No. 32109-6 -III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

PATRIOT GENERAL INSURANCE COMPANY, a foreign corporation,
Petitioner

v.

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

REPLY BRIEF OF PETITIONER

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I. Introduction

For nearly 40 years, the Washington courts have unambiguously declared that an insurer and insured may determine who is covered by a UIM policy. The respondents urge this Court to sweep aside this case law, arguing that a 21-year-old statute—one intended to modify PIP coverage—completely redefined the scope of mandatory UIM coverage. Yet they cannot cite one case in this heavily litigated area of the law that supports their position. Patriot's position, by contrast, comports with the well-established case law.

Case law striking down family-member exclusions has no bearing on this case. While the Washington courts have invalidated UIM exclusions from coverage for family members, they have held that an insurer and insured may define who is and is not insured in the first instance. The restriction on certain Patriot's policy is part of the grant of coverage, not an exclusion, and as a result it complies with Washington law.

Respondent Jorge Gutierrez would require an insurer such as Patriot show it was prejudiced by having to cover someone who was not identified as an insured in the policy. This would be an unprecedented extension of the rule that an insurer is required to show that an insured's violation of a condition after a loss—such as a condition requiring prompt

notice—harmed the insurer. The Court should reject this attempt to remake Washington law and to require insurers to show prejudice when a stranger to a policy demands coverage.

II. Statement of the Case

While the parties generally agree on the relevant facts, respondent Jorge Gutierrez makes two unsupported factual statements that cannot go unchallenged. He first contends that his son Javier "had no other way to get his own insurance,"[1] but there is no record evidence that Javier could not have acquired UIM insurance from a source other than Patriot. Jorge further maintains, again without any support in the record, that Javier cannot receive necessary treatment because he cannot afford it.[2] This statement not only lacks record support, it is a bald-faced attempt to garner sympathy for Javier using "facts" that are irrelevant to the legal issues before this Court. Both unsupported statements should be disregarded.

III. Argument

1. The definition of "insured" in RCW 48.22.005 does not apply to RCW 48.22.030 because the latter statute uses the separate phrase "persons insured thereunder."

Javier Gutierrez maintains that "insured" and "persons insured

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[1] Jorge's Brief at 10; *see also id.* at 13 ("Plus Javier had no other way to get automobile insurance because he lived at home with his parents and did not own a vehicle.").

[2] *Id.* at 37.

thereunder" are essentially the same term and therefore have the same meaning. But giving both terms the same meaning would violate the rules that statutes must be interpreted so that all the language used is given effect,[3] and that legislative definitions provided by the statute are controlling.[4] If the legislature had intended those terms to have the same meaning, it would have used precisely the same term. It did not. The legislature therefore intended to convey different meanings. As the courts have said many times, the intent of RCW 48.22.030 is to make each person who is an insured for liability coverage also an insured for UIM coverage.[5]

Javier argues that the statement that the definitions in RCW 48.22.005 apply throughout the chapter "[u]nless the context clearly requires otherwise" imposes a "heightened-ambiguity standard."[6] But the phrase is a common one that the legislative bill-drafting guide recommends be used in all statutory definition sections, and it is used in at

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[3] *Whatcom Cnty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

[4] *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001).

[5] *E.g., Federated Am. Ins. Co. v. Raynes*, 88 Wn.2d 439, 444, 563 P.2d 815 (1977) ("The policy of RCW 48.22.030 requires that insurers make available uninsured motorist coverage to a class of 'insureds' that is at least as broad as the class in the primary liability sections of the policy."), *abrogated in other part by statute as stated in Vadheim v. Cont'l Ins. Co.*, 107 Wn.2d 836, 844, 734 P.2d 17 (1987).

[6] Brief of Respondent Javier Gutierrez at 10–11.

least 600 statutes.[7] Javier cites no case holding that this language places any special restrictions on the interpretation of a statute.

Javier and Jorge further argue that the terms "insured" and "persons insured thereunder"—the critical phrase in RCW 48.22.030(2)—mean the same thing because "persons insured thereunder" is simply the plural of "insured." But the plural of "insured" is "insureds," and, contrary Javier's assertion that this term is "awfully awkward,"[8] the Washington legislature and courts have used it countless times.[9] If the legislature had intended to refer to the same thing, they would have used precisely the same term.

The canons of construction that Javier cites also do not support his position. He argues that the principle of *in pari materia*—that statutes on the same subject should be interpreted similarly—means that the PIP statute and the UIM statute should be interpreted in the same way. But this disregards the different language used in each statutory section; RCW 48.22.005(5) refers to the "insured," while the UIM statute refers to

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[7] *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 99, 285 P.3d 34 (2012).

