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NO. 97703-8
(King County No. 17—12030-8 SEA)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CARLOS PACHECO,

Plaintiff/Appellant

v.

OREGON MUTUAL INSURANCE COMPANY,

Defendant/Respondent

DEFENDANT/RESPONDENT OREGON MUTUAL INSURANCE COMPANY'S ANSWER TO PLAINTIFF-APPELLANT'S PETITION FOR REVIEW TO THE SUPREME COURT

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I. IDENTITY OF RESPONDENT/CROSS PETITIONER

Oregon Mutual Insurance Company ("Oregon Mutual") is an independent mutual insurance company formed under the laws of the State of Oregon with its principle place of business in McMinnville, Oregon. Oregon Mutual is authorized to transact business in the State of Washington.

II. ISSUES PRESENTED FOR REVIEW

1) Does the Division I Court of Appeals ruling that an insurer may incorporate a "loss of use" damage exclusion into its underinsured motorist ("UIM") coverage conflict with existing Washington law? **No.**

2) Does the Division I Court of Appeals ruling that an exclusion for "diminished value" damages in an insurer's UIM provision is void as a matter of public policy conflict with existing Washington law? **Yes.**

3) Does the ruling of the Division I Court of Appeals require reversal where Mr. Pacheco is not the prevailing party? **Yes.**

III. RESPONSE TO PLAINTIFF'S STATEMENT OF THE CASE

This lawsuit arises from an insurance claim made by Mr. Pacheco under the underinsured motorist coverage included in policy no. WP

748733, issued by Oregon Mutual (the "Policy").[1] Mr. Pacheco was involved in a motor vehicle accident in his 2014 Audi with an uninsured driver.[2] Mr. Pacheco made a claim to Oregon Mutual under the Policy's underinsured motorist coverage.[3] Oregon Mutual accepted coverage, and made $16,115.37 in payments on the claim, including the $1,050 limit for rental car expenses.[4] Oregon Mutual did not pay for alleged diminished value damages, nor did it pay for loss of use damages beyond the amount provided for rental car coverage, based on the diminished value and loss of use exclusions contained in the Policy.[5]

Mr. Pacheco then filed suit in the King County District Court.[6] Mr. Pacheco's Complaint did not clearly assert any claims, but alleged that Oregon Mutual "despite having the opportunity and information necessary to pay the Plaintiff's claim for diminished value and loss of use, denied coverage for both damage elements."[7] Mr. Pacheco's Complaint sought payment of the excluded damages, attorney fees under "*Olympic*

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[1] CP 352-353 at ¶¶ 4-8.

[2] CP 231 at 1:18-19; CP 353 at ¶ 5.

[3] CP 278-280.

[4] *Id.*

[5] *Id.*

[6] CP 352-353.

[7] CP 353 at ¶8.

Steamship[8] and RCW 4.56.250," and "interest calculated at the maximum amount allowable by law[.]"[9]

Mr. Pacheco subsequently filed a motion for summary judgment seeking a determination that exclusions for loss of use and diminished value were void as a matter of public policy.[10] In that motion, Mr. Pacheco admitted that the policy language in question is unambiguous and enforceable, and did not place the Policy or its language before the court.[11] Mr. Pacheco nevertheless sought a ruling on all such exclusions, regardless of their specific language.[12] The parties did not dispute that the motion presented a pure question of law and that summary judgment determination of the issue was appropriate.[13]

The King County District Court found that public policy supports voiding of the diminished value exclusion where the diminished value is caused by "unrepairable continuing physical damage."[14] The

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[8] *Olympic Steamship Co., Inc. v. Centennial Ins. Co.,* 117 Wn.2d, 811 P.2d 673 (1991).

[9] CP 353.

[10] *See* CP 231-244.

[11] *See* CP 231:14-16.

[12] *See* Opening Brief.

[13] *See* CP 219-228.

[14] CP 444:4-11 (VRP, Vol 1, 03/20/17, 21:4-11).

