97703-8

No. 77525-1-I
(King County No. 17-2-12030-8 SEA)

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

CARLOS PACHECO
Plaintiff-Appellant,

v.

OREGON MUTUAL INSURANCE COMPANY,
Defendant-Respondent.

PLAINTIFF-APPELLANT'S PETITION FOR REVIEW

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ATTORNEYS FOR PLAINTIFF-APPELLANT

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I. IDENTITY OF PETITIONER

Petitioner, Carlos Pacheco, Plaintiff-Appellant below ("Insured"), is an Oregon Mutual Insurance Company ("OMI") underinsured motorist property damage ("UIM") insured who was denied coverage for loss of use under an express exclusion to his statutorily mandated UIM coverage.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the August 19, 2019 published decision, *Pacheco v. Oregon Mut. Ins. Co*., __Wn.App.2d __, __ P.3d.__ (Div. 1 2019) (Appendix A hereto; hereafter "*Pacheco*") upholding OMI's exclusion of "damages" for loss of use "because of property damage" under RCW 48.22.030(3).[1]

III. ISSUES PRESENTED FOR REVIEW

(1) Do RCW 48.22.030(2) and (3), construed together in conjunction with the statutory purposes and existing case law, only require a scope of UIM Property Damage coverage for "physical damage," or does the statute require coverage for "damages" a policyholder is "legally entitled to recover" from an underinsured motorist "because of" / "as a result of" "property damage" to the insured vehicle.

[1] Insured does not seek review of the portions of the decision striking OMI's exclusion of damages for diminished damages because of property damage. *Pacheco* at ¶18-19, 22.

(2) Can an insurer exclude loss of use "damages" which are "the result of" / "because of" "property damage" to the insured vehicle from the statutorily mandated UIM coverage under RCW 48.22.030.

IV. STATEMENT OF THE CASE

On May 15, 2016, an at-fault uninsured motorist caused physical damage to Insured's 2014 Audi Allroad Quattro Wagon. CP82, CP101. Insured carried UIM coverage through Respondent insurer OMI. CP39. The policy's coverage clause, consistent with RCW48.22.030(2)'s coverage language, states (bolding in original) that "**We** will pay damages for **property damage** which a covered person is legally entitled to recovery" from the uninsured driver. The policy's *definitions section* further states: "'**property damage'** means physical injury to or destruction of" the insured vehicle."[2]

The Audi's property damage caused Insured to incur $14,074.06 in repair costs, which were covered by OMI as "damages for property damage" the insured "is legally entitled to recover" under the policy. CP105, 111. The property damage to the Audi also caused $7,950.00 in

[2] This language is standard form policy language found in numerous UIM policies. See e.g. *Kalles v. State Farm*, 7 Wn.App. 3d 330, 331, 433 P.3d 523 (Div. 2 2019) (construing functionally identical "compensatory damages for property damage" the insured is "legally entitled to recover" coverage language as covering loss of use, irrespective of definition of "property damages" as "physical damages").

diminished value damages. R90. OMI denied coverage for these damages based on an *express exclusion* in the OMI auto policy. CP112.

The property damage to Insured's Audi further resulted in $2,084.40 in damages for loss of use. CP119. While OMI paid $1,050.00 for rental reimbursement under a no-fault coverage for which Insured had paid an *additional* $24 premium *on top of the premium paid to OMI for the statutorily mandated UIM coverage*, (CP111), the policy limits on the no-fault rental reimbursement coverage left Insured with $318.71 in out-of-pocket rental expenses and an additional $715.69 in uncompensated damages, resulting from the *property damage* to his vehicle, as a result of his inability to use his Audi. CP115, CP119. While there is no dispute that these damages would have been recoverable from the at fault driver, *had he/she been insured* (see WPI 30.16) OMI denied Insured's request for damages for loss of use due to an express exclusion OMI had written into the policy. CP112.

Insured sued and the King County District Court voided the diminished value exclusion, but not the loss of use exclusion. CP11. On Appeal, the King County Superior Court, while stating that the UIM statute was "not a model of clarity or draftsmanship" upheld both exclusions without providing a reasoned explanation. CP504-505. The

Superior Court certified its Order as being one where there was "substantial ground for difference of opinion" under CR 54(b). CP529.

Division I granted review, reversed the Superior Court and reinstated the District Court's decision, stating that "We hold that the exclusion for diminished value violates the language of the statute [RCW 48.22.030], but that the exclusion for loss of use does not violate either the language of the statute or public policy." *Pacheco* at ¶ 1. The *Pacheco* Court reasoned: "The plain reading of the statutory language [in RCW 48.22.030(3)] requires that physical damage to the insured motor vehicle must be covered. Other property damages, including consequential damages, are not require to be covered by the UIM policy." *Id*. at ¶17.

The Court reached this conclusion by reasoning that RCW 48.22.030(2)'s language stating that: no automobile policy "shall be issued…unless coverage is provided therein…for the protection of persons insured thereunder who are legally entitled to recover damages…because of…property damage" simply stated *who must be insured*, it did not state *what must be covered*, (i.e it was not a "*coverage clause*"), Instead, the Court believed that language in RCW 48.22.030(3) defined the *limits* on the amount of coverage and what would trigger coverage, stating:

> "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" constituted the scope of covered damages clause. *Pacheco* at ¶15-16.

