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SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals No. 32109-6-III)

PATRIOT GENERAL INSURANCE COMPANY, a foreign corporation,
Petitioner,

v.

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

RESPONDENT JAVIER GUTIERREZ'S ANSWER TO PETITION FOR
REVIEW

Peter J. Hess
Of Attorneys for Respondent,
Javier Gutierrez

Hess Law Office, PLLC
415 N. 2nd Avenue
Walla Walla, WA 99362
(509)525-4744
WSBA #: 39721

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A. IDENTITY OF RESPONDENT

Javier Gutierrez asks this Court to deny review of the Court of Appeals' decision terminating review designated in Part B of this answer.

B. COURT OF APPEALS DECISION

In a published opinion filed February 24, 2015, Division III of the Court of Appeals ruled that the language of Jorge Gutierrez's ("Jorge") Patriot General Insurance Company policy provided uninsured motorist coverage to his son, Javier Gutierrez ("Javier").

C. DISCUSSION OF THE ISSUES

1. The Court of Appeals' decision, finding Petitioner's insurance policy granted coverage to Respondent Javier Gutierrez, comports with the decisions of the courts of this state and raises no issues of substantial public interest.

2. The Court of Appeals' decision was correctly decided on the narrow grounds of contract interpretation, making it unnecessary to address issues of statutory application.

D. RESTATEMENT OF THE CASE

Respondent Jorge Gutierrez went to insurance agent Tomas Miranda

for automobile insurance in 2010.¹ Jorge intended for his entire family, including his son, Javier, to be covered by the insurance.² The application was in English, and Jorge, who does not speak English, relied on Mr. Miranda to complete the insurance application.³ Patriot General Insurance Company issued an automobile policy to Jorge on October 29, 2010.⁴

On January 9, 2011, Javier Gutierrez was injured while riding as a passenger in an uninsured vehicle that was involved in a single-car-roll-over collision near Walla Walla, Washington.⁵ At the time of the collision, Javier was 19 years old and was living in Jorge's household.⁶ Javier made a policy-limit UIM claim under his father's, Jorge Gutierrez, automobile policy.

Patriot denied Javier's UIM claim in May of 2012 on the basis that Javier was over the age of 14 and not listed on the policy.⁷ This was the first time Jorge found out the policy required disclosure of any relatives.⁸ Patriot General then sued Javier and Jorge seeking a declaratory judgment that it had

¹Declaration of Tomas Miranda, CP77.

²Declaration of Jorge Gutierrez, CP 106.

³*Id.*

⁴Policy, CP 55.

⁵Defendant Javier Gutierrez's Answer to Complaint for Declaratory Judgment and Counterclaims, CP 149.

⁶*Id.*

⁷Kyle Mosbrucker Letter dated May 22, 2012, CP 19-20.

⁸Declaration of Jorge Gutierrez, CP 106.

no duty to pay benefits under the UIM coverage of its policy.⁹

Patriot General moved for summary judgment on the issue of coverage.¹⁰ A Walla Walla Superior Court Commissioner denied Patriot's motion, and entered partial summary judgment in favor of Javier and Jorge, finding that the definition of "insured" in RCW 48.22.005 ("The Definition Statute") of the Casualty Insurance Chapter, was read into the policy and replaced the policy definition.¹¹ Under this statute, "Insured" is defined to include "[t]he 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 ...".¹² Patriot General then moved to revise the Commissioner's order¹³ and was denied by Walla Walla Superior Court Judge M. Scott Wolfram.¹⁴ Patriot General petitioned for discretionary

⁹Complaint for Declaratory Judgment, CP 2.

¹⁰Plaintiff Patriot General Insurance Company's Motion for Summary Judgment, CP 4-15.

¹¹Order Granting Defendants' Motion to Strike, Denying Patriot General's Motion for Summary Judgment and Establishing UIM Coverage for Defendant Javier Gutierrez, CP160-63.

¹²RCW 48.22.005(5)(a)

¹³Plaintiff's Motion for Revision of Court Commissioner's Order Denying Patriot General's Motion for Summary Judgment and Establishing UIM Coverage for Defendant Javier Gutierrez, CP 164-170.