District Court, however, correctly ruled that there was no basis to void an exclusion for loss of use damages.[15]

Both parties filed motions for reconsideration.[16] The District Court heard the parties' motions, but left its original decision in place.[17] Oregon Mutual filed a timely notice of appeal, and Mr. Pacheco filed a notice of cross-appeal.[18]

On appeal, the King County Superior Court reversed the District Court's Order finding that exclusions for diminished value damages are void for public policy reasons, and upheld the District Court's Order finding that there was no basis to void exclusions for loss of use damages.[19] Mr. Pacheco filed a motion for discretionary review with the Court of Appeals, which was granted.

The Division I Court of Appeals reversed the decision of the King County Superior Court with regard to exclusions for diminished value, but upheld the King County Superior Court with regard to exclusions for loss of use.[20] Mr. Pacheco then filed his Petition for

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[15] *Id.*

[16] *See* CP 205-210 and CP 198-202.

[17] CP 459:8 - CP 460:1 (VRP, Vol 2, 04/10/17, 13:8-14:1).

[18] CP 7-13 and CP 17-22.

[19] CP 504-505.

[20] *See* Opinion in Appendix to Plaintiff-Appellant's Petition for Review.

Review.

IV. REASONS PLAINTIFF'S REQUEST FOR REVIEW SHOULD BE DENIED

A. Standard of Review

Pursuant to the Washington Rules of Appellate Procedure, Rule 13.4(b), a petition for review to the Washington Supreme Court is accepted only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Mr. Pacheco contends that review of the Division I Opinion with regard to loss of use is warranted based on the incorrect assertion that this decision conflicts with prior decisions of the Washington Supreme Court and the Court of Appeals and with statutory language, and that this petition involves an issue of substantial public interest. As discussed below, Mr. Pacheco is mistaken and review is not required under any of the criteria established in RAP 13.4(b). Further, Oregon Mutual strenuously objects to Mr. Pacheco's representation that policy language

from a State Farm insurance policy excerpted from *Kalles v. State Farm*[21] is the same language contained in the Oregon Mutual policy at issue.[22] Mr. Pacheco's representation is simply wrong—the Oregon Mutual policy language differs from that presented in *Kalles* and the *Kalles* policy did not contain the exclusions at issue. Mr. Pacheco made an intentional decision not to place the Oregon Mutual policy language before the Court and present his claims as a pure issue of law.[23] Mr. Pacheco's present attempt to create new facts based on the facts of an unrelated case is procedurally improper and supports denial of review in this instance.

B. The Court of Appeals' Decision Re Loss of Use Is Not in Conflict with Washington Law

Contrary to Mr. Pacheco's representation to this court, the public policy behind the UIM statute (RCW 48.22, *et seq.*) is not to provide full compensation, but rather, to provide a floating layer of insurance coverage, as clearly stated by the Washington Supreme Court in *Greengo v. Pub. Employees Mut. Ins. Co.*, 135 Wn.2d 799, 959 P.2d 657 (1998). Prior to 1975, the Washington Supreme Court had "declared the public policy underlying the predecessor uninsured motorist statute to be full

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[21] *Kalles v. State Farm Mut. Auto. Ins. Co.*, 7 Wn. App. 2d 330, 433 P.3d 523 (2019).

[22] Petition for Review at p. 2.

[23] *See* CP 231:14-16.

compensation."[24] The Washington Legislature reacted to that declaration by amending the UIM statute in 1980, which shifted public policy away from one of full compensation for an injured party to one that only provides a second layer of floating[25] protection.[26]

The Division I Opinion accepted and followed this stated public policy and case law with respect to the "loss of use" exclusion. The decision thus does not conflict with any Supreme Court rules or decisions on this topic. There is also no conflict with any Washington Court of Appeals decisions on this topic. Review by this Court of the Division I Opinion on "loss of use" is thus not mandated on the basis of Supreme Court conflict.