In so holding the *Pacheco* Court found the scope of coverage to be set by RCW 48.22.030(3) and found the statutory term "damages" to mean the same thing as "property damage". *Id*. at ¶16-17.

As discussed herein, the *Pacheco* decision cites to no authority to support its reasoning, is inconsistent with the actual language and structure of RCW 48.22.030(2), (3) and how insurers have interpreted the statutory UIM coverage obligation, is in conflict with the reasoning of multiple decision of the Courts of this state which find the statutory phrase "damages because of property damage" to define the *scope of coverage provided; i.e. what "damages" are recoverable*. See RAP 13.4(1), (2).

The decision, if not reviewed, by allowing insurers to exclude common everyday "consequential damages" *resulting from* (or "because of") property damage (such as loss of use and towing charges) from UIM coverage will likely impact *hundreds of thousands of insureds in this State* who, when they suffer property damages caused by uninsured motorists will lose "the protection of persons" "who are legally entitled to recovery

damages…because of…property damage" which RCW 48.22.030(2) expressly sought to provide. See RAP 13.4(4).

V. ARGUMENT

A. *The Court of Appeals' Decision and Reasoning Conflicts with UIM Decisions of the Supreme Court and Court of Appeals.*

The Court of Appeals' decision conflicts with the Statutory language as interpreted in prior cases; with appellate opinions distinguishing "damages" (plural) from " property damage" (singular); and with the Legislature's intent in mandating that UIM coverage, when purchased, indemnify policyholders for financial harm caused by physical/property damage to their covered automobiles caused by uninsured drivers. As such, review is appropriate under RAP 13.4(1), (2).

Any analysis of the UIM statute must start with the fact that the Legislature drafted the statute "to protect innocent victims of motorists of underinsured motor vehicles." RCW 48.22.030(12). Multiple decisions, starting with *Britton v. Safeco Ins. Co*., 104 Wn.2d 531 707 P.2d 125 (1985) have held that "we construe the purpose of the underinsured motorist aspects of the new underinsured motorist statute as allowing an injured party to recover those damages which the injured party would have received had the responsible party been insured" *Id*., see e.g. *Hamilton v.*

Farmers Ins. Co., 107 Wn.2d 721, 727, 733 P.2d 213 (1987) (quoting *Britton* and stating that "[t]he intent of the statute is to provide full compensation to the insured under an underinsured motorist policy."); *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 87-88, 794 P.2d 1259 (1990) (quoting *Britton*, and stating "UIM insurance provides a source of indemnification when the tortfeaser does not provide adequate protection."). Notably, each of these cases looks to the phrase "legally entitled to recovery damages…because of…bodily injury, death, or property damages" in RCW 48.22.030(2) for what damages *are covered*, not to, as did the *Pacheco* Court, the definitional language regarding covered risks in RCW 48.22.030(3).

Daly v. Allstate Ins. Co., 135 Wn.2d 777, 782-3, 958 P.2d 990 (1998) is directly contrary to the interpretation of the relevant language of the UIM statute in *Pacheco*. In *Daly* this Court stated that "[t]he Washington Legislature mandates UIM coverage for insured persons who are legally entitled to recover damages from owners of underinsured motor vehicles for 'damages ... because of bodily injury, death, or property damage....' RCW 48.22.030(2)." As such *Daly* found, and quoted, *the damages which were coverage* (i.e. the *scope* of coverage) in the statutory wording of 48.22.030(2) – *not subsection (3)* as did *Pacheco* at ¶15-16.

The *Daly* Court focused, as Insured argued below and should have occurred in this case, on the insurance term of art as to the scope of coverage "damages *because of* bodily injury" ("property damage" in this case), and whether the damages sought "arise as a result of" the event that triggers coverage. 958 P.2d at 992. As *Daly* held, citing to multiple prior decisions, "the Legislature allows UIM coverage to be limited to damages suffered *as a result of* 'bodily injury'" *Id*., 958 P.3d at 998, & id., at 998 (noting that an exclusion for damages "unrelated to" physical injury was permitted as it "directly mirrors the coverage mandated pursuant to Washington's UIM statute"). The *Pacheco* decision at ¶ 15-16 directly conflicts with, and does not address, this interpretation of the UIM statute, instead looking at the term "property damage" *in isolation*, rather than requiring coverage for those 'damages" (with an "s") which are "as a result of" and "because of" the covered loss, here "property damage"[3]

[3] By reading these terms out of the policy as simply being an unnecessary expression of *who* is covered (something that is already made clear in the phrase "for the protection of persons insured thereunder") and as such in essence writing them out of the policy, the *Pacheco* Opinion is also in conflict with the rules of statutory interpretation as expressed in multiple cases. E.g. *Jametsky v. Olsen*, 179 Wn.2d 756, 761-62, 317 P.3d 1003 (2014) ("If possible, we must give effect to [the] plain meaning [of a statute] as an expression of legislative intent. This plain meaning is derived from the context of the entire act"); *Homestreet, Inc. v. State, Dept. of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009)("[E]ach word of a statute is to be accorded meaning."); *Kasper v. City of Edmonds*, 69 Wn.2d 799, 804, 420 P.2d 346 (1966) (Statutes are to be construed so "no clause, sentence or word shall be superfluous, void, or insignificant.").

