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

COURT OF APPEALS OF WASHINGTON, DIVISION I

CARLOS PACHECO, Petitioner

v.

OREGON MUTUAL INSURANCE COMPANY, Respondent

PLAINTIFF-PETITIONER'S REPLY ISO RAP 13.4 PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES & CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION / SUMMARY

Respondent Insurer Oregon Mutual Insurance Company ("OMI") predicates its entire response to the Petition, *and then its own request for review*, upon an unsupported and false assertion, which it then repeats over and over and over to-wit: that "loss of use exclusions are legally incorporated into general automotive liability coverage provisions." (Answer at 8).[1] This false assertion, that RCW 46.29.090 would permit insurers to exclude, for at-fault motorists, liability coverage for damages for loss of use and diminished value,[2] is supported by no citation to any statute, insurance regulation, or any other reasoning, let alone citation to any case law upholding such an exclusion.

Such an exclusion – if actually attempted - would shock both insurance policyholders and claimants. A consumer who purchases liability coverage, and causes a collision, breathes a sigh of relief that they

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[1] See also Answer at 12-13, 14-16 (making same assertions as to both loss of use and diminished value being excludable from minimum liability coverage).

[2] Both items of damages are clearly recoverable from an at fault driver. See e.g. WPI 30.12 (recovery of diminished value in addition to cost of repairs), WPI 30.16 (recovery of "economic damages" for "any loss of use of any damaged property during the time reasonably required for its [repair] [replacement].")

complied with the Financial Responsibility Act. They would be shocked to get the bad news that their insurance company will not pay damages for loss of use or diminished value *because of* the property damage they caused, leaving them exposed to possible substantial liability, *even when the damages they caused were less than their applicable limits*. As for the victim? They file a claim with the liability carrier and are told they have to try to collect from the insured personally, as the carrier will not cover their entire loss, *even when less than the statutory minimum for coverage*. They would be justifiably upset as this would require them to either initiate expensive legal proceedings or (in the event the at-fault party lacked the ability to pay for the excluded damages) simply suffer the losses caused by the at-fault party.

OMI is wrong, and OMI's argument actually shows why Division 1 erred in a ruling that will affect millions of insureds in Washington State absent review being granted.

OMI itself argues that the scope of Underinsured Motorist ("UIM") coverage under RCW 48.22.030(2) as construed by Washington courts "is intended to imitate liability coverage of the at-fault driver." (Answer at 8 & 14). Petitioner agrees that this has been (contrary to

Division 1's ruling below) a touchstone in interpreting the UIM statute. See Petition at 6-7.

Yet, as pointed out to the Appellate Court,[3] under Washington's financial responsibility law, RCW 46.29.090, there must be provided liability coverage for "not less than ten thousand dollars *because of* injury to or destruction of property of others." (Italics added). Under the clear wording of RCW 46.29.090 (which is in no respects limited to "property damage") and as Petitioner showed earlier, the meaning of the statutory phrase "because of"[4] meaning "as a result of" in multiple Washington

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[3] See Brief of Appellant at 32-34 and Reply Br. of Appellant at 16-17

[4] As Petitioner argues RCW 48.22.030(2) mirrors this language in requiring coverage for "damages ... because of … property damage." The Court of Appeals statutory interpretation *that this was not the language while defines the scope of coverage*, is as noted earlier directly contrary to this Court's holding in *Daley v. Allstate Ins. Co*., 135 Wn.2d 777, 782-3, 958 P.2d 990 (1998) which expressly found this to be the relevant language under the UIM Statute stating 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)." *Id*.

OMI's assertion – the only argument made against review based upon the direct conflict with this Court's earlier decisions - that "*Daley v. Allstate Ins. Co.* did not address coverage under the UIM statute" (Answer at 9) is completely spurious. The above quote, and a quick review of *Daley,* shows that *Daley* in fact cites and discusses RCW 48.22.030(2) at length, going so far as to italicize the key coverage phrase "*because of bodily injury, death, or property damage*" noting "emphasis added" after doing

authorities (Petition at 7-11), Washington law clearly requires coverage for both loss of use and diminished value under the minimum liability coverage. An exclusion taking coverage *below* these requirements is not permitted under Washington Law.