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[24] *Greengo v. Pub. Emps. Mut. Ins. Co.*, 135 Wn.2d 799, 808–09, 959 P.2d 657, 661 (1998), citing *Cammel v. State Farm Mut. Auto. Ins. Co.,* 86 Wn.2d 264, 543 P.2d 634 (1975), *overruled by statute as stated in Millers Cas. Ins. Co. v. Briggs,* 100 Wn.2d 1, 4, 665 P.2d 891 (1983).

[25] UIM coverage is referred to as a "floating" layer of protection because it "floats" on top of recovery from other sources, such as the under insured motorist's policy limits. A "floating" layer of protection is contrasted against a "decreasing layer" of protection, which is reduced by recovery from other sources. *See Elovich v. Nationwide Ins. Co.*, 104 Wn.2d 543, 548–50, 707 P.2d 1319, 1323 (1985).

[26] *See Greengo v. Pub. Emps. Mut. Ins. Co.* 135 Wn.2d 799, 808-09, 959 P.2d 657 (1998).

Washington Courts have also repeatedly stated that UIM coverage is intended to imitate liability coverage of the at-fault driver.[27] The Division I Opinion is in congruence with this position. Loss of use exclusions are legally incorporated into general automobile liability coverage provisions. That same rule applies to the inclusion of identical provisions into UIM coverage. Mr. Pacheco, however, seeks a ruling that conflicts with Supreme Court and Court of Appeals decisions with the effect voiding loss of use provisions in UIM coverage, while at the same time upholding the use of these same provisions in liability coverage. The argument conflicts with stated case law, with the practical effect of shifting back to the old public policy standard of full compensation rejected by the Washington legislature.[28]

Similarly, Mr. Pacheco's assertion that the Division I Opinion on loss of use is in conflict with the UIM statute itself because Division I declined to adopt the "trigger theory" presented by Mr. Pacheco is incorrect. The UIM statute does not require coverage for all consequential

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[27] *See Daley v. Allstate Ins. Co.*, 135 Wn.2d 777, 789, 958 P.2d 990, 996 (1998) ("…the purpose of the statute 'is to allow an injured party to recover those damages which would have been received had the responsible party maintained liability insurance.'") *citing Britton v. Safeco Ins. Co.*, 104 Wn.2d 518, 522, 707 P.2d 125 (1985).

[28] *See Greengo v. Pub. Emps. Mut. Ins. Co.* 135 Wn.2d 799, 808-09, 959 P.2d 657 (1998).

damages as asserted by Mr. Pacheco, neither by its express language nor by the public policy that underlies it.

The other decisions cited by Mr. Pacheco simply have no bearing on the issues examined by Division I in this matter, and the Division I Opinion on loss of use does not present any conflict with the same. For example, the Court in *Daley v. Allstate Ins. Co.*, did not address coverage under the UIM statute, but rather whether purely emotional injuries fell within the scope of the definition of "bodily injury" contained in the Allstate insurance policy at issue.[29] Further, The *Daley* Court expressly stated that a UIM carrier "is not required to pay all damages incurred by the plaintiff as the result of an act of a tort-feasor..." [30] The fact that damages are recoverable from a tortfeasor does not mean that they must fall within the scope of mandatory UIM coverage.

This matter is also one of statutory interpretation, not contract interpretation. Indeed, Pacheco admitted that the Oregon Mutual policy language was unambiguous and applicable to his loss.[31] As such, Pacheco's citations to third party property damage pollution liability

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[29] CP 499:7-16; *See also Daley v. Allstate Ins. Co.*, 135 Wn.2d 777, 785, 958 P.2d 990 (1998).

[30] *Daley v. Allstate Ins. Co.*, 135 Wn.2d 777, 785, 958 P.2d 990 (1998)..

