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I. INTRODUCTION

The issue here is whether, a “summary form”, held insufficient in a another jurisdiction, is legally sufficient to permit waiver of UIM coverage equal to liability limits (*i.e.*, “statutory limits”) with the result that an injured party will not be fully compensated for his injuries. The roadmap for consideration of whether statutory UIM coverage (equal to liability limits) has been effectively waived begins with the proposition that, by operation of law, statutory UIM coverage is contained within every policy of automobile insurance absent an effective waiver. A waiver of statutory UIM coverage can only be upheld if the waiver is expressed in writing through a knowing and unequivocal act; if the waiver is not, the policy contains, as matter of law, statutory UIM limits. Fundamental to this premise is, if the waiver itself is ambiguous, the waiver is construed against the insurer and, therefore, the policy reverts to statutory UIM limits.

Zurich’s briefing is entirely reliant upon the premise that no specific form for waiver of statutory UIM coverage is required in Washington State. Starkly absent from Zurich’s briefing is a detailed comparison of its “summary form” with those rejection forms previously accepted by Washington courts as establishing an effective “written” rejection. Zurich’s form, as Zurich clearly understands, cannot withstand

such a comparison because all forms previously considered by Washington courts clearly advise the insured of the right to statutory UIM coverage then allow the insured to reject coverage entirely or select an alternate level of coverage. There is, in short, no Washington case which permits a form, akin to the “summary form” here, to stand as a valid written rejection.

Zurich also places substantial reliance upon cases, not applicable under these facts, where the insured affirmatively corresponds in writing with the insurer and all documentation produced by the insured evidences the insured’s intent to reject UIM coverage or select an alternate limit. The line of cases addressing insured produced documents are only applicable here insofar as they serve to show that the insured had the requisite knowledge of his right to coverage and, therefore, knowingly, waived that right. That scenario is simply not applicable here where, under the facts of this case, there is no insured produced writing.

Perhaps most telling, Zurich, repeatedly, references the claim that the “summary form”, as it appears to indicate a selection of \$60,000 in coverage, is effective under Washington law because it shows “what the insured had in mind”. Zurich’s argument falls apart upon a basic review of the only case construing the “summary form” at issue, Stemple v. Zurich, which specifically held that any “election” on the summary form did not

show what the insured had in mind because it only referred to elections made, somewhere else, on state specific forms. There is, in sum, no written rejection of statutory UIM coverage.

Zurich's position that the insured's intent is manifest within the "summary form" is belied by its own submissions. Expressly, based upon Zurich's submissions, the insured requested the "minimum" limits of UIM coverage "required" in each state. In Washington, the "minimum" UIM limit is \$0. Whether the insured received what he wanted is ambiguous and, furthermore, does not establish that the insured had any knowledge of what his rights were. As such, it is impossible to find a knowing waiver under the circumstances herein.

To hold the "summary form" constitutes a statutorily sufficient rejection is not supported by Washington precedent. The sea of documentation submitted by Zurich extrinsic to the summary form only serves to underscore that there was no "knowing" waiver. This Court should, therefore, remand for entry of judgment and award of attorney fees in favor of the injured party, Humleker.

II. ARGUMENT IN REPLY

A. The public policy principles of statutorily based UIM coverage.

In its responsive briefing, Zurich strongly discounts the public policy concerns underlying full insurance benefits for injured parties and,

in so doing, misconstrues Washington law by implying that the insurance contract is read separately from the UIM statute (Resp. Br. at p. 9) Zurich, in fact, goes so far as to state “public policy simply does not enter into the equation.” (Resp. Br. at p. 25) Zurich’s bold statement is not supported by Washington law.

It is well established that UIM coverage with limits equal to liability limits exists, by operation of law, in every contract of insurance absent an effective waiver. See, Clements v. Traveler’s Indemnity Co., 121 Wn.2d 243, 850 P.2d 1298 (1993). The reason for this is the enactment of the UIM statute which, in turn, affords protection to injured victims of automobile accidents; *i.e.*, service to public policy. In short, the UIM statute becomes part of every policy of insurance issued in Washington; to permit, as urged by Zurich, the parties to contract away rights afforded by Washington law is not supported by any legal authority. Id. at 255. As noted in Clements, an insurer’s attempt to ignore the “fact that insurance regulatory statutes become part of insurance policies” cannot be given credence. Id. at 254. In short, if the courts were merely to defer to the intent of the parties, not expressed in writing, the purposes of the UIM statute would not be served. Id.

