 138, 298 P.3d 94 (2013) (UIM coverage is restricted insurance "chiefly for the benefit of the named insured," and limiting who else is defined as "an 'insured' does not run afoul" of the UIM statute's public policy.).

Both *Blackburn* and *Millers* also held that excluding third-party guest passengers from UIM coverage did not violate Washington's UIM statute. Recognizing this fact, Mr. Thompson argues state law has been modified since the decisions in *Blackburn* and *Millers*. Specifically, in 1993 the legislature added a "definitions" section to the casualty insurance code, making clear that a guest passenger, not just a named insured, meets the definition of an "insured." RCW 48.22.005(5)(b)(i).

Mr. Thompson's reliance on RCW 48.22.005(5)(b)(i) is inapposite. Both *Blackburn* and *Millers* already recognized that a guest passenger met the definition of an "insured" for purposes of UIM coverage. *Blackburn*, 115 Wn.2d at 88-89. That was not an issue. What was at issue was whether a guest passenger, as an insured person but not the named insured or a relative thereto, could be denied UIM coverage based on policy

language that excluded recovery from injuries caused by the operation of a covered vehicle. As previously stated, both *Blackburn* and *Millers* upheld the exclusions under state law. All RCW 48.22.005(5) did was to codify the essential definition of "insured" utilized by the Supreme Court in *Blackburn.* 115 Wn.2d at 88-89.[2] Consistent with *Blackburn* and *Millers*, RCW 48.22.005(5) differentiates between a named insured, RCW 48.22.005(5)(a), and a third-party (other) insured person, RCW 48.22.005(5)(b). Given the consistency of RCW 48.22.005(5) with the Supreme Court's decisions in *Blackburn* and *Millers*, the enactment of this statute in 1993 cannot be fairly read as a legislative effort to overturn *Blackburn* and *Millers.*

---

[2] *Blackburn* recognized two categories of "insureds" for purposes of UIM coverage: the "named insured" and the "other insured." 115 Wn.2d at 88. The UIM portion of the policy at issue in *Blackburn* defined "insured" as, "1. You or any family member[.] 2. Anyone else occupying a covered auto or a temporary substitute for a covered auto. The covered auto must be out of service because of its breakdown, repair, servicing, loss or destruction." *Id.* at 84. In codifying the definition of "insured," our legislature similarly recognized two categories of insureds. RCW 48.22.005(5) defines "insured" as: "(a) The named insured or a person who is a resident of the named insured's household and is either related to the named insured by blood, marriage, or adoption, or is the named insured's ward, foster child, or stepchild; or (b) A person who sustains bodily injury caused by accident while: (i) Occupying or using the insured automobile with the permission of the named insured; or (ii) a pedestrian accidentally struck by the insured automobile."

Rather than looking to RCW 48.22.005(5)'s definitions, the statute applicable to Progressive's UIM exclusion is RCW 48.22.030, which as not been modified in pertinent part since the Supreme Court's decisions in *Blackburn* and *Millers*. Since 1981, this statute has defined an "underinsured motor vehicle" as:

> a motor vehicle with respect to the ownership, maintenance, or use of which either no bodily injury or property damage liability bond or insurance policy applies at the time of an accident, or with respect to which the sum of the limits of liability under all bodily injury or property damage liability bonds and insurance policies applicable to a covered person after an accident is less than the applicable damages which the covered person is legally entitled to recover.

RCW 48.22.030(1).

The statute also includes a mandate regarding UIM coverage (last amended in 1985), which states:

> No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage, suffered by any person arising out of the ownership, maintenance, or use of a *motor vehicle* shall be issued with respect to any *motor vehicle* registered or principally garaged in this state unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of *underinsured motor vehicles*, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death, or property damage, resulting therefrom, except while operating or occupying a motorcycle or motor-driven cycle, and except while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member, and which is not insured under the liability coverage of the policy. The coverage required to be offered under this chapter is not

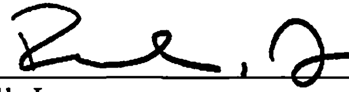
> applicable to general liability policies, commonly known as umbrella policies, or other policies which apply only as excess to the insurance directly applicable to the vehicle insured.

RCW 48.22.030(2) (emphasis added).