[8] Javier's Brief at 13; Jorge's Brief at 30.

[9] *E.g.*, RCW 48.19.460 (referring to "underinsured motorist coverage for those *insureds* who are fifty-five years of age and older . . .") (emphasis added); *Cedell v. Farmers Ins. Co.*, 176 Wn.2d 686, 698, 295 P.3d 239 (2013) ("First party bad faith claims by *insureds* against their own insurer are unique and founded upon two important public policy pillars . . .") (emphasis added).

"persons insured thereunder." And the canon of construction that requires reconciliation of contradictory statutory provisions is inapplicable because there is no contradiction between the statutes. Rather, those statutes simply allow for different definitions of insured. Finally, Javier argues that the court should hold that he is covered because UIM policies should be interpreted to extend coverage. This disregards the numerous cases authorizing insurers and policyholders to determine the scope of who is an insured. The general principle that ambiguities in UIM policies should be interpreted to extend coverage does not allow a court to disregard or rewrite a specific, clear definition of who is covered by a policy.

2. All case law supports Patriot's position.

As noted in Patriot's appellate brief, the Washington courts have stated in at least seven separate cases that an insurer and an insured are free to determine the scope of UIM coverage, so long as it is congruent with the scope of liability coverage.[10]

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[10] *Raynes*, 88 Wn.2d at 443; *Smith v. Cont'l Cas. Co.*, 128 Wn.2d 73, 83, 904 P.2d 749 (1995); *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 75, 549 P.2d 9 (1976); *Vasquez v. American Fire & Cas. Co.*, 174 Wn. App. 132, 298 P.3d 94, 98 (2013); *Wheeler v. Rocky Mountain Fire & Cas. Co.*, 124 Wn. App. 868, 103 P.3d 240 (2004); *Fin. Indem. Co. v. Keomaneethong*, 85 Wn. App. 350, 353, 931 P.2d 168 (1997); *see also Dairyland Ins. Co. v. Uhls*, 41 Wn. App. 49, 53, 702 P.2d 1214 (1985) ("'[T]he parties may agree to a narrow definition of insured so long as that definition is applied consistently throughout the policy[.]'") (quoting *Raynes*, 88 Wn.2d at 444).

The respondents' attempts to distinguish this case law fail. First, they claim that the pre-1993 cases are inapposite because they were abrogated by RCW 48.22.005(5). As Patriot General demonstrated in its opening brief, however, RCW 4.22.005(5) does not modify the UIM statute, and the pre-1993 cases are therefore still binding. Moreover, the defendants admit that not one case supports their position.[11]

Jorge and Javier argue that two of the post-1993 cases, *Smith* and *Vasquez*, are somehow inapposite because they involved "commercial policies."[12] *Smith* involved a policy issued to an individual, not a corporate entity.[13] Javier also claims that the definitions of insured in *Wheeler* and *Keomaneethong* "mirrored" RCW 48.22.004(5)(a)'s definition. But neither of those cases states exactly what the definition of "insured" was in the policies at issue. The respondents' attempt to distinguish these cases obscures the more important point: all four of these post-1993 cases clearly state that the UIM statute does not impose any particular scope for the definition of who is insured under a UIM policy.

The respondents overlook that fact that RCW 48.22.005's definition of "insured," if applied to the UIM statute, would have made a

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[11] Javier's Brief at 18; Jorge's Brief at 31.

[12] Javier's Brief at 15–16.

[13] 128 Wn.2d at 76 (stating that policy was issued to "Claude Smith, d/b/a Smitty's Fleet Service").

difference in at least one of the pst-1993 cases, *Keomaneethong*.[14] There, a passenger in the insured's vehicle was denied UIM coverage because the policy only covered the named insured's relatives who lived in the same household. RCW 48.22.005(5)(b) would include the claimant within the definition of "insured" because he was "occupying . . . the insured vehicle with the permission of the named insured . . ." Yet the court did not hold that this statute mandated coverage of the injured party. Rather, the court reiterated the Washington courts' longstanding position: "[W]hen the question revolves around the initial extension of coverage, that is, the definition of who is and is not an insured, public policy is not violated so long as insured persons are defined the same in the primary liability and UIM sections of the policy."[15]

Javier and Jorge also argue that *Cherry v. Truck Insurance Exchange*[16] reads RCW 48.22.005's definitions directly into the UIM statute.[17] However, the cited portion of *Cherry* regarding the definition of "insured" carries little or no weight because it is dictum that appears in a parenthetical statement in a footnote. Another case they cite, *Daley v.*

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[14] 85 Wn. App. 350, 353, 931 P.2d 168 (1997).
[15] *Id.* at 353.
[16] 77 Wn. App. 557, 563 n.3, 892 P.2d 768 (1995).
[17] Javier's Brief at 17; Jorge's Brief at 33.

