SUPREME COURT FOR
THE STATE OF WASHINGTON

No. 97312-1

JOSEPH M. THOMPSON, an individual,
Petitioner,

vs.

PROGRESSIVE DIRECT INSURANCE COMPANY,
Respondent.

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

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INTRODUCTION

In this case, the petitioner/Thompson, a passenger, was injured in a one car accident caused by Progressive's insured/the driver. Progressive paid Thompson the limits of its insured's liability insurance. But, applying the language of the policy which is grounded in this Court's decisions in *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 1, 665 P.2d 891 (1983), *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 794 P.2d 1259 (1990), and *Tissell v. Liberty Mut. Ins. Co.*, 115 Wn.2d 107, 795 P.2d 126, (1990), it refused to pay him underinsured motorist benefits. Applying that well-established precedent, the Court of Appeals agreed that Progressive's decision was correct.

For the first time, Petitioner concedes the *Millers/Blackburn* cases control here. He argues now that they should be overruled. But, the decisions were well and soundly reasoned. In the more than three decades since they were issued, the legislature has not acted to overrule them or amend the UIM statute to alter their holdings. As a result, they are the law of the land and staples of Washington insurance law.

Thompson has given the Court no record or reasoned basis for overruling those decisions. The only change he points to is the legislature's 1993 adoption of laws requiring insurers to offer personal injury protection insurance which included a definition of the term "insured" used therein. But the statutes did not address underinsured

motorist insurance. In the history of those statutes, the legislature did not mention the *Blackburn* or *Millers* decisions. Therefore, those statutes do not support overruling the established precedent.

IDENTITY OF RESPONDING PARTY

Progressive Direct Insurance Company, defendant in the trial court and appellant in the Court of Appeals, hereby responds to Petitioner Thompson's Petition for Review.

ARGUMENT

Rule of Appellate Procedure 13.4(b) provides that a petition for review will be accepted by the Supreme Court 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 a published 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.

This case does not satisfy subsections (1) and (2) because, as Thompson acknowledges, the Court of Appeals' decision follows the decisions of this Court and the courts of appeals. Instead, Thompson pins review on subsection 4. His primary contention is that, after nearly four decades, this Court should adopt the reasoning of the dissent in *Blackburn*. Petition at 6-7 ("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.").

"'[O]verruling prior precedent should not be taken lightly.'" *Hardee v. Dept. of Social & Health Servs.*, 172 Wn.2d 1, 15, 256 P.3d 339 (2011)(quoting *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009)). To abandon established precedent, there must be "'a clear showing that an established rule is incorrect and harmful.'" *Fergen v. Sestero*, 182 Wn.2d 794, 809, 346 P.3d 708 (2015) (quoting *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006)(quoting *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004)). "'The Legislature is presumed to be aware of judicial interpretation of its enactments,' and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language." *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 238, 236 P.3d 182, (2010) (quoting *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *Friends of Snoqualmie Valley v. King County Boundary Review Bd.*, 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992))).

Millers, *Blackburn*, and the limitation on those decisions expressed in *Tissell*, have been the law of the land for at least three decades. As the policy involved in this case shows, insurers issuing insurance in this state have written their policies to comport with the holdings in those cases.

Since the Court issued them, the legislature has not changed the UIM statute to address the decisions, or shown any intent to overrule their holdings. Many other court decisions have relied upon their analysis. See, e.g., *Holz v. North Pacific Ins. Co.*, 53 Wn. App. 62, 765 P.2d 1306 (1988); *Kyrkos v. State Farm Mut. Auto. Ins. Co.*, 121 Wn.2d 669, 852 P.2d 1078 (1993); *Greengo v. Public Employees Mut. Ins. Co.*, 135 Wn.2d 799, 959 P.2d 657 (1998); *Vasquez v. American Fire & Cas. Co.*, 174 Wn. App. 132, 298 P.3d 94 (2013). Against this backdrop, Thompson offers nearly nothing but a disagreement with the holdings in those cases in support of his contention. As such, he fails to make a clear showing that *Blackburn* and *Millers* are "incorrect and harmful."