Despite this, the only ground that OMI attacks in its cross-petition is the fall-back holding by the Court of Appeals as to diminished value (i.e. that it cannot be excluded as it constitutes a form of "property damage", see *Pacheco v. Oregon Mut. Ins. Co.*, ___ Wn.App.___2d (Div 1 2019) at ¶19, 22). Notably, OMI does not argue that Division 1's interpretation that one cannot exclude "diminished value resulting from physical damage to the vehicle" *id*. at ¶22 is (a) contrary to any prior case, nor (b) that it would negatively impact the millions of insureds with UIM coverage in this state, nor (c) that it is an unreasonable reading of the actual words in the statute. Rather, OMI asserts: "the Division 1 Opinion regarding diminished value creates a scheme where UIM coverage must provide more coverage than the corresponding liability coverage" (Answer at 16). This argument is entirely unsupported – and wrong – given that the

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so as part of its analysis. *Daley*, 135 Wn.2d __, 958 P.2d at 992. This is the exact language that Division 1 *found not to define the scope of coverage*, in a ruling that is in direct conflict with *Daley*'s construction of the UIM statute.

minimum liability coverage required RCW 46.29.090 does not allow an exclusion for diminished value or loss of use, and no Washington case has ever held that it could be so interpreted.

As discussed below, OMI's unsupported argument simply *confirms* why review of Division 1's ruling that loss of use can be excluded because (contrary to *Daley* and other cases cites in the petition as well as how insurers, including OMI, have themselves interpreted the statute in drafting their policies[5]) the scope of coverage is not, in the opinion of

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[5] OMI wrongly asserts that Petitioner has misquoted what OMI itself determined was the relevant statutory coverage language. See Answer at 6. OMI's policy is exactly as cited in the Petition at 2. OMI's policy language is required to be filed with the Washington Office of Insurance Commissioner, and is found at https://fortress.wa.gov/oic/onlinefilingsearch/Search.aspx?SearchType=GeneralSearch&FileTypeCriteriaRequired=true (OIC Tracking ID:241366; at 11 of 35 ("We will pay damages for property damage which a covered person is legally entitled to recover from the owner or operator of an underinsured motor vehicle") and 12 of 35 ("the most we will pay for all damages resulting from any one auto accident is the Limit of Insurance for Underinsured Motorists Property Damage Coverage shown on the Declaration page.), and *Id* (in arbitration question is "whether the covered person is legally entitled to recover damages from the owner or operator of an underinsured motor vehicle because of property damage,)

OMI's language is exactly the same as the language construed by Division 2 as requiring coverage for loss of use in *Kalles v. State Farm*, 7 Wn.App. 3d 330 (Div 2 2019) and does not limit coverage to only "physical damage." Upon review this Court can take judicial notice of OMI's actual policy language to the extent that it is relevant, ER201, and here that language shows that in drafting it's own policy OMI, like other insures

Division 1, defined by RCW 48.22.030(2), but instead that this section can be ignored in favor of a single phrase in RCW 48.22.030(3).

II. REPLY ARGUMENT

A. *OMI's Assertions That Insurers Need Not Provide Liability Coverage for Diminished Value And Loss Of Use Under RCW 46.29.090 Is Incorrect.*

As discussed above, OMI repeatedly asserts in its Answer that unspecified insurers exclude *liability coverage* for both diminished value and loss of use. See Answer at 8, 12, 13, 14, 15, 16. OMI argues, for example, "[t]he Division 1 Opinion regarding diminished value creates a scheme where UIM coverage must provide more coverage than the corresponding liability coverage in the same policy" (Answer at 14). Yet OMI cites to nothing in the record, nor to any judicial opinion, nor any regulatory filing or other source that this Court can review, showing either that (a) any insurer has sought to exclude either loss of use or diminished value from the liability coverage it sells, or (b) that such an exclusion - leaving the public unable to recover for those items of damages from the liability policy of the at fault driver - has been approved in any respect by

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such as that in *Kalles*, found the relevant coverage granting language in RCW 48.22.030(2), not as did Division 1 below, in RCW 48.22.030(3).

any Court. Petitioner has located no such case (or policy attempting to exclude these items of damages) and believes none exists.