Prior to the *Pacheco* opinion upon which review is sought, Courts have also repeatedly, and favorably to the Insured, addressed the distinction between "damages" and "property damage" in the context of insurance coverage, a line of authority argued below that the Court below did not address, and conflicts with its reasoning. *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 428-29, 38 P.3d 322 (2002) construed functionally and materially identical "legally obligated to pay as damages because of . . . property damage" language, finding that (consistent with *Daly*) it triggered broader coverage than simply "physical damage":

> The Court of Appeals seemingly confused the concept of "property damage" with that of "damages" . . . In *Boeing [Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990)] for example, we explained the term "damages" in an insuring agreement refers to the cost of compensating a claimant for damage done to the property. Id. (citing Webster's Third New International Dictionary 517 (1971)). This is vastly different from "property damage," which is defined by the policy as "physical injury to or destruction of tangible property." CP at 296. It follows that "damage" must be distinguished from "damages." See *Am. Stevedores v. Porello*, 330 U.S. 446, 450 n.6, 67 S. Ct. 847, 91 L. Ed. 1011 (1947). "Damage" means the actual loss, injury, or deterioration of the property itself. Id. "Damages," on the other hand, means compensating loss or damage. Id.

The phrase that the Court below found to be a limit on coverage to "property damage", is instead what *triggers* coverage for "damages"

which are as "a result of" or in the words of the UIM statute "because of" that "property damage".[4] Other cases cited below also hold "property damage" to be a trigger for coverage of "damages," not a limitation on the scope of recoverable compensatory damages. See e.g. *American National Fire Ins. Co., v. B & L Trucking & Constr. Co., Inc.,* 134 Wn.2d 413, 428-9, 951 P.2d 250 (1998); *Griffin v. Allstate Ins. Co*., 108 Wn. App. 133, 138, 29 P. 3d 777, 780 (2001) ("triggering event" for policy reading "legally obligated to pay because of . . . property damages" is filing of lawsuit by the other driver); *Transcontinental Ins. Co. v. Wa. Public Utilities Districts' Utility Sys*., 111 Wn.2d 452, 469-470, 760 P. 2d 337 (1988) (becoming "legally obligated to pay" is triggering language for coverage for damages). Cases looking at the same question from the opposite perspective have reached the same conclusion. *E.g., Hayden v Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 65-66, 1 P.3d 1167 (2000) (holding that a policy exclusion for loss of use of property *that has not*

[4] This is also the reasoning of *Kalles,,* 7 Wn.App. 3d 330 (Div 2 2019) which was cited to the *Pacheco* panel below, and holds in direct conflict with the decision below that it was reasonable that the coverage clause: " 'compensatory damages for property damage'…should be read to 'provide/include the same elements of damages that would be recoverable from the at-fault tortfeasor under Washington law' and that 'for property damage' acts as triggering language rather than limiting language." *Id*. at ¶12 (internal citations omitted). *Kalles* is in direct conflict with the reasoning of *Pacheco* as to what constitutes the coverage language under the policy.

been physically injured was permissible as it was not "damages because of property damage.")[5]

These holdings are all *directly contrary* to the reasoning and holding of the Appellate Court below which allowed the exclusion of damages "because of" or "as a result of" property damage, requiring instead that those damages be (as it understood it) the actual coverage trigging "property damage"

As shown above, all prior Washington decisions, and insurers such as OMI and State Farm in *Kalles* in drafting their UIM coverage clause[6] have looked to the statutory phrase and repeatedly construed the insurance term of art "damages because of bodily injury/property damage" found in RCW 48.22.030(2) to define what is covered. There are strong textural reasons in the UIM statute why this is correct, which the *Pacheco* Opinion did not address. RCW 48.22.030(2) states that policies shall not be issued "unless coverage is provided…*for the protection of* persons insured

[5] Insured notes that he is not suggesting that RCW 48.20.030(2) requires UIM loss of use coverage without there first being "physical damage" to the car; here that trigger has been satisfied.

[6] Insurers have implicitly agreed – in direct contrast with the *Pacheco* decision – in drafting their policies that the operative language under the UIM statute is a form of the phraseology "damages because of property damage" not simply "property damage." As such policies do not say that "we will cover only the property damage to the insured vehicle" or similar language.

thereunder who are legally entitled to recover *damages because of …property damage*" (emphasis added). That this statutory language contains a description not just of *whom* is to be covered, but of what *losses are to be covered* ("damages because of property damage/bodily injury" which the insured is "legally entitled to recover") is made clear by the use not once but twice in RCW 48.22.030(3) of the phrase "coverage required by subsection (2)." This makes clear that the scope of coverage (i.e. what "damages" are to be protected against and recoverable) is found in subsection (2) not in subsection (3) as *Pacheco* read the UIM statute.

While the *Pacheco* decision reasoned that the scope of coverage language is in subsection (3), that section in fact tells the reader to look to "subsection (2)" and the language therein to determine what coverage is required. Further, by its own terms, the phrase "property damage coverage required under subsection (2) *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" (emphasis added) is not the statutory *coverage* clause (i.e. an explanation of what damages are covered), rather it is *a further definition* of the language "property damage" in subsection (2) as to what trigger's coverage for "damages because of" that event.