¹⁴Order Denying Patriot General's Motion for Revision of Order Denying Patriot General's Motion for Summary Judgment and Establishing UIM Coverage, CP 223-226.

review to the Court of Appeals. On acceptance of review, the Court affirmed the grant of summary judgment to Javier and Jorge, holding that Javier is insured based on the policy language itself. Therefore, the Court of Appeals did not need to address the issue of whether The Definition Statute's definition of "insured" must be read into all Washington UIM policies.¹⁵

E. WHY THE COURT SHOULD DENY REVIEW

1. The Court of Appeals decision comports with Washington law and raises no issues of substantial public interest.

- a. The difference between a "limitation on a grant of coverage" and an "exclusion" was irrelevant to the Court of Appeals' decision because the Court of Appeals correctly determined that The Sentence in Question could be construed as a cooperation clause.**

Patriot General's policy states that, "[a]ny relative who is age fourteen (14) or older must be listed on the application or endorsed on the policy prior to a car accident or loss."¹⁶ Patriot General contends that this sentence ("The Sentence in Question") is a "limitation on a grant of coverage".¹⁷ Patriot General further contends that the Court of Appeals decision should be reviewed because it mistakenly conflates a "limitation

¹⁵Amended Appx. at 12.

¹⁶Policy, CP 58.

¹⁷Patriot General Insurance Company's Amended Petition for Review at 10.

on a grant of coverage” with an “exclusion from coverage”.¹⁸ Even assuming these two terms did have different meanings, it would have no effect on the Court of Appeals opinion. The opinion did not hinge on the difference between a grant of coverage and an exclusion. Instead, the Court of Appeals ruled that the sentence in question is vague because it could define who is insured under the policy or it could simply impose a duty to cooperate.¹⁹

As this Court has ruled, “[i]f any clause in the policy is ambiguous, a meaning and construction most favorable to the insured must be applied, even though the insurer may have intended another meaning.”²⁰ In construction most favorable to Javier, The Sentence in Question simply imposes a duty to cooperate. Once The Sentence in Question is read as a duty to cooperate, the burden shifts to Patriot General to show a breach of that duty and actual prejudice caused by that breach.²¹ In this case, the Court of Appeals found no evidence that Jorge breached his duty to

¹⁸*Id.* at 6.

¹⁹Amended Appx. at 9.

²⁰*Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Zuver*, 110 Wn. 2d 207, 210, 750 P.2d 1247 (1988).

²¹*Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 377, 535 P.2d 816 (1975)

cooperate and no evidence of prejudice to Patriot General.²²

In summary, the Court of Appeals correctly determined that The Sentence in Question is vague and must be construed in favor of coverage for Javier. Any difference between a grant of coverage and an exclusionary clause, if any exists, is irrelevant in this case because, in the light most favorable to Javier, The Sentence in Question is neither a limitation on a grant of coverage nor an exclusion.

b. The Court of Appeals' decision correctly applies Washington law regarding an insured's duty to cooperate.

The Court of Appeals held that The Sentence in Question could be interpreted as imposing a duty to cooperate.²³ Petitioner argues that, “no Washington case has held that the definition section of a policy, which does not mention cooperation, imposes a duty to cooperate in disclosing who is to be insured under a policy.”²⁴ It may be true that no appellate court has ruled on this very narrow issue; however, this does not create a conflict of law. Patriot General drafted The Sentence in Question. The sentence is vague and could be read as a cooperation clause. Far from a

²²Amended Appx. at 11.

²³Amended Appx. at 9.

²⁴Patriot General Insurance Company's Amended Petition for Review at 11.

conflict, the Court of Appeals' decision encourages clear contractual drafting.

Petitioner also argues that no court has extended "the prejudice requirement to policy definitions determining who is insured under the policy."²⁵ Again, The Sentence in Question does not "determine who is insured under the policy". Instead, the Court of Appeals determined that it is a cooperation clause. Washington law clearly applies the prejudice requirement to cooperation clauses.²⁶ Therefore, the Court of Appeals correctly applied the law to this case.

c. This case does not present an issue of substantial public interest.

Petitioner argues that interpretation of this policy involves an issue of substantial public interest because it has a broad impact on a large number of automobile insurance policies.²⁷ Petitioner cites no numbers or evidence to support this dubious proposition and Respondent's law firm, having practiced in the auto insurance arena for many years, has never run across a similar definition in policies outside of Patriot General's family of

²⁵*Id.* at 12.

²⁶*Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 377, 535 P.2d 816 (1975).

²⁷Patriot General Insurance Company's Amended Petition for Review at 12.

companies. While Petitioner's vague contractual drafting may now be of some concern to them, it is hardly an issue of substantial public interest. This is especially true considering that Division III's decision is resoundingly in favor of the citizens of this state. Further, Patriot General can easily fix its policies by issuing amendments to clarify the vague language.