Cases from this Court suggest that such an exclusion would clearly violate not only the minimum requirements of RCW 46.29.090[6] but the strong public policy of this State. Illustrative of these principles is the leading case, *Mendoza v. Rivera-Chavez*, 140 Wn.2d 659, 999 P.2d 29 (2000) which involved an effort to exclude from the minimum liability coverage use of the vehicle "in the commission of any felony." 140 Wn.2d 650. In *Mendoza,* reviewing RCW 46.29.090 and 46.30.020 together this Court held that "both the FRA and the mandatory liability insurance act express a strong public policy in favor of compensating the victims of road accidents." *Id*. at 665. In so holding, this Court cited to, and relied upon, its prior decision in *Mutual of Enumclaw Ins. Co. v.*

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[6] "Words have meaning, words in a statute are not superfluous." *American Continental Ins. Co. v. Steen*,151 Wn.2d 512, 91 P.3d 864, 896 (2004). OMI's argument that insurers can exclude two well recognized recoverable items of damages, loss of use and diminished value from liability policies runs directly into the requirement in RCW 46.29.090 that "No policy or bond is effective…unless such policy is subject [to] if the accident has resulted in injury to, or destruction of, property to a limit of not less than **ten thousand dollars *because of* injury to or destruction of property** of others in any one accident." (emphasis added). OMI's argument would read the statutory phrase "because of" out of RCW 46.29.090, showing that their argument that an exclusion could exist is unreasonable for a second independent reason.

Wiscomb, 97 Wn.2d 203, 643 P.2d 441 (1982) which found that an exclusion in the auto liability policy for "family or household members" violated public policy.

As the *Mendoza* Court reasoned, based upon *Wiscomb*, the exclusion was invalid as, "the exclusion at issue in this case is not based on the conduct of the driver but on the injuries suffered by the victim" and as such violated public policy. *Id*. at 672. This, of course, would be the exact same situation with an exclusion from the at-fault party's liability coverage for the victim's damages which were "because of" diminished value or loss of use.

Mendoza also distinguished exclusions from the mandatory minimum liability coverage for certain "injuries suffered by the victim" *which are not permitted* from those which would be as they were based upon "two broad rationales: the exclusion clause was specifically bargained for or increased the risk to the insurer." *Id*. at 666. As *Mendoza* explains, the first situation was one where coverage was offered to cover a class of persons (e.g. passengers on motorcycles) but was rejected by the insured. *Id*. at 667. The second is where *an activity was excluded from coverage* and "the activity excluded increased the risk to the insurer." *Id*.

Examples of this provided were excluding coverage for drunk driving, non-licensed and underage drivers, and non-named drivers. *Id*.

The holding and reasoning of *Mendoza* and prior decisions show that exclusions from liability coverage – if one were added by an insurer – for diminished value or loss of use are not permitted under the minimum coverage requirements of RCW 46.29.090 and as such that OMI's argument should be rejected.

B. OMI's Arguments Support Granting Review On The Issues Raised By Petitioner.

Mendoza and other cases have repeatedly noted that the requirements of RCW 46.29.090 and RCW 48.22.030(2) serve a similar purpose to protect innocent victims of at-fault drivers and should be construed consistent with each other given the identical public policy behind them. See e.g. *Mendoza*, (supra) 140 Wn.2d at 663 - 664; see also *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 482, 687 P.2d 1139 (1984). Here, that suggests that OMI's arguments for review of additional issues are misplaced. RCW 46.29.090 and the public policy underlying it must be read as requiring coverage for diminished value, *which is consistent with the holding of Division 1 below* that an insurer cannot exclude "diminished value resulting from physical damage to the vehicle"

from UIM coverage. *Pacheco v. Oregon Mut. Ins. Co.*, ___ Wn.App.___2d (Div 1 2019) at ¶22.