[31] CP 231:14-16.

decisions in *Overton v. Consolidated Ins. Co.,*[32]*American National Fire Ins. Co. v. B & L Trucking & Constr. Co., Inc.,*[33] and *Transcontinental Ins. Co. v. Wa. Public Utilities Districts' Utility Sys.*,[34] are wholly misplaced as these decisions did not interpret the UIM statute. The same could be said of Pacheco's citation to *Moeller v. Farmers Ins. Co. of Washington,*[35] which dealt with a completely different set of policy provisions and did not implicate UIM coverage. Similarly, *Kalles v. State Farm,*[36] cited by Mr. Pacheco, only addressed the language of the UIM coverage grant in the policy at issue (which differs from the Oregon Mutual coverage), and did not discuss interpretation of the UIM statute.

The rules of statutory interpretation differ in meaningful ways from the rules of statutory interpretation. For example, under the rules of statutory interpretation,

> If the statutory meaning is clear, we give effect to the plain language without regard to the rules of statutory

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[32] *Overton v. Consolidated Ins. Co.,* 145 Wn.2d 417, 428-29, 38 P.3d 322 (2002).

[33] *American National Fire Ins. Co., v. B & L Trucking & Constr. Co., Inc.,* 134 Wn.2d 413, 428-9, 951 P.2d 250 (1998).

[34] *Transcontinental Ins. Co. v. Wa. Public Utilities Districts' Utility Sys*., 111 Wn.2d 452, 469-470, 760 P. 2d 337 (1988).

[35] *Moeller v. Farmers Ins. Co. of Washington,* 155 Wn. App. 133, 143, 229 P.3d 857 (2010).

[36] *Kalles v. State Farm Mut. Auto. Ins. Co,* 7 Wn. App. 3d 330 (Div. 2 2019).

> construction. When interpreting statutes, our function is to give effect to the object and intent of the legislature. We assume that the legislature means what it says.[37]

In stark contrast, the rules of insurance policy interpretation hold that any ambiguity in the language contained in an insurance policy must be construed in favor of the insured.[38] Accordingly, the policy interpretation decisions cited by Pacheco do not have any bearing on this matter and do create a conflict with the Division I Opinion regarding loss of use.

Mr. Pacheco also misrepresents the content of some of the cases on which he relies. For example, *Hayden v. Mutual of Enumclaw Ins. Co.*,[39] did not address the UIM statute in any way. Rather, the *Hayden* Court analyzed whether a loss of use exclusion contained in a comprehensive general liability policy barred coverage such that there was no duty to defend the insured in an underlying lawsuit.[40]

In summary, the decision of Division I regarding loss of use does not conflict with any decisions of the Washington Court of Appeals. Accordingly, Pacheco's request for review should be denied.

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[37] *Doan v. Dep't of Labor & Indus.,* 143 Wn. App. 596, 601, 178 P.3d 1074 (2008) (citations omitted).

[38] *Britton v. Safeco Ins. Co. of Am.*, 104 Wn.2d 518, 528, 707 P.2d 125, 132 (1985).

[39] *Hayden v. Mutual of Enumclaw Ins. Co.,* 141 Wn.2d 55, 1 P.3d 1167 (2000).

[40] *Id* at 65-66.

C. The Petition Does Not Involve an Issue of Substantial Public Interest Requiring a Determination by This Court.

Mr. Pacheco's final contention is that this decision involves an issue of substantial public interest.

Here, there is no substantial public interest in Mr. Pacheco's request that this Court revisit the Division I Opinion correctly applying settled law regarding statutory interpretation and determining that loss of use may be excluded in UIM coverage. The Division I Opinion makes no change to the existing law, and simply applies the law correctly to the question of loss of use exclusions.

Mr. Pacheco, however, seeks to change the existing law, urging that this Court adopt a "trigger theory" that would mandate coverage for all consequential, intangible, economic losses and create "exclusion free" coverage, with the exception of exclusions specifically called out in the UIM statute.[41] Adoption of a "trigger theory", as urged by Mr. Pacheco, is in direct conflict with the actual public policy underlying the UIM statute and represents a return to the public policy of full compensation rejected by the Washington State legislature.