Initially it bears noting that this Court has already done what petitioner requests: Review the public policy of the UIM statute in light of the dissent in *Blackburn.* It did that in *Blackburn* itself, within the majority decision. Seven justices considered and rejected the dissent's analysis.

More important, the dissent's reasoning was not sound then and is not now. The dissent rested on the central premise that the controlling policy behind the UIM statute is "full compensation for injured persons." The dissent then measured all opposing arguments against that premise. Thompson does the same. Petition at 8. But, the Supreme Court has rejected the premise as incorrect. See *Greengo v. Public Employees Mut.*

Ins. Co., 135 Wn.2d at 809-10. And, the dissent's myopic vision of the policy behind the statute led the two justices to fail to consider the full intent of the legislature. Accord, *Tissell*, 115 Wn.2d at 120, 795 P.2d 126 (Callow, C.J., concurring with six other justices)("[T]he [lead opinion's] fixation on the UIM statute's public policy of 'full compensation' is misplaced...."). In contrast, the *Blackburn* majority correctly recognized that restrictions and limitations within the UIM statute showed that compensation is not the only policy behind the UIM statute. After considering the statute as a whole, including its purpose of providing a low-cost floating layer of coverage, and the fact that persons in Thompson's position can purchase that layer on their own, the majority reasoned that "no public policy requires an insurer to provide an insured with a third source of recovery." The Court also agreed with the *Millers* court's analysis that an insured who wants to protect passengers from the insured's own negligence may and should do so by increasing the limits of liability insurance, not shifting the risk to the lower cost UIM insurance. 115 Wn.2d at 91-92.

Thompson argues that *Millers* and *Blackburn* are unsound because they leave some possible claimants – a class he characterizes as "our most vulnerable citizens" – potentially without the ability to obtain UIM coverage. In essence he argues for an expansion of the *Tissell* exception.

The argument is for another case and another day. Thompson is

not among the "vulnerable" claimants, and has no standing to argue for them. Thompson falls squarely among those persons addressed in *Blackburn*: Unrelated passengers who have the ability to insure themselves. As a result, even if the Court applied *Tissell* to the class of possible claimants Thompson describes, the decision would not apply to him. He is not, therefore, a proper litigant to make the argument.

Moreover, Thompson has not provided the Court with evidence that the class of possible claimants – persons who cannot buy automobile insurance – even exists, or that the *Millers/Blackburn* analysis harms persons within that class. He has not provided testimony or evidence that insurance is not available to such possible claimants, or at what cost, or even if a claim has been made by any such claimant. That is because Thompson raises the argument for the first time in his petition for review. Because the Court has no record on which to assess the merits of his argument, the issue of whether the *Tissell* exception should be expanded to others should be left for another case.

The only change to which Thompson points as justifying reconsideration of *Millers* and *Blackburn* is the legislature's 1993 enactment of a law creating personal injury protection coverage, which included a definition of "insured." But, his contention that this enactment implicitly overruled *Millers* and *Blackburn*, or even changed the UIM landscape, is unfounded.

Certainly, the legislature may abrogate a court's interpretation of a statute by amending the statute. See, e.g., *Ohio Security Ins. Co. v. Axis Ins. Co.*, 190 Wn.2d 348, 355, 413 P.3d 1028 (2018). There is, however, no indication the legislature did or intended to do that directly or indirectly through the 1993 act. That is shown by both the wording of the act and its history.

The part of the 1993 act Thompson relies upon is the definition of "insured." However, the UIM statute does not use the word "insured" as a noun as it is defined in the 1993 act, so the definition does impact the UIM statute. See RCW 48.22.030

That is consistent with the history of the act. The 1993 act was entitled "Motor Vehicle Insurance – Personal Injury Protection Benefits." 1993 Wash. Laws ch. 242 . Consistent with its title, the act states its purpose: "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." *Id.* Legislative history shows that the legislature's sole focus was on providing for mandatory offering of personal injury protection insurance, not changing the fundamental operation of UIM insurance. See, e.g., H.B. Rep. on H.B. 1233, 53rd Leg., Reg. Sess. (Wash. Feb. 4, 1993); S.B. Rep. on E.S.H.B. 1233, 53rd Leg., Reg. Sess. (Wash. Apr. 1, 1993); H.B. 1233, 53rd Leg., Reg. Sess., Legislative Digest (Wash. 1993); E.S.H.B. 1233, 53rd Leg.,