Allstate Insurance Company,[18] regarding the definition of "bodily injury," also has no precedential value because it was reversed by the Supreme Court. And as Javier points out, *American States Insurance Co. v. Bolin*[19] merely "implies"—rather than holds or even states—that the definition of "automobile" in RCW 48.22.005 applies to the UIM statute.[20]

Javier claims that the Washington courts have not held that RCW 48.22.005(5) abrogates this line of cases because "the vast majority of Washington carriers have adopted [RCW 48.22.005(5)]'s definition of 'insured' into their UIM policy language. . . "[21] This sweeping assertion is not, however, supported by citation to the record, to any case, or to any other authority. Javier's proffered explanation for why the *Touchette* line of cases has been abrogated should therefore be disregarded.

Finally, Javier argues that Patriot's position harms "the children of our state" because they can obtain UIM coverage only through their parents' policies. But this overlooks the obvious fact that the Patriot policy allowed Jorge to add Javier to the policy simply by including him on the application. The policy does not limit coverage to all relatives over a certain age; rather, it simply requires relatives 14 and over to be listed on

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[18] 86 Wn. App. 346, 355, 936 P.2d 1185 (1997), *rev'd*, 135 Wn.2d 777, 958 P.2d 990 (1998).
[19] 122 Wn. App. 717, 94 P.3d 1010 (2004).
[20] Javier's Brief at 17.
[21] Javier's Brief at 18.

the application or added by endorsement before a loss. Ruling in Patriot's favor does not by any means allow insurers to deprive children of UIM coverage.

3. Cases invalidating household or family exclusions are inapposite.

Jorge and Javier argue that the Patriot policy violates the public policy expressed in the UIM statute. They cite a case holding that family member exclusions to UIM policies are invalid, and they maintain that the language in the Patriot policy defining who is insured is an exclusion that violates this rule. This argument fails because the language at issue is not an exclusion but is rather part of the definition of who is and is not insured, and case law clearly permits insurers to shape that definition without violating public policy.

The respondents' argument blurs the critical distinction between grants of coverage and exclusions from coverage. The cases on which they rely struck down exclusions, rather than mandating a particular definition of "insured." In *Tissell v. Liberty Mutual Insurance Co.*,[22] the Washington Supreme Court invalidated a UIM provision that excluded coverage for a family member who was a named insured. The policy in that case included the named insured's family member as a "covered person," but excluded

[22] 115 Wn.2d 107, 795 P.2d (1990).

UIM coverage for a vehicle owned by a family member. The insurer denied UIM coverage to Tissell, a named insured, because she was injured while riding in the family car. *Tissell* invalidated this so-called "family member exclusion" as against public policy because it was directed at a class of victims, rather than conduct that affected the insurer's risk. *Tissell* explained that, although an insurance company may exclude persons from their status as "insured," once an insurance company has decided to insure a driver, it cannot deny coverage based on the identity of a victim injured by its insured driver.[23]

A second case, cited by Jorge, is also not on point. In *Mutual of Enumclaw Insurance Co. v. Wiscomb*,[24] the plaintiff was injured when the motorcycle she was riding collided with an automobile being driven by her husband. A policy excluded coverage for persons related to the driver. Invalidating this exclusion, *Wiscomb* held that an insurer that agrees to indemnify an insured against damage caused by the insured's negligence may not exclude "an entire class of innocent victims."[25]

While the UIM statute prohibits certain exclusions, it permits insurers and insureds to define the scope of who is insured by a UIM policy. Washington courts have long held that the UIM statute "does not

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[23] *Id.* at 108.
[24] 97 Wn.2d 203, 643 P.2d 441 (1982).
[25] *Id.* at 208.

mandate any particular scope for the definition of who is an insured in a particular automobile insurance policy."

The distinction between grants of coverage and exclusions is not merely semantic, as Javier claims; Washington courts treat the two very differently. For instance, an insured has the initial burden of showing that the loss falls within the scope of the policy's insured losses. If that burden is met, the insurer then has the burden to show that the loss is excluded by specific policy language.[26] The relevant language in the Patriot policy appears in the definitions section, not in the separate exclusions section. *Tissell* and *Wiscomb* are therefore inapplicable.