Further, exclusions for loss of use already apply to automobile liability coverage and a holding that such an exclusion cannot apply to

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[41] Petition for Review at p. 5-6.

UIM coverage would create a two tiered system of insurance coverage, with UIM coverage providing a greater insurance recovery than liability coverage under the same policy. This would create a perverse incentive, where motorists can obtain a greater insurance recovery from a collision with an uninsured motorist than from an insured one, and thus should prefer to be in a collision with another motorist who is uninsured.

Further, as Mr. Pacheco notes, Oregon Mutual paid the limits of the rental car coverage provided under the policy. Accordingly, Mr. Pacheco seeks to require that Oregon Mutual provide "loss of use" coverage that is duplicative of policy benefits that have already been paid.[42] Such a windfall goes against the well-established indemnity principle of insurance.[43]

Accordingly, for all the above-stated reasons Pacheco's request for review should be denied.

V. REASONS OREGON MUTUAL'S REQUEST FOR REVIEW SHOULD BE GRANTED

If this Court accepts Mr. Pacheco's request for review, Oregon Mutual respectfully requests that the Court grant its request for review, made pursuant to RAP 13.4.

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[42] CP 278-280.

[43] *Dombrosky v. Farmers Ins. Co. of Washington*, 84 Wn. App. 245, 259, 928 P.2d 1127, 1136 (1996), *as amended* (Feb. 7, 1997), citing *Keenan v. Industrial Indem. Ins. Co.,* 108 Wn.2d 314, 318–19, 738 P.2d 270 (1987).

A. Standard of Review

As stated previously, a petition for review to the Washington Supreme Court is accepted under the standards set out in RAP 13.4(b).

The Opinion of Division I regarding diminished value is subject to review by this Court because it is in conflict with the UIM statute, the Washington Supreme Court's decision in *Greengo,*[44]and multiple decisions of the Washington Appellate Courts, and because it involves an issue of substantial public interest.

B. The Court of Appeals' Decision Re Diminished Value Presents a Conflict

The Division I Opinion regarding diminished value creates a scheme where UIM coverage must provide more coverage than the corresponding liability coverage in the same policy. The decision conflicts with the long line of decisions holding that UIM coverage is intended to imitate liability coverage of the at-fault driver.[45] Further, by holding that some exclusions for intangible, economic, consequential damages are prohibited under the statute, the Division I Opinion creates a scheme

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[44] *Greengo v. Pub. Emps. Mut. Ins. Co.* 135 Wn.2d 799, 959 P.2d 657 (1998).

[45] *See Daley v. Allstate Ins. Co.*, 135 Wn.2d 777, 789, 958 P.2d 990, 996 (1998) ("…the purpose of the statute 'is to allow an injured party to recover those damages which would have been received had the responsible party maintained liability insurance.'") *citing Britton v. Safeco Ins. Co.*, 104 Wn.2d 518, 522, 707 P.2d 125 (1985).

where coverage and recovery for property damage under UIM coverage will be greater than that available from the corresponding liability coverage; thus causing a perverse incentive. Because under this scheme, motorists can obtain a greater insurance recovery from a collision with an uninsured motorist than from an insured one, and thus arguably would prefer to be in a collision with another motorist who is uninsured.

The Division I Opinion is also in conflict with the UIM statute itself. As noted by Division I, the UIM statute does not require that UIM coverage for property damage provide the identical benefits as property damage liability coverage under the same policy.[46] In clear contrast, UIM coverage for bodily injury must match that contained in the liability coverage under the same policy.[47] It is not conceivable that the legislature would have exempted property damage coverage from the matching requirements placed on bodily injury coverage if it had intended that UIM coverage for property damage be more generous than liability coverage for the same.