Reg. Sess., Legislative Digest (Wash. 1993). Accordingly, in 2003, when the legislature amended the act, including the definitions section, the amendments pertained exclusively to personal injury protection coverage as well. 2003 Wash. Laws ch. 115; see House Comm. on Financial Institutions and Insurance, Bill Analysis on H.B. 1084, 58th Leg., Reg. Sess. (Wash. 2003); House Comm. on Financial Institutions and Insurance, Senate Comm. on Financial Services, Insurance and Housing, Final Bill Report, H.B. 1084, 58th Leg., Reg. Session (Wash. 2003). Neither the act itself, nor legislative history related to the act, mention or reference the UIM statute, UIM insurance, the definition of underinsured motor vehicle, *Blackburn*, *Millers* or any court decision, or even the holdings stated in *Blackburn* and *Millers*. Nothing in the 1993 act or its history suggests the legislature intended to change how courts apply the UIM statute.

Likewise, nothing in the 1993 legislation even impliedly changed the underlying basis for the *Blackburn* court's decision. The *Blackburn* court based its decision on the fact that the UIM statute contemplated two distinct motor vehicles: the motor vehicle with respect to which uninsured motorist coverage is issued and the "uninsured or underinsured" motor vehicle. In addition, the court noted, the statute distinguishes between the person insured under the liability coverage and the owner or operator of the uninsured or underinsured motor vehicle. 115 Wn.2d at 90, quoting

Millers Cas. Ins. Co. v. Briggs, 100 Wn.2d 1, 6, 665 P.2d 891 (1983). The 1993 legislation did not change any of those characteristics of the UIM statute.

In the end, however, Thompson's reasons for contending the statute either overruled *Millers/Blackburn* or impact this case are unsupportable. Thompson contends the act's definition of "insured" must be read into UIM policies, and when that is done, the definition nullifies or overrules *Blackburn*. His theory is that "the definition statute requires all policies issued in Washington to provide underinsured motorist coverage to individuals occupying an insured automobile with the permission of the named insured." (CP 12)

The premise is obviously incorrect. First, neither the UIM statute nor the 1993 act require insurers to include UIM coverage in policies. The UIM statute only requires insurers to make UIM coverage available to policyholders. RCW 48.22.030; *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 250, 850 P.2d 1298 (1993).

More importantly, the definition of insured is not material to either this case or *Millers* and *Blackburn*. As noted above, the UIM statute does not use the word "insured" as a noun, so the definition does not impact the UIM statute. Moreover, there is no dispute that, even if the statutory definition applied, Progressive's policy definition of insured was consistent with it, or that Thompson fell within that definition. Likewise,

in *Millers* and *Blackburn*, there was no dispute that the claimant was an insured under the policy. At issue here, and in those cases, was the definition of underinsured motor vehicle, not the definition of insured. The definition of underinsured motor vehicle is provided by the UIM statute, not the personal injury protection insurance statute. RCW 48.22.030(1). Because the issue involved in this case does not turn on the definition of insured, Thompson's reliance on the 1993 act creates a false issue that does not exist.

CONCLUSION

The holdings in *Blackburn* and *Millers* do not present issues of substantial public import warranting review. The decisions are soundly reasoned. They have been the law of the land for decades. They have guided insurers in the drafting of insurance policies, and courts in interpreting and applying those policies, over that time. Thompson has shown no harm from the decisions. The legislature has not overruled the holdings in those cases. And, the 1993 act creating personal injury protection insurance did not do so by implication. Because Thompson

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fails to present good reason for the court to abandon this decades old law, respondent Progressive asks the court to deny his Petition for Review.

Dated this 10th day of June, 2019.

/s/ Timothy R. Gosselin

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CERTIFICATE OF SERVICE

I certify that, per agreement, I emailed a copy of the foregoing Appellant's Second Motion to Extend Time to File Reply Brief of Appellant to:

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