B. Zurich fails to meet its burden to establish that USB knowingly waived UIM limits equal to liability limits.

Zurich, conveniently, fails to acknowledge that it has the burden to set forth evidence that USB knowingly waived UIM coverage limits in the amount of \$1 million. Clements, 121 Wn.2d at 255. Zurich must, as per Clements, establish that: (1) it made UIM coverage available to USB; and (2) USB knowingly rejected the coverage in writing. Id. at 250. By so doing, Zurich misstates the issue for this Court to determine by stating that the only issue for determination is whether “USB knowingly waived, in writing, UIM limits of \$1 million and instead elected limits of \$60,000.” (Brief of Resp. at p. 12). Instead, as set forth by Washington’s Supreme Court, the onus is on Zurich to establish both the “offer” of UIM coverage equal to liability limits and the “knowing and unequivocal” written rejection of that coverage. Zurich fails to do so. Clements, 121 Wn.2d at 250.

1. Zurich fails to establish that it made any offer of statutory UIM coverage to USB.

The argument, advanced by Zurich, that an insured can reject, in writing, UIM coverage before it is ever offered entirely contradicts the reasoning of the Supreme Court in Clements; and, furthermore, belies common sense. In short, how can a person reject something he has not been offered? Zurich appears to understand the silliness of its position

because it goes on to contend, in disregard of the facts, that, “UIM coverage equal to liability limits was offered to USB.” (Brief of Resp. at p. 26). The record is devoid of any showing that Zurich made statutory UIM coverage available to USB and, accordingly, any purported “rejection” fails to meet the requirements of the UIM statute.

Zurich fails to concede, as is appropriate, that the “offer” issue raised here by Humleker has not been expressly considered by any Washington court. Instead, Zurich relies upon Weir v. American Motorist’s Insurance Company, 63 Wn.App. 187, 816 P.2d 1278 (1991), for the proposition that conversations between an insured’s broker and the insured serve to fulfill the insurer’s “offer” requirement as stated by Clements. (Brief of Resp. at p. 27). In Weir, the insured’s broker (not the insurer) prepared all writings pertinent to securing coverage. Id. at 189. The Weir court confirmed that the broker could act on behalf of the insured to reject insurance coverage, however, there is nothing within the Weir decision which leads to the conclusion, urged by Zurich, that the insured’s broker could fulfill the “offer” duties of the insurer. The quote offered by Zurich in support of its contentions, stating, “there is nothing in Washington’s UIM statute or our case law precluding an agent from acting on behalf of an insured in rejecting UIM coverage” establishes the fundamental flaw in Zurich’s arguments; in short, there is nothing in Weir

which overrules the principle set forth in Clements establishing that an “offer” of coverage must be made by the insurer. In sum, the issue of “offer” was never raised by the parties in Weir and, as such, it is not persuasive on this point.

Zurich, amazingly, cites Cochran v. Great West Casualty, 116 Wn.App. 636, 67 P.3d 1123 (2003) for the proposition that an “offer” of UIM coverage was made in the current case. In Cochran, the insurer prepared a form for the insured which, expressly, offered UIM coverage “at limits equal to the policy’s liability limits”; the insured signed this written form. Id. at 639. The fact that the insured’s representative did not recall receiving an “offer” was not pertinent to the analysis because the documentary evidence established that the insurer had, in fact, “offered” UIM limits in accordance with statutory requirements. Id. Cochran, the only Washington case to specifically analyze the “offer” requirement, held that an insured’s written request for an alternate UIM coverage amount, “made in a document that advises the insured of its right to select UIM coverage in an amount equal to the policy’s liability issue” is sufficient to meet the requirements of the statute. This argument does not hold water here as, unlike in Cochran, the “summary form” signed by USB does not contain any “offer” of UIM coverage in an amount equal to that of liability limits.