The policy reasons for allowing an insurer to limit *what property is being insured* (i.e. what "property damage" would trigger coverage) is made clear by the words of the statute itself. Unlike the term "because of bodily injury" which is limited to those covered by the policy and as such needs no further definition,[7] there can be many types of triggering "property damage" requiring some further explanation as to what risks are to be covered. The Legislature drafted RCW 48.22.030(3) with the intent to allow a narrower scope of UIM property damage coverage than the scope of liability coverage required to comply with Washington's Financial Responsibility Act. As such, the statute does not require that coverage be triggered by every type of property damage a collision with an uninsured driver proximately causes, making clear for example that coverage triggered by property damage to "the contents thereof" (which would be an additional risk beyond the value of the insured vehicle) is not required by the UIM statue. *Id*. This reading of the language of RCW 48.22.030(3) as limiting the insurers mandatory UIM exposure *to that flowing from the insured vehicle itself* is supported by *Schelinski v.*

[7] See e.g. *Allstate Ins. Co. v. Hammonds*, 72 Wn.App. 664, 668, 865 P.2d 560 (1994)(finding that damages for "loss of consortium" under UIM statute must be the result of physical injury *to a person covered under the policy*, not an uncovered individual; the insurer can determine "the conditions for coverage" to arise)

Medwest Mut. Ins., 71 Wn. App. 783, 786, 863 P.2d 564 (1993) which involved an exclusion from UIM coverage for non-owned vehicles and "a trailer of any type" and held coverage need not be provided when the insured was driving a non-insured vehicle. *Id*.

A driver who negligently damages an automobile, the contents inside the vehicle, and a trailer towed behind, owes damages for all three. Yet, the Legislature only mandates UIM coverage for "damages" triggered by "physical damage to the insured motor vehicle" itself under the language of RCW 48.22.030(3) unless the insurer elects to cover contents or trailers or for example a camper shell, and presumable the policyholder then pays a premium to cover the additional risk presented by their being more insured property.[8] This is the correct reading of RCW 48.22.030(3), not that it acts as a *limit* on consequential damages as *Pacheco* at ¶17 (holding "Other property damages, including consequential damages, are not required to be covered by the UIM policy.") incorrectly found.

B. *Loss of Use are "damages" that result from and are "because of property damage" and as such are covered by RCW 48.22.030(2)*

[8] Similarly, if the accident pushed the insured vehicle into the insured's garage, damages to that garage would not be "damages because of property damage", to the insured vehicle or in the term used in *Daly* and other cases "damages as a result of" the property damage which triggered coverage.

"Damages," in the context of property, are objectively verifiable (monetary or non-monetary but monetized) losses, including repair costs (or replacement costs in the case of a total loss), diminished value, and loss of use. RCW 4.56.250(1)(a); *Kane v. Nakamoto*, 113 Wash. 476, 481, 194 Pac. 381 (1920); WPI 30.10; WPI 30.12; *Holmes v. Raffo*, 60 Wn.2d 421, 374 P.2d 536 (1962); *Straka Trucking v. Estate of Peterson*, 98 Wn. App. 209, 989 P.2d 1181 (1999); WPI 30.16. As shown above, the language "because of" interpreted to mean as "as a result of" in prior UIM cases, plainly refers to a proximately causal relationship with the term "property damage." Subsections (2) and (3) together, read in a harmonious manner in the context of insurance, reflect the Legislature's intent to mandate insurers to pay "damages" policyholders suffer "because of" "physical damage to the insured motor vehicle" as a result of accidents with at-fault underinsured motorists.

Nor as the *Pacheco* Court asserted is there some artificial distinction between paying for "compensatory damages" and "property damage." When a negligent party causes physical damage a body shop charges money to repair it, and the charges are compensatory damages. RCW 4.56.250(1)(a); *Bader v. Martin*, 160 Wash. 460, 463, 295 P. 160 (1932); WPI 30.10; WPI 30.12. Everyone in Washington, including OMI,

the Legislature, our Courts, and every consumer, expects UIM coverage to pay the collision repair bill after an at-fault underinsured driver causes physical damage to the policyholder's car even though the collision repair bill is not "physical damage," but rather an element of compensatory damages the physical damage proximately causes. Repair (or total loss) costs are simply "damages because of property damage" they are not "property damage.

Diminished value – which *Pacheco* found non-excludible - is likewise a recoverable element of compensatory damages which is proximately caused by physical damage to the vehicle. *Kane,* 113 Wash. at 481, WPI 30.10; WPI 30.12. The Court of Appeals (Division II) agreed and explained, in a portion of its opinion Division I omitted in its opinion in this case, "A collision begins a chain of events that sometimes results in a tangible, physical injury that cannot be fully repaired. Absent an intervening cause, diminished value is a loss <u>proximately caused</u> by the collision and thus is covered." *Moeller v. Farmers Ins. Co. of Washington*, 155 Wn. App.133, 143, 229 P.3d 857 (2010) (emphasis added).

Loss of use is also recoverable compensatory damages that physical damage to the insured vehicle proximately causes (i.e. is

"because of" or is "as a result of" as the UIM cases other than *Pacheco* hold). *Holmes,* 60 Wn.2d 421; *Straka Trucking*, 98 Wn. App. 209; WPI 30.16. The Court of Appeals' decision below is in conflict with these prior decisions and review is necessary under RAP 13.4(1) & (2).

C. The Court of Appeals Erred in Upholding the OMI Loss of Use Exclusion Because it Conflicts with RCW 48.22.030(2) and Prior Cases.