As Mr. Pacheco has asserted throughout these proceedings, and continues to assert in his Petition for Review, diminished value, like loss

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[46] *See* Opinion in Appendix to Plaintiff-Appellant's Petition for Review at 10.

[47] *Id.*

of use, is an intangible, economic loss.[48] Mr. Pacheco's assertion that the UIM statute mandates that coverage be provided for consequential damages such as loss of use and diminished value is based on a "trigger theory" that would render virtually all exclusions void unless specifically called out in the UIM statute.[49] The Opinion of Division I on diminished value is thus a shift back to this rejected public policy scheme, and is in conflict with *Greengo,* the above-cited appellate decisions, and the UIM statute itself.[50] Accordingly, review on this issue should be granted.

C. Defendant's Petition Involves an Issue of Substantial Public Interest Requiring a Determination by This Court.

As noted above, the Division I Opinion regarding diminished value creates a scheme where UIM coverage must provide more coverage than the corresponding liability coverage. This scheme creates a perverse incentive whereby a motorist can obtain a greater insurance recovery from a collision with an uninsured motorist than from an insured one, and thus would prefer to be in a collision with another motorist who is uninsured. This incentive would affect all purchasers of insurance and cuts against

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[48] CP 44-50 at CP 48:10 ("Diminished value is a *dollar figure.*") (emphasis in original); CP 49:18-19 (Collision repair charges, diminished value, stigma damage, and loss of use are all "non-physical damages" and "intangible."); Petition for Review at p. 16.

[49] Petition for Review at p. 5-6.

[50] *See Greengo v. Pub. Emps. Mut. Ins. Co.* 135 Wn.2d 799, 808-09, 959 P.2d 657 (1998).

Washington law requiring all drivers to carry liability insurance.[51] Accordingly, review on this issue should be granted.

D. Attorney Fees

Division I held that Mr. Pacheco is entitled to recover reasonable attorney fees pursuant to *Olympic Steamship*,[52] because Mr. Pacheco prevailed in his argument regarding diminished value exclusions.[53] To the extent that Division I's ruling on diminished value is reversed, the award of fees must also be reversed. Oregon Mutual does not contest the determination of Division I on the amount of attorney fees deemed reasonable.

VI. CONCLUSION

For the reasons stated above, Oregon Mutual respectfully requests that this Court deny Mr. Pacheco's petition. However, if this Court grants Mr. Pacheco's petition, Oregon Mutual requests that the Court grant its petition as well.

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[51] *See* RCW 46.30.020.

[52] *Olympic Steamship Co., Inc. v. Centennial Ins. Co.,* 117 Wn.2d, 811 P.2d 673 (1991).

[53] *See* Opinion in Appendix to Plaintiff-Appellant's Petition for Review at p. 15.

DATED this 18 day of October, 2019.

SOHA & LANG, P.S.

By: ____________________

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Insurance Company

CERTIFICATE OF SERVICE

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action; my business address is SOHA & LANG, PS, 1325 Fourth Avenue, Suite 2000, Seattle, WA 98101.

I hereby certify that on October 18, 2019, I caused to be served a true and correct copy of the foregoing **DEFENDANT/RESPONDENT OREGON MUTUAL INSURANCE COMPANY'S ANSWER TO PLAINTIFF-APPELLANT'S PETITION FOR REVIEW TO THE SUPREME COURT** via the Supreme Court's electronic transmission to all parties and Email courtesy company on the following:

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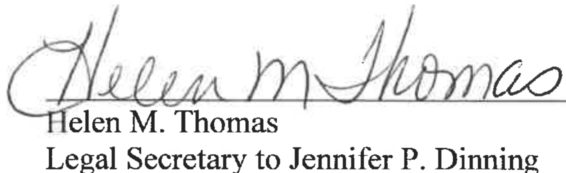
Executed on this 18th day of October, 2019, at Seattle, Washington.

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.



Helen M. Thomas
Legal Secretary to Jennifer P. Dinning

SOHA & LANG

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