As recognized in *Blackburn* and *Millers*, the UIM statute is written in a way that references two general classes of vehicles. There is the "motor vehicle" for which liability coverage has been issued (i.e., the "covered auto") and there are third-party "underinsured motor vehicles," which are not covered by a named insured's policy. The UIM statute contemplates coverage only for bodily injury, death, or property damage caused by the operation of third-party vehicles. Although public policy prohibits excluding a named insured or the named insured's family members from UIM coverage involving a covered vehicle, *see Tissell v. Liberty Mutual Insurance Co.*, 115 Wn.2d 107, 112-14, 795 P.2d 126 (1990), nothing in Washington's casualty insurance code requires extending UIM coverage to a third party with a liability claim against the same covered vehicle. Instead, the third party's recourse is to rely on liability insurance, the personal responsibility of the negligent driver, and the third party's own insurance coverage. The UIM statute does not provide an additional avenue for recovery.

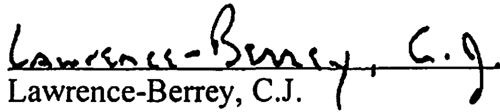
CONCLUSION

We reverse the superior court's summary judgment order and award of attorney fees and costs. This matter is remanded for entry of judgment in favor of Progressive.



Pennell, J.

I CONCUR:



Lawrence-Berrey, C.J.

No. 35864-0-III

FEARING, J. (concurring) — I hold a differing perspective than the majority, but, based on Washington Supreme Court precedent and a review of chapter 48.22 RCW, I concur in the majority's decision.

In *Millers Casualty Insurance Co. v. Briggs*, 100 Wn.2d 1, 665 P.2d 891 (1983), the Evergreen State Supreme Court unanimously held that an insurance carrier may exclude underinsured motorist coverage from a passenger traveling in a vehicle insured for liability coverage by the carrier as long as the traveler is not the insured or a family member residing with the insured. Seven years later the state high court affirmed the holding of *Millers* in *Blackburn v. Safeco Insurance Co.*, 115 Wn.2d 82, 794 P.2d 1259 (1990). The *Blackburn* court was not unanimous, however. Two dissenters distinguished *Millers* on the difference that Bret Blackburn was also denied payment under the liability coverage of the Safeco insurance policy. Nevertheless, the dissenters also wished to overrule *Millers* because the exclusion barring underinsured motorist coverage for the passenger limited insurance coverage on a basis other than the risk of the insurer and thereby contravened Washington's policy of full compensation for accident victims.

I concur in the reasoning of the dissenters in *Blackburn v. Safeco Insurance Co.* But unlike dissenting members of the Supreme Court, I am bound by Supreme Court precedent.

Three years after *Blackburn v. Safeco Insurance Co.*, the Washington State Legislature adopted House Bill 1233, titled "Motor Vehicle Insurance—Personal Injury Protection Benefits." LAWS OF 1993, ch. 242. Joseph Thompson contends the 1993 bill legislatively overruled *Millers Casualty Insurance Co. v. Briggs* and *Blackburn v. Safeco Insurance Co.* The relevant portion of the bill declared:

> **CHAPTER 242**
> [Engrossed Substitute House Bill 1233]
> MOTOR VEHICLE INSURANCE—PERSONAL INJURY PROTECTION BENEFITS
>
> . . . .
>
> *AN ACT Relating to mandatory offering of personal injury protection insurance; adding new sections to chapter 48.22 RCW; creating a new section;* and providing an effective date.
>
> . . . .
>
> NEW SECTION. **Sec. 1.** Unless the context clearly requires otherwise, the definitions in this section *apply throughout this chapter*.
>
> . . . .
>
> (5) "Insured" means:
>
> . . . .
>
> (b) A person who sustains bodily injury caused by accident while: (i) Occupying or using the insured automobile with the permission of the named insured. . . .
>
> NEW SECTION. **Sec. 2.** (1) No new automobile liability insurance policy or renewal of such an existing policy may be issued unless personal injury protection coverage benefits . . . for medical and hospital expenses, funeral expenses, income continuation, and loss of services sustained by an *insured* . . . are offered as an optional coverage.

(Emphasis added.) Sections 3 to 5 of House Bill 1233 address the extent to which a casualty insurer must afford personal injury protection coverage.