The *Pacheco* Court voided OMI's diminished value exclusion and upheld the loss of use exclusion based on a conclusion that diminished value is "physical damage" but loss of use is not. The Court held that RCW 48.22.030(3) only requires coverage for "physical damage" to the vehicle but does not require coverage for "damages" that "flow from" physical damage to the vehicle and held that diminished value is a form of "physical damage" while loss of use is not.

The Court of Appeals overemphasized RCW 48.22.030(3) while reading the wording of RCW 48.22.030(2) which has been cited and relied upon as the scope of coverage in numerous prior opinions (*above* at 6-13) out of the statutory text. The *Pacheco* Court upheld OMI's loss of use exclusion because, it reasoned, loss of use "flows from" physical damage to the policyholder's car but is not, itself, physical damage. The Court of Appeals, while acknowledging the causal relationship between physical

damage to the insured motor vehicle and loss of use, violated the *in para materia* and *noscitur a sociis* principles and gave the "damages because of" clause in subsection (2) no effect. This was clear error.

Consistent with prior decisions and the actual structure of the UIM statute, the Court of Appeals should have read "physical damage to the insured motor vehicle" as the language triggering coverage. It should have read "damages . . . because of . . . property damage" to the insured vehicle as the mandatory scope of coverage, and voided both the diminished value and loss of use exclusions in the Insured's auto policy.

D. This Petition Involves an Issue of Substantial Public Interest that Should be Determined by the Supreme Court under RAP 13.4(4)

The Legislature has declared that insurance coverage disputes substantially affect the public interest. RCW 48.01.030; RCW 19.86.170. As noted above at 6-7, this Court has repeatedly highlighted the importance under the UIM statute of "allowing an injured party to recover those damages which the injured party would have received had the responsible party been insured." Given the importance of UIM coverage, and that decisions as to its scope impact nearly every insured in Washington, this Court has repeatedly addressed cases concerning whether a UIM insurance policy contains an exclusion contrary to an

applicable statute. *See, e.g., Blackburn.*, 115 Wn.2d 82, *Britton*, 104 Wn.2d 518; and *Elovich v. Nationwide Ins. Co.*, 104 Wn.2d 543, 707 P.2d 1319 (1985). By their very nature, decisions as to exclusions for UIM damages which commonly arise (and with loss of use, nearly always arise) present issues under RAP 13.4. See *State v. Watson*, 155 Wn.2d 574, 133 P.3d 903, 904 (2005) (Granting review under RAP13.4(b)(4) as decision "has the potential to affect every sentencing proceeding in Pierce County").

The Court of Appeals' decision in this case will adversely affect tens of thousands, if not hundreds of thousands, of Washington consumers who sensibly purchase UIM auto insurance. Consumers who own cars and trucks outright commonly forego expensive no-fault physical damage ("collision") and no-fault rental reimbursement coverages, which in any event – being not statutorily mandated – can, and nearly always do, exclude loss of use and diminished value. Many of those same consumers purchase UIM coverage because they are unwilling to retain the risk of financial harm <u>that is not their fault</u>. They expect, and the Legislature intended, that if their vehicle suffered property damage in an accident that they would not be left holding the bag, and (as they would if the at fault

driver was insured, *see above* at 16-17) they will be able to rent a similar car to get to work, or to drop off their child at daycare.[9]

The natural and predictable result of the Court of Appeals' decision, if not reviewed, is that despite the recent contrary holding of *Kalles v. State Farm* (*above* fn.4) that loss of use is covered as damages that "result from" and are triggered by "property damage" UIM exclusions for loss of use, and likely for other "damages" which are not under *Pacheco* "property damage" such as towing costs, will proliferate. This undermining of the protections of the UIM statute calls for review by this Court to correct the erroneous statutory interpretation below. RAP 13.4(4)

VI. CONCLUSION

The Supreme Court should grant review and reverse Division I's decision to uphold OMI's UIM exclusion for loss of use.

DATED: September 18, 2019 at Seattle, Washington.

Galileo Law PLLC

s/Paul M. Veillon

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Attorney for Petitioner

[9] Likewise, many consumers own vehicles worth significantly more than the $10,000 statutory minimum limit of liability under the Financial Responsibility Act, which is commonly inadequate to fully compensate vehicle owners for repair costs, diminished value, towing, and loss of use, leading the insured to fall back on UIM benefits.

CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 18th day of September, 2019, I filed the above and foregoing document with the Clerk of the Court of Appeals, Division I, State of Washington, and served a copy on counsel for Defendants/Petitioners via e-mail, as follows:

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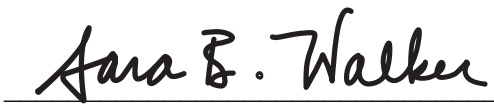
DATED this 18th day of September, 2019, at Tacoma, Washington.



SARA B. WALKER, Legal Assistant

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8/19/2019
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DIVISION ONE

PUBLISHED OPINION

FILED: August 19, 2019

APPELWICK, C.J. — Pacheco filed a claim under the underinsured motorist insurance coverage under a policy provided by Oregon Mutual. The policy expressly excluded coverage for diminished value and loss of use. Pacheco sought discretionary review from denial of his motion to determine that both exclusions are contrary to RCW 48.22.030 and violate public policy. We hold that the exclusion for diminished value violates the language of the statute, but that the exclusion for loss of use does not violate either the language of the statute or public policy. We affirm in part, reverse in part, and remand for further proceedings.