The distinction between the extension or grant of coverage and exclusions from coverage is made clear in several Washington cases, one of which is *Farmers Insurance Co. v. Miller*.[27] In that case, Lane Miller obtained an auto policy, which included uninsured motorist coverage, from Farmers. Miller's son was later killed while riding as a passenger in an uninsured vehicle. Farmers rejected Miller's uninsured motorist claim because his son was not an insured. The policy stated that Farmers would provide uninsured motorist coverage to "the insured," which the policy defined to include a relative of the named insured who was a resident of

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[26] *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000 (1992), 119 Wn.2d at 731.

[27] 87 Wn.2d 70, 549 P.2d 9 (1976).

the same household and who did not own a motor vehicle. Miller's son owned a car, so he did not come within the definition of insured. The trial court granted summary judgment to Farmers. On appeal, Miller argued that the public policy expressed in RCW 48.22.030 prohibited this type of clause. The court rejected this argument because the statute "does not mandate any particular scope for the definition of who is an insured in a particular automobile insurance policy." Cases invalidating exclusions were not on point because the issue before the court was the scope of the policy's initial grant of coverage, and not an exclusionary clause, and because the insured was defined consistently throughout the policy.

4. Patriot can decline to provide coverage to persons who are not insured by the policy without a showing of prejudice.

Jorge argues that the final sentence of the definition of "relative" is akin to a cooperation or notice clause, and that, like those clauses, it should be enforceable only if the breach of the clause prejudices the insurer.

The language is not, however, analogous to a cooperation or notice clause. It appears in the definition section of the policy, rather than the separate conditions section. It therefore defines who is and who is not an insured under the policy.

Washington courts have never imposed a prejudice requirement on

such a term. The need to show prejudice has only been applied to procedures for handling a claim after a loss: the duty to notify the insurer of a claim,[28] the duty to cooperate with the insurer's investigation and defense of the claim,[29] and the duty not to settle a claim without authorization.[30] No case law supports extending the prejudice requirement to the determination of who is insured by a policy.

Case law does affirmatively establish that an insurer is not required to show that it would be prejudiced by including someone within the definition of insured who is not in fact an insured. For instance, in *West Coast Pizza Co., Inc. v. United National Insurance Co.*,[31] the plaintiff completed an insurance application with National Continental Insurance Company, listing various restaurants and pizza-delivery drivers. West Coast did not disclose that it wanted coverage for a related business, Mad Pizza, which employed some of the listed drivers and owned some of the listed restaurants. After a Mad Pizza employee caused an auto accident, West Coast tendered to National Continental, which denied the claim. In West Coast's suit against the insurer, the Court of Appeals held that Mad

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[28] *Canron, Inc. v. Federal Ins. Co.*, 82 Wn. App. 480, 485, 918 P.2d 937 (1996).

[29] *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 377, 35 P.2d 816 (1975).

[30] *Pub. Util Dist. No. 1 of Klickitat Cnty. v. International Ins. Co.*, 124 Wn.2d 789, 803–04, 881 P.2d 1020 (1994).

[31] 166 Wn. App. 33, 41, 271 P.3d 894 (2011).

Pizza was not covered because it was not a named insured in the policy and there was no evidence that the parties had mutually intended to include Mad Pizza as an insured. The court did not inquire whether the carrier was prejudiced by West Coast's failure to list Mad Pizza on its application. Rather, the court focused on whether Mad Pizza was a covered entity under the terms of the policy. The court should use the same analysis here.

5. Respondents are not entitled to *Olympic Steamship* fees.

Under *Olympic Steamship*, an insured who succeeds in obtaining the full benefit of an insurance policy in a coverage action is entitled to reasonable attorneys' fees and costs.[32] Because Javier is not entitled to coverage, neither respondent is entitled to a fee award.

IV. Conclusion

This Court should apply longstanding case law by reversing the order granting summary judgment to the respondents and remanding to the trial court with instructions to enter summary judgment for Patriot.

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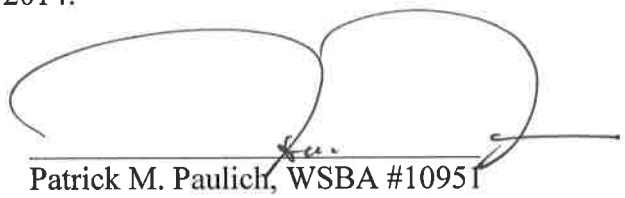
[32] *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991).

Dated this 11th day of June, 2014.



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Certificate of Service

I declare under penalty of perjury under the laws of the State of Washington that I caused the document to which this certificate is affixed to be served on the following counsel in the manner described below:

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