This appeal concerns section 1 of House Bill 1233's definition of "insured" and whether that definition extends to more than the provisions of the bill and to an underinsured motor vehicle insurance statute found in RCW 48.22.030. Note that section 1 of House Bill 1233 applies its definitions to "this chapter." The prior portions of the bill, however, reference two distinct "chapters": first, chapter 242, the number from Washington LAWS OF 1993; and second, chapter 48.22 RCW. Confusion arises as to whether the definitions announced in section 1 of House Bill 1233 apply to chapter 242 of the LAWS OF 1993, to chapter 48.22 RCW, or to both. The confusion escalates when one learns that section 1 of House Bill 1233 became RCW 48.22.005 and one observes that chapter 48.22 RCW refers to creditor coverage, vendor coverage, and underinsured motorist coverage in addition to the sections for personal injury protection coverage added by House Bill 1233.

As a result of House Bill 1233, the Washington State code reviser created three new code sections and placed sections 3 through 5 of the bill into RCW 48.22.090, RCW 48.22.095, and RCW 48.22.100. The reviser created a new code section and inserted verbatim section 1 of the House Bill 1233 into RCW 48.22.005. RCW 48.22.005 now reads in relevant part:

> Unless the context clearly requires otherwise, the definitions in this

> section apply throughout *this chapter*.
>
> . . . .
>
> (5) "Insured" means:
>
> . . . .
>
> (b) a person who sustains bodily injury caused by accident while (i) Occupying or using the insured automobile with the permission of the named insured. . . .

(Emphasis added.)

We must juxtapose RCW 48.22.005 with RCW 48.22.030(2), the underinsured motor vehicle insurance statute. The latter statute declares:

> No new policy or renewal of an existing policy insuring against loss resulting from liability . . . shall be issued . . . unless coverage is provided therein . . . for the protection of persons *insured* thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles[.] . . . except while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member, and which is not insured under the liability coverage of the policy.

(Emphasis added.) The lengthy sentence and confusing language of RCW 48.22.030 may nonsensically suggest that the exclusion from underinsured motor vehicle coverage cannot apply if the car, in which the insured rode, is not listed in the liability policy. But no one raises this point. Surprisingly the Washington appellate courts have never addressed the ambiguity caused by the two different references to a "chapter" in House Bill 1233 or addressed the aggravation of the uncertainty resulting from the insertion of section 1 of the bill in RCW 48.22.005.

Joseph Thompson rode in a car driven by Stacie Haney and insured for liability coverage by Progressive Direct Insurance Company. Haney's negligence caused the

accident. Thompson was not a family member of Haney. Thompson recovered $100,000 under the liability insurance endorsement of the Progressive insurance policy, but he claims the $100,000 does not fully compensate him for the injuries sustained in the accident. He seeks to recover underinsured motorist benefits under the Progressive policy. The policy excludes from the definition of "underinsured motor vehicle" a vehicle covered under the liability endorsement of the insurance policy except as to Haney or her family members.

Joseph Thompson astutely argues that the definitions inserted into RCW 48.22.005 should control the remainder of chapter RCW 48.22. Thompson particularly asks that RCW 48.22.005's definition of "insured" control the meaning of "insured" in RCW 48.22.030. RCW 48.22.030 demands a motor vehicle casualty policy cover an "insured" under the underinsured motor vehicle endorsement. RCW 48.22.005, for purposes of "this chapter," defines an "insured" as a person who sustains bodily injury caused by accident while occupying the insured automobile.

I disagree with Joseph Thompson's analysis. The Washington State Legislature holds the prerogative in declaring public policy with regard to requirements for casualty insurance. Therefore, our fundamental purpose in construing an insurance statute is to ascertain and fulfill the intent of the legislature. *In re Marriage of Schneider*, 173 Wn.2d 353, 363, 268 P.3d 215 (2011). This court should construe the statute to effect its purpose. *State v. McDougal*, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992). If the statute

is ambiguous, we may rely on legislative history. *State v. Jones*, 172 Wn.2d 236, 242, 257 P.3d 616 (2011).