FACTS

On May 15, 2016, an uninsured driver damaged Carlos Pacheco's 2014 Audi. Pacheco made a claim to Oregon Mutual Insurance Company under the policy's underinsured motorist coverage. Oregon Mutual accepted coverage, and made $16,115 in payments on the claim, including the $1,050 limit for rental car

expenses. 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. Oregon Mutual informed Pacheco, "The uninsured motorist property damage provisions of the policy . . . unambiguously exclude such coverage" for loss of use and diminished value.

Pacheco filed suit against Oregon Mutual in King County District Court. The complaint sought payment of the excluded damages for "diminished value and loss of use," attorney fees, and interest. Pacheco then filed a motion for partial summary judgment, requesting a determination that, "while the plain language of the policy excludes those damages from the benefits recoverable, said exclusion is void as contrary to public policy."[1] The district court granted the motion as to the diminished value exclusion where the diminished value is caused by "unrepairable continuing physical damage." But, the court ruled that there was no basis to void an exclusion for loss of use damages.

Both parties filed motions for reconsideration. The district court denied both motions, leaving its original decision in place. Oregon Mutual filed a notice of appeal to the King County Superior Court, and Pacheco filed a notice of cross-appeal.

The superior court reversed the district court's order as to the finding that exclusions for diminished value damages are void, and affirmed the finding as to

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[1] In support of his motion for partial summary judgment, Pacheco offered a declaration from Darrell Harber, who had over 28 years of experience in the automotive collision repair industry. Harber opined that the accident had reduced the value of Pacheco's Audi by $7,950.

loss of use damages. Pursuant to CR 54(b), the trial court certified that its order is eligible for discretionary review. Pacheco sought review, which this court granted.

DISCUSSION

I. Standard of Review

An appellate court reviews de novo a grant of summary judgment. Bostain v. Food Exp., Inc., 159 Wn.2d 700, 708, 153 P.3d 846 (2007). Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Id. Facts and reasonable inferences therefrom are viewed most favorably to the nonmoving party. Id.

When interpreting a statute, the court first looks to its plain language. Homestreet, Inc. v. Dep't. of Revenue, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). Our function is to give effect to the object and intent of the Legislature. Hoa Doan v. Dep't of Labor & Indus., 143 Wn. App. 596, 601, 178 P.3d 1074 (2008).

II. Underinsured Motorist Statute

Washington law requires mandatory minimum liability automobile insurance. RCW 46.60.020. Washington law also requires that all insurers make UIM coverage available to Washington automobile liability policyholders. Clements v. Travelers Indem. Co., 121 Wn.2d 243, 250, 850 P.2d 1298 (1993); RCW 48.22.030(2). The purpose of the UIM statute is "to protect innocent victims of motorists of underinsured motor vehicles." RCW 48.22.030(12). UIM coverage is not mandated, and policyholders can waive all or part of that coverage. RCW 48.22.030(4).

The relevant text of the UIM statute is RCW 48.22.030:

(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.
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> (11) If the covered person seeking underinsured motorist coverage under this section was the intended victim of the tort feasor [sic], the incident must be reported to the appropriate law enforcement agency and the covered person must cooperate with any related law enforcement investigation.
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> (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.
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> (13) The coverage under this section may be excluded as provided for under RCW 48.177.010(6).[2]
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> (14) "Underinsured coverage," for the purposes of this section, means coverage for "underinsured motor vehicles," as defined in subsection (1) of this section.

Pacheco argues that the superior court erred in failing to find that RCW 48.22.030 requires coverage for damages for diminished value and loss of use.[3]

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[2] RCW 48.177.010(6) provides: "Insurers that write automobile insurance in Washington may exclude any and all coverage afforded under a private passenger automobile insurance policy issued to an owner or operator of a personal vehicle for any loss or injury that occurs while a driver for a commercial transportation services provider is logged in to a commercial transportation services provider's digital network or while a driver provides a prearranged ride. This right to exclude all coverage may apply to any coverage included in a private passenger automobile insurance policy including, but not limited to: . . . (c) Underinsured motorist coverage." This is the only explicit exclusion enumerated in the statute.

[3] Pacheco did not assert below, and does not argue on appeal, that the Oregon Mutual policy included coverage for diminished value and loss of use. Instead, he argues that the policy's exclusions for such coverage violate the statute in question.

And, Pacheco argues the exclusions for diminished value and loss of use in the underinsured motorist policy he holds are void as contrary to the UIM statute and public policy.[4] He reads RCW 48.22.030(2) as requiring coverage for all damages because of bodily injury, death, or property damage, including consequential damages. The statute provides, "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." RCW 48.22.030(3).

Framing this case first as one of statutory interpretation, Pacheco asserts, "While the statute notes that 'property damage' 'shall mean' 'physical damage,' this is a definition as to what risks are covered, not a limitation to the covered damages, and it impacts nothing but the phrase it defines: i.e., 'property damage.'" He asserts, "Applying the statutory definition language as to the covered risks, the purpose is still clear: coverage must be provided to protect insureds 'legally entitled to recover damages' 'because of' 'physical damage.'"

We begin by analyzing the language of the subsection that mandates the insurance offering:

> (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

[4] Oregon Mutual asserted below that Pacheco's expert combined stigma and diminished value damages in his analysis. But, Pacheco presented his argument as purely an issue of law on his motion for partial summary judgment, and the distinction of damages was not discussed.