2. **The Court of Appeals' decision correctly limited its decision to a narrow issue of contract interpretation, making it unnecessary to address issues of statutory application.**

The Superior Court ruled that the definition of "insured" under The Definition Statute (RCW 48.22.005(5)(a)) applies to The UIM Statute (RCW 48.22.030).²⁸ Specifically, Javier argued that The Definition Statute's definition of "insured" applies throughout the chapter, including The UIM Statute.²⁹ Because valid statutes are read into insurance policies,³⁰ and because Javier fits The Definition Statute's definition of "insured", Javier must be provided UIM coverage under Patriot General's policy. The Superior Court agreed with this argument, finding that the definition of

²⁸Order Granting Defendants' Motion to Strike, Denying Patriot General's Motion for Summary Judgment and Establishing UIM Coverage for Defendant Javier Gutierrez, CP 160-63.

²⁹*Id.*

³⁰*Dowell, Inc. V. United Pac. Cas. Ins. Co.*, 191 Wash. 666, 682, 72 P.2d 296 (1937).

“insured” in RCW 48.22.005(5) is read into the policy, and replaces the policy language. It granted Javier coverage to Javier under the UIM section of the policy.³¹ However, on review the Court of Appeals correctly found that Javier was granted coverage under the language of the policy itself, negating the need to address the statutory interpretation issue.³² Because the Court of Appeals decision was narrowly tailored to the issue of contract interpretation, there is no statutory issue nor substantial public interest requiring review by this Court.

F. REQUEST FOR FEES

Respondents Javier and Jorge Gutierrez were awarded fees and expenses after prevailing in the Court of Appeals. Should this Court deny Patriot General’s petition for review, Respondent Javier Gutierrez requests an award of fees and expenses pursuant to RAP 18.1(j).

G. CONCLUSION

The Court of Appeals found that Respondent Javier Gutierrez was granted coverage under the language of Petitioner Patriot General’s insurance policy. This decision conflicts with no Washington law and raises no issues

³¹Order Granting Defendants’ Motion to Strike, Denying Patriot General’s Motion for Summary Judgment and Establishing UIM Coverage for Defendant Javier Gutierrez, CP 160-63.

³²Amended Appx. at 7-8.

of substantial public interest. At the most, this decision will effect a change in some portion of Patriot General's existing Washington insurance policies, and likely already has. Given the narrowness of the decision and lack of conflict with Washington law, none of the conditions for review under RAP 13.4(b) are met. For all the reasons stated above, this Court should deny review and award fees pursuant to RAP 18.1(j).

DATED: May 10, 2015

Respectfully Submitted,



Peter J. Hess, WSBA#: 39721
Hess Law Office, PLLC
415 N. 2nd Avenue
Walla Walla, WA 99362
Phone: (509)525-4744
Fax: (509)525-4977
Email: peter@hesslawoffice.com
Of Attorneys for Respondent
Javier Gutierrez

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JAVIER GUTIERREZ, Respondent.

DECLARATION OF SERVICE

Peter J. Hess
Of Attorneys for Respondent,
Javier Gutierrez

Hess Law Office, PLLC
415 N. 2nd Avenue
Walla Walla, WA 99362
(509)525-4744
WSBA #: 39721

Declaration of Service

I declare under penalty of perjury under the laws of the State of Washington that I caused the below listed documents to be served on the following counsel in the manner described below:

1. Respondent Javier Gutierrez's Answer to Petition for Review
2. Declaration of Service.

Mr. Patrick M. Paulich
Betts, Patterson & Mines, P.S.
One Convention Place
701 Pike Street, Suite 1400
Seattle, WA 98101
ppaulich@bpmlaw.com
Via Email & Fax (per agreement)

Ms. Shannon Kilpatrick
Dawson Brown, PS
1000 2nd Avenue, #1420
Seattle, WA 98104
shannon@Dawson-Brown.com
Via Email & Fax (per agreement)

Executed at Walla Walla, Washington this 11th Day of May, 2015

By: _____

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Dear Supreme Court Clerk,

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Respondent Javier Gutierrez's Answer to Petition for Review, in the matter of
Patriot General Ins. Co. v. Jorge Gutierrez
Case # 91510-5

Filing Attorney: Peter J. Hess
Phone: (509)525-4744
WSBA #: 39721
Email: peter@hesslawoffice.com

Thank you,

Peter J. Hess, Attorney



Peter J. Hess
Attorney
509.525.4744
Fax 525.4977
peter@hesslawoffice.com

415 North Second Ave.
Walla Walla, WA 99362

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