The preamble to House Bill 1233 reads that the bill seeks to impose mandatory requirements for offering personal injury protection coverage, to "add new sections" to chapter 48.22 RCW, and to "create a new section." One might quizzically ponder the difference between "adding" a new section and "creating" a new section. Regardless, the bill does not expressly identify which section of House Bill 1233 becomes the "created" section as opposed to the added sections, and the bill does not declare where in the Revised Code of Washington the created section should fall. I might guess that the legislature intended section 1 of House Bill 1233 to be the "newly created" section, and that, if the legislature considered the question, it might wish the "created section" to lie inside RCW 48.22. But House Bill 1233 does not expressly declare that the definitions listed in the new section, including the definition for "insured," should control all of the provisions of chapter 48.22 RCW. The legislature did not direct where to insert the created section within RCW 48.22. The code reviser could have placed this new or created section after RCW 48.22.030 and immediately before the three sections addressing personal injury protection coverage.

All definitions listed in section 1 of House Bill 1233 and, in turn, contained in RCW 48.22.005 correspond to words or phrases found elsewhere in House Bill 1233 and, in turn, the personal injury protection coverage statutes codified in RCW 48.22.090 to

RCW 48.22.100. Or all such definitions help to define other terms inside section 1 of House Bill 1233 and RCW 48.22.005. RCW 48.22.030, which creates mandatory underinsured motor vehicle coverage, contains its own two internal definitions.

House Bill 1233 shows a primary, if not exclusive, intent in imposing mandatory requirements on insurance companies to offer personal injury protection coverage for automobile insurance policies. The title to the bill only references personal injury protection benefits. House Bill 1233 shows no intent to modify the law with regard to mandatory underinsured motor vehicle insurance coverage. RCW 48.22.005's definitions should be read in this light.

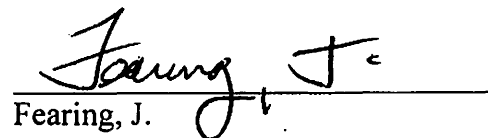
I find no Washington case law that addresses whether legislative intent as expressed in an underlying bill holds priority over the manner in which a code reviser inserts the language of the bill into a code. Nevertheless, the populace elects legislators, not code compilers, to enact law. Washington courts have declared that the code reviser's labeling of a statute should not change the meaning of the legislature's enactment. *Tesoro Refining & Marketing Co. v. Department of Revenue*, 164 Wn.2d 310, 318 n.3, 190 P.3d 28 (2008); *State v. Cooley*, 53 Wn. App. 163, 166, 765 P.2d 1327 (1989).

Foreign jurisdictions have announced rules more apt to this appeal. In construing a statute, courts should not consider the title of a chapter where the reviser places an enactment or the location within the code where the reviser places the enactment.

American Premier Insurance Co. v. McBride, 159 S.W.3d 342, 349 (Ky. Ct. App. 2004). The construction of a statute cannot be affected by the insertion of the statute by the compiler of the code. *Chesapeake & Ohio Railway Co. v. Pew*, 109 Va. 288, 64 S.E. 35, 37 (1909).

Joseph Thompson's insertion of the definition of "insured" from RCW 48.22.005 into RCW 48.22.030 would render other language in RCW 48.22.030 inoperative. The statute allows the insurance company to exclude underinsured motor vehicle coverage for an "insured" while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member. Inserting RCW 48.22.005's definition of "insured" into RCW 48.22.030 would preclude this exception. Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *Spokane County. v. Department of Fish & Wildlife*, 192 Wn.2d 453, 457-58, 430 P.3d 655 (2018).

I CONCUR:



Fearing, J.

APPENDIX B

FILED
MAY 9, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

JOSEPH M. THOMPSON, an individual, Respondent, v. PROGRESSIVE DIRECT INSURANCE COMPANY, Appellant.	))))))))))	No. 35864-0-III ORDER DENYING MOTION TO RECONSIDER

THE COURT has considered respondent Joseph M. Thompson's motion to reconsider our April 9, 2019, opinion, and the record and file herein.

IT IS ORDERED that the respondent's motion to reconsider is denied.

PANEL: Judges Pennell, Fearing, Lawrence-Berrey

FOR THE COURT:

ROBERT LAWRENCE-BERREY
Chief Judge

APPENDIX C

RCW 48.22.005

Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Automobile" means a passenger car as defined in RCW **46.04.382** registered or principally garaged in this state other than:

(a) A farm-type tractor or other self-propelled equipment designed for use principally off public roads;

(b) A vehicle operated on rails or crawler-treads;

(c) A vehicle located for use as a residence;

(d) A motor home as defined in RCW **46.04.305**; or

(e) A moped as defined in RCW **46.04.304**.