> 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).

The statutory mandate language, "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" is based on the definitions of motor vehicle, RCW 48.22.005(1), and automobile liability policy, RCW 48.22.005(8). It could be replaced by "No automobile liability insurance policy shall be issued . . . ."[5]

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[5] RCW 48.22.005 provides these definitions:

> (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.
> . . . .
> (8) "Automobile liability insurance policy" means a policy insuring against loss resulting from liability imposed by law for bodily

The exceptions in this subsection to the mandated coverage offering also derive from the definitions of automobile and automobile liability insurance policy found in RCW 48.22.005, and of passenger car found in RCW 46.04.382:

> [E]xcept 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). Offering UIM motorcycle coverage is optional under RCW 48.22.030(9) and (10). The exceptions are of no interest in this case.

The focus here is on the remaining language, stating that no automobile liability insurance policy shall be issued "unless coverage is provided . . . 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."[6] RCW 48.22.030(2). The key is that the clause

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> 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:
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> (a) Vendors single interest or collateral protection coverage;
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> (b) General liability insurance; or
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> (c) Excess liability insurance, commonly known as an umbrella policy, where coverage applies only as excess to an underlying automobile policy.

RCW 46.04.382 provides that "Passenger car" means every motor vehicle except motorcycles and motor-driven cycles, designed for carrying 10 passengers or less and used for the transportation of persons.

[6] "Underinsured motor vehicle" is defined in RCW 48.22.030(1). "Phantom vehicle" is defined in RCW 48.22.030(8).

which begins with "who," modifies "persons insured." It is a limitation on whether an insured has coverage following an accident. The insured may recover under UIM coverage only if (1) the insured is legally entitled to recover damages; (2) those damages will be recovered from owners or operators of underinsured motor vehicles, hit-and-run motor vehicles, and phantom vehicles; and (3) the damages are because of bodily injury, death, or property damage, resulting from the accident. The use of the phrases "legally entitled to recover damages" and "because of bodily injury, death, or property damage" does not change the clause from a limitation on whether an insured is covered for the accident into one defining the scope of coverage under the UIM policy.

While subsection (2) requires that UIM coverage be offered and defines when it is applicable, subsection (3) identifies the minimum scope of coverage:

> 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.

RCW 48.22.030(3). This subsection treats property coverage differently from bodily injury or death coverage in several ways. Property damage coverage need be issued only in conjunction with coverage for bodily injury or death, not as a standalone coverage. Property damage need not be the same amount as the insured's third party liability coverage, while other coverages must be. "Property damage" is defined, and defined narrowly, as "physical damage to the insured

motor vehicle." Coverage of vehicle contents or other forms of property damage is optional. And, under subsection (7), minimal deductibles for property damage coverage are prescribed.

The plain reading of the statutory language requires that physical damage to the insured motor vehicle must be covered. Other property damages, including consequential damages, are not require to be covered by the UIM policy.

III. Exclusions

UIM insurers cannot reduce statutorily mandated UIM coverage through language in the insurance policy. McIllwain v. State Farm Mut. Auto. Ins. Co., 133 Wn. App. 439, 446, 136 P.3d 135 (2006). The terms and conditions of the insured's contract with the UIM carrier must be consistent with the statute and cases construing it. Blackburn v. Safeco Ins. Co., 115 Wn.2d 82, 86, 794 P.2d 1259 (1990). Our Supreme Court has addressed exclusions under UIM coverage:

> In determining the validity of a UIM exclusionary clause the court applies a two-part test which asks: "Does the proposed exclusion conflict with the express language of the UIM statute? If not, is the exclusion contrary to the UIM statute's declared public policy?" A UIM exclusionary clause will be upheld only if we can answer both inquiries in the negative.

Greengo v. Pub. Employees Mut. Ins. Co., 135 Wn.2d 799, 806, 959 P.2d 657 (1998) (quoting Bohme v. PEMCO Mut. Ins. Co., 127 Wn.2d 409, 412, 899 P.2d 787 (1995)). In Greengo, the court also stated, "[L]ack of express statutory authorization for the precise exclusion is not the focus of our inquiry. Instead we look to whether such exclusion conflicts with the statute." Id. at 808.[7]

[7] Again, the only explicit exclusion enumerated in the statute, under subsection (13), is "for any loss or injury that occurs while a driver for a commercial

Addressing the diminished value exclusion, we must ask first whether the exclusion for diminished value conflicts with the express language of the UIM statute. In Moeller, the court set out diminished value, explaining, "'A vehicle suffers "diminished value" when it sustains physical damage in an accident, but due to the nature of the damage, it cannot be fully restored to its preloss condition. Weakened metal that cannot be repaired is one such example.'" Moeller v. Farmers Ins. Co. of Wash., 173 Wn.2d 264, 271, 267 P.3d 998 (2011) (quoting Moeller v. Farmers Ins. Co. of Wash., 155 Wn. App. 133, 142, 229 P.3d 857 (2010), aff'd 173 Wn.2d 264.). Thus, under Washington case law, the diminished value of a vehicle from physical injury is property damage as defined in the UIM statute. An express policy exclusion for coverage for diminished value of the damaged vehicle is therefore contrary to the UIM statutory language. Having answered the first question under Greengo in the affirmative, we need not answer the second question of whether it conflicts with public policy.