As shown above, OMI's argument actually cuts in favor of review of the issues raised by Petitioner: while RCW 46.29.090 would not allow an exclusion of the liability claimant's (party not-at-fault's) damages for loss of use, Division 1 found that this item of damages can be excluded from coverage under RCW 48.22.030(3). The statutory interpretation undertaking by Division 1, by focusing on the wrong section of statutory text and ignoring the language of RCW 48.22.030(2) ("damages because of property damage") created a conflict with how RCW 46.29.090 ("ten thousand dollars because of injury to or destruction of property") would reasonable be interpreted. This violates what *both parties agree* (see above at 2) is the correct rule for interpreting the UIM statute: RCW 48.22.030(2) as construed by Washington courts "is intended to imitate liability coverage of the at-fault driver" (Answer at 8 & 14). Under Division 1's reading it does not as to loss of use.

Petitioner finally notes that OMI, having made no showing that Petitioner has miscited the multiple opinions of this Court, including *Daley, supra*, which are in direct conflict with the reasoning and holding of Division 1 below (meeting the requirements for review under RAP

13.4(1), (2)), that OMI has implicitly conceded that the decision below will impact millions of insureds in this State, and "would affect all purchasers of insurance." (Answer at 16). This concession about the likely statewide impact of the decision below, if not reviewed, supports the necessity of review under RAP 13.4(4).

C. RCW 48.22.030(3) Does Not Change the Rule That UIM Coverage Is (In OMI's Own Words) "Intended To Imitate Liability Coverage Of The At-Fault Driver" Vis A Vis The Insured Auto.

RCW 48.22.030(3) includes a definition limiting *the type of property covered* which must be offered under "property damage coverage" to "physical damage to the insured auto" absent the insurer's policy agreeing to cover the contents of the vehicle or other related property such as a trailer or attached camper. The Financial Responsibility Act has no such clause. Despite this, the statutory purposed to in OMI's words "imitate liability coverage of the at-fault driver" (Answer at 8, 14) still applies with respect to all damages which are "because of" or "as a result of" the damage to the insured auto.

The Financial Responsibility Act requires an auto insurer to pay up to the minimum coverage requirements "of not less than ten thousand dollars *because of injury to or destruction of property* of others in any one

accident." RCW 46.29.090 (emphasis added). The Financial Responsibility Act sets no limits on the *type of property* damages which trigger coverage, using the broader phrase "not less than ten thousand dollars because of injury to or destruction of property" rather than parallel phrase in "damages because of … property damage" found in RCW 48.22.030(2). Unlike the former, the latter seeks to limit the scope of the property whose damage will trigger coverage (and as such the scope of the insured risk for the insurer).

The difference in the type of property whose physical damage will trigger coverage is not surprising. A liability policy is designed to protect the insured from all damages they cause with their vehicle (up to the applicable limits) regardless of whether it is someone's vehicle, or a telephone pole, or a neighbor's fence, or a trailer, or the contents inside a vehicle they hit which is damaged. All are damage which the at-fault insured would be responsible for if sued. However, no policyholder expects their "car insurance" policy to fix *their own* fence if an uninsured driver damages it; homeowner's coverage is available for the fence; the same is true for personal property. Likewise, a policyholder would need to buy coverage for a trailer to protect it under the policy. A "car insurance" policy requires coverage related to "a car" in contrast with

liability coverage for damages the car does. Therefore, under RCW 48.22.030(2), (3) the UIM coverage required for "damages" "because of" "property damage" to the car, is limited to those damages that would not be otherwise recoverable under other types of insurance, i.e. those flowing from or as a result of damage to the car itself.

Therefore, while RCW 48.22.030(3) does, under some circumstances, differ from the mandatory scope of liability coverage (which covers damage to all types of property caused by the insured automobile) that distinction does not apply to "the insured motor vehicle" itself, which is all that RCW 48.22.030(2) seeks to protect. For "the insured motor vehicle," the coverages mirror each other.

D. Attorney's Fees.

Petitioner agrees that the Court of Appeals' fee award will either (a) affirm if the opinion below is affirmed (with additional fees being added on appeal to this Court); (b) affirmed if this Court reverses the Court of Appeals ruling on loss of use; or (c) reversed if this Court reverses the Court of Appeals' diminished value opinion. Petitioner has not required OMI to post any bond for the pending fee award from the Court of Appeals.

III. CONCLUSION

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

RESPECTFULLY SUBMITTED November 4, 2019 at Seattle, Washington.

Galileo Law PLLC

s/Paul M. Veillon

_____

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Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 4th day of November, 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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November 04, 2019 - 3:18 PM

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