(2) "Bodily injury" means bodily injury, sickness, or disease, including death at any time resulting from the injury, sickness, or disease.

(3) "Income continuation benefits" means payments for the insured's loss of income from work, because of bodily injury sustained by the insured in an automobile accident, less income earned during the benefit payment period. The combined weekly payment an insured may receive under personal injury protection coverage, worker's compensation, disability insurance, or other income continuation benefits may not exceed eighty-five percent of the insured's weekly income from work. The benefit payment period begins fourteen days after the date of the automobile accident and ends at the earliest of the following:

(a) The date on which the insured is reasonably able to perform the duties of his or her usual occupation;

(b) Fifty-four weeks from the date of the automobile accident; or

(c) The date of the insured's death.

(4) "Insured automobile" means an automobile described on the declarations page of the policy.

(5) "Insured" means:

(a) The named insured or a person who is a resident of the named insured's household and is either related to the named insured by blood, marriage, or adoption, or is the named insured's ward, foster child, or stepchild; or

(b) A person who sustains bodily injury caused by accident while: (i) Occupying or using the insured automobile with the permission of the named insured; or (ii) a pedestrian accidentally struck by the insured automobile.

(6) "Loss of services benefits" means reimbursement for payment to others, not members of the insured's household, for expenses reasonably incurred for services in lieu of those the insured would usually have performed for his or her household without compensation, provided the services are actually rendered. The maximum benefit is forty dollars per day. Reimbursement for loss of services ends the earliest of the following:

(a) The date on which the insured person is reasonably able to perform those services;

(b) Fifty-two weeks from the date of the automobile accident; or

(c) The date of the insured's death.

(7) "Medical and hospital benefits" means payments for all reasonable and necessary expenses incurred by or on behalf of the insured for injuries sustained as a result of an automobile accident for health care services provided by persons licensed under Title **18** RCW, including pharmaceuticals, prosthetic devices and eyeglasses, and necessary ambulance,

hospital, and professional nursing service. Medical and hospital benefits are payable for expenses incurred within three years from the date of the automobile accident.

(8) "Automobile liability insurance policy" means a policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage suffered by any person and arising out of the ownership, maintenance, or use of an insured automobile. An automobile liability policy does not include:

(a) Vendors single interest or collateral protection coverage;

(b) General liability insurance; or

(c) Excess liability insurance, commonly known as an umbrella policy, where coverage applies only as excess to an underlying automobile policy.

(9) "Named insured" means the individual named in the declarations of the policy and includes his or her spouse if a resident of the same household.

(10) "Occupying" means in or upon or entering into or alighting from.

(11) "Pedestrian" means a natural person not occupying a motor vehicle as defined in RCW **46.04.320**.

(12) "Personal injury protection" means the benefits described in this section and RCW **48.22.085** through **48.22.100**. Payments made under personal injury protection coverage are limited to the actual amount of loss or expense incurred.

[**2003 c 115 § 1; 1993 c 242 § 1.**]

NOTES:

Severability—1993 c 242: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1993 c 242 § 7.**]

Effective date—1993 c 242: "Sections 1 through 5 of this act shall take effect July 1, 1994." [**1993 c 242 § 8.**]

APPENDIX D

RCW 48.22.030

Underinsured, hit-and-run, phantom vehicle coverage to be provided —Purpose—Definitions—Exceptions—Conditions—Deductibles —Information on motorcycle or motor-driven cycle coverage—Intended victims.

(1) "Underinsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance, or use of which either no bodily injury or property damage liability bond or insurance policy applies at the time of an accident, or with respect to which the sum of the limits of liability under all bodily injury or property damage liability bonds and insurance policies applicable to a covered person after an accident is less than the applicable damages which the covered person is legally entitled to recover.

(2) No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage, suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death, or property damage, resulting therefrom, except while operating or occupying a motorcycle or motor-driven cycle, and except while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member, and which is not insured under the liability coverage of the policy. The coverage required to be offered under this chapter is not applicable to general liability policies, commonly known as umbrella policies, or other policies which apply only as excess to the insurance directly applicable to the vehicle insured.

(3) Except as to property damage, 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. Coverage for property damage need only be issued in conjunction with coverage for bodily injury or death. Property damage coverage required under subsection (2) of this section shall mean physical damage to the insured motor vehicle unless the policy specifically provides coverage for the contents thereof or other forms of property damage.