Addressing the loss of use exclusion, we must ask first whether the exclusion for loss of use conflicts with the express language of the UIM statute. Loss of use may flow from physical damage to a vehicle, but it is not physical damage to the vehicle. Loss of use is not property damage as defined in RCW 48.22.030. Because it is not required by the statute, it does not violate the express language of the statute to exclude it.

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transportation services provider is logged in to a commercial transportation services provider's digital network or while a driver provides a prearranged ride." RCW 48.22.030(13); RCW 48.177.010(6). It does not apply here.

Having answered the first question in the negative, under Greengo, we ask next whether the exclusion for loss of use violates public policy. The declared public policy of the UIM statute is to protect innocent insureds. RCW 48.22.030(12). The protection afforded by the statute is not absolute.[8] The legislature defined property damage coverage narrowly as "physical damage to the insured motor vehicle." RCW 48.22.030(3). It made additional coverage optional rather than mandatory with the clause "unless the policy specifically provides coverage for the contents thereof or other forms of property damage." Id. This language, contained in the same section as the declared public policy, makes plain that damages such as loss of use are not required to be covered. An express UIM policy exclusion for loss of use of a vehicle is not inconsistent with the stated public policy.

We conclude that a UIM policy exclusion for diminished value resulting from physical damage to a vehicle is void. The trial court erred in finding that the exclusion for diminished value is not void. However, because the statutory language and declared public policy do not require coverage for loss of use as property damage, the trial court did not err in upholding the exclusion for loss of use in the UIM policy.

IV. Attorney Fees

Pacheco requests attorney fees under Olympic S.S. Co. v. Centennial Ins.

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[8] Our State Supreme Court has stressed that the public policy underlying the UIM statute is to create a second layer of floating protection for the insured, not to guarantee full compensation for accident victims. Greengo, 135 Wn.2d at 809-10. And, subsections (4), (5), (6), and (7) of RCW 48.22.030 are each in some manner a potential limitation on recovery under UIM coverage.

Co., 117 Wn.2d 37, 811 P.2d 673 (1991).

In Olympic Steamship, the court held, "[A]n award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract, regardless of whether the insurer's duty to defend is at issue." 117 Wn.2d at 53. RAP 18.1(a) authorizes an award of fees on appeal if applicable law grants to a party the right to recover reasonable attorney fees. Id.

The State Supreme Court has expanded on the Olympic Steamship rule. See Leingang v. Pierce County. Med. Bureau, Inc., 131 Wn.2d 133, 147, 930 P.2d 288 (1997). In Leingang, the court explained,

> If a claim is denied on the basis of an alleged lack of coverage and a court later determines there is coverage, then the case would fall under the rule of Olympic Steamship. The holding of Olympic Steamship and Dayton[9] is that an insured is entitled to attorney fees if the insured litigates an issue of coverage, but not if the issue is merely a dispute about the value of a claim. The present case is like the McGreevy[10] case in that the insurer admitted there was some coverage but disputed the scope of the coverage. Coverage disputes include both cases in which the issue of any coverage is disputed and cases in which "the extent of the benefit provided by an insurance contract" is at issue.

Id. (quoting McGreevy, 128 Wn.2d at 33). In Leingang, the dispute was over coverage as it was the claim of the insurer that the exclusion at issue denied possibility of recovery under any foreseeable facts. Id. The court held that the insurer was liable for the reasonable attorney fees its insured incurred in its

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[9] Dayton v. Farmers Ins. Grp., 124 Wn.2d 277, 876 P.2d 896 (1994).

[10] McGreevy v. Oregon Mut. Ins. Co., 128 Wn.2d 26, 904 P.2d 731 (1995), overruled on other grounds by Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co., 144 Wn.2d 130, 26 P.3d 910 (2001).

successful effort to overcome the asserted policy exclusion from coverage. Id. at 147-48.

In Greengo, the court reiterated that a party is entitled to attorney fees when an insurer wrongfully denies "coverage," as distinguished from the situation where "coverage" is conceded but the claim fails, or recovery is diminished on its factual merits. 135 Wn.2d at 817. The Greengo court answered "the threshold coverage question, while reserving the factual entitlement to a monetary recovery against the insurer, as well as the amount of that recovery, to remand." Id. at 817-18. But, the court found that awarding reasonable attorney fees at that stage was appropriate. Id. at 818.

Pacheco had to pursue legal action to obtain a determination that the policy cannot exclude coverage for diminished value. Pursuant to Greengo, awarding Pacheco appellate attorney fees at this stage of the proceeding is appropriate.

We affirm in part, reverse in part, and remand for further proceedings.

Eyecheck, CJ

WE CONCUR:

Smith, J.

Andrus, J.

CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 18th day of September, 2019, I filed the above and foregoing document with the Clerk of the Court of Appeals, Division I, State of Washington, and served a copy on counsel for Defendants/Petitioners via e-mail, as follows:

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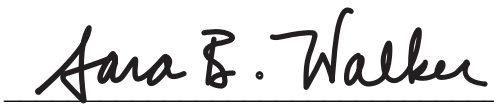
DATED this 18th day of September, 2019, at Tacoma, Washington.



SARA B. WALKER, Legal Assistant

LAW OFFICES OF STEPHEN M. HANSEN

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