(4) A named insured or spouse may reject, in writing, underinsured coverage for bodily injury or death, or property damage, and the requirements of subsections (2) and (3) of this section shall not apply. If a named insured or spouse has rejected underinsured coverage, such coverage shall not be included in any supplemental or renewal policy unless a named insured or spouse subsequently requests such coverage in writing. The requirement of a written rejection under this subsection shall apply only to the original issuance of policies issued after July 24, 1983, and not to any renewal or replacement policy. When a named insured or spouse chooses a property damage coverage that is less than the insured's third party liability coverage for property damage, a written rejection is not required.

(5) The limit of liability under the policy coverage may be defined as the maximum limits of liability for all damages resulting from any one accident regardless of the number of covered persons, claims made, or vehicles or premiums shown on the policy, or premiums paid, or vehicles involved in an accident.

(6) The policy may provide that if an injured person has other similar insurance available to him or her under other policies, the total limits of liability of all coverages shall not exceed the

higher of the applicable limits of the respective coverages.

(7)(a) The policy may provide for a deductible of not more than three hundred dollars for payment for property damage when the damage is caused by a hit-and-run driver or a phantom vehicle.

(b) In all other cases of underinsured property damage coverage, the policy may provide for a deductible of not more than one hundred dollars.

(8) For the purposes of this chapter, a "phantom vehicle" shall mean a motor vehicle which causes bodily injury, death, or property damage to an insured and has no physical contact with the insured or the vehicle which the insured is occupying at the time of the accident if:

(a) The facts of the accident can be corroborated by competent evidence other than the testimony of the insured or any person having an underinsured motorist claim resulting from the accident; and

(b) The accident has been reported to the appropriate law enforcement agency within seventy-two hours of the accident.

(9) An insurer who elects to write motorcycle or motor-driven cycle insurance in this state must provide information to prospective insureds about the coverage.

(10) An insurer who elects to write motorcycle or motor-driven cycle insurance in this state must provide an opportunity for named insureds, who have purchased liability coverage for a motorcycle or motor-driven cycle, to reject underinsured coverage for that motorcycle or motor-driven cycle in writing.

(11) If the covered person seeking underinsured motorist coverage under this section was the intended victim of the tort feasor, the incident must be reported to the appropriate law enforcement agency and the covered person must cooperate with any related law enforcement investigation.

(12) The purpose of this section is to protect innocent victims of motorists of underinsured motor vehicles. Covered persons are entitled to coverage without regard to whether an incident was intentionally caused. However, a person is not entitled to coverage if the insurer can demonstrate that the covered person intended to cause the event for which a claim is made under the coverage described in this section. As used in this section, and in the section of policies providing the underinsured motorist coverage described in this section, "accident" means an occurrence that is unexpected and unintended from the standpoint of the covered person.

(13) The coverage under this section may be excluded as provided for under RCW **48.177.010**(6).

(14) "Underinsured coverage," for the purposes of this section, means coverage for "underinsured motor vehicles," as defined in subsection (1) of this section.

[**2015 c 236 § 7; 2009 c 549 § 7106; 2007 c 80 § 14.** Prior: **2006 c 187 § 1; 2006 c 110 § 1; 2006 c 25 § 17; 2004 c 90 § 1; 1985 c 328 § 1; 1983 c 182 § 1; 1981 c 150 § 1; 1980 c 117 § 1; 1967 c 150 § 27.**]

NOTES:

Severability—1983 c 182: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1983 c 182 § 3.**]

Effective date—1981 c 150: "This act shall take effect on September 1, 1981." [**1981 c 150 § 3.**]

Effective date—1980 c 117: "This act shall take effect on September 1, 1980." [**1980 c 117 § 8.**]

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INJURY ATTORNEYS

June 10, 2019

Thompson v. Progressive Direct Insurance Company

No. 35864-0-III

Certificate of Service by Email

I, Ryan Armentrout, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 10th day of June, 2019, I caused a true and correct copy of the Petition for Review to be served on the party designated below by email per agreement:

Timothy R. Gosselin
tim@gosselinlawoffice.com

Gosselin Law Office, PLLC
1901 Jefferson Ave, Suite 304
Tacoma, WA 98402

Signed in Walla Walla, Washington on June 10th, 2019

Ryan Armentrout

HESS LAW OFFICE

June 10, 2019 - 10:18 AM

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