Zurich also relies upon Galbraith v. National Union Fire Insurance Company of Pittsburgh, 78 Wn.App. 526, 897 P.2d 417 (1995) for the proposition that notice of UIM limits equal to liability limits (*i.e.*, an “offer”) can be provided by the insured’s broker (rather than the insurer). As in Weir no party ever raised the issue of “offer” and, accordingly, the Galbraith court did not ever consider whether UIM coverage had been effectively offered to the insured. See generally, id. Galbraith is, therefore, not persuasive.

Zurich contends, apparently as a stop gap measure, that the letters sent to USB by Zurich enclosing the summary election form are sufficient to constitute an “offer”. (CP 328-329)(Brief of Resp. at p. 29) The letters sent by Zurich merely enclose the “summary form” and encourage USB to promptly sign the forms to ensure it is not charged higher premiums. (Id.) There is no showing of any offer of statutory UIM coverage made by Zurich to USB.

Zurich also relies upon the declaration of Jerry Boness (on behalf of USB) for the proposition that Mr. Boness was provided “notice of the availability of UIM coverage equal to policy limits and a choice of the coverage he wished to select.” (Brief of Resp. at p. 29) Zurich’s analysis does not resolve the issue. There is no Washington case which holds that an offer of UIM coverage equal to liability limits can be made orally by an

insured's own broker. To the contrary, the only case which, even tangentially, addresses the "offer" requirement holds that the "offer" of UIM coverage must be contained within the document wherein the insured rejects full UIM coverage. Cochran, supra.

2. There is no Washington case which supports a determination that the "summary form" used by Zurich is an effective waiver of UIM coverage and the only case considering Zurich's "summary form" has held the form is inadequate.

Zurich's contentions that the written waiver requirement for UIM coverage should, in essence, be liberally construed is precisely the argument which the Supreme Court in Clements sought to guard against by requiring strict enforcement, regardless of intent, of the written waiver requirement. (Brief of Respondent at p. 31); see, Clements, 121 Wn.2d at 250 (the purpose of the UIM statute's written waiver requirement is to ensure that the broad protections for injured persons not be "eroded by a myriad of legal niceties arising from exclusionary clauses.") The basis for Zurich's argument is that there is no specific "waiver" form which is required for use in Washington, however, contrary to Zurich's contentions, Washington precedent, read together, establishes what documentation is acceptable to constitute written rejection as per the UIM statute.

Zurich's argument that the "summary form" should not be evaluated as against the "writings" previously construed in Washington

disregards the requirement that this Court base its decision upon Washington precedent. In order to fulfill this directive, the Court must consider the “writings” evaluated previously and, using that comparison, determine whether the “summary form” is a sufficient waiver under Washington law. In evaluating the “writings” held sufficient in Washington, it becomes clear that the “writings” are either entirely prepared by the insured (or the insured’s broker) or, if prepared by the insurer, specifically set forth the statutory right to UIM coverage and require the insured to acknowledge, in writing, his awareness of his rights.

In Cochran, supra, the insured signed a form which stated:

Underinsured Motorists Insurance (including uninsured motorists insurance) must be provided for either bodily injury liability or bodily injury and property damage liability. The bodily injury coverage must be provided at limits equal to the policy’s liability limit(s) but not higher than that limit(s). I have the right to reject this coverage in writing or select limits lower than the policy’s liability limit(s).

The insured then affirmatively selected Underinsured Motorists Insurance at the limit of \$60,000. Cochran, 116 Wn.App. at 639. The form, facially, advised the insured of his right to UIM coverage at an amount equal to liability limits and allowed the insured to, in writing, select the specific amount of coverage he desired. In Cochran, the insured did not recall being offered UIM coverage equal to liability limits, however, the

insured's recollection was not pertinent to the analysis because, the writing established that he was offered coverage and then rejected it.

Zurich argues that the language of the Cochran decision does not hold that an insurer must advise the insured of the right to select UIM coverage in an amount equal to liability limits and, instead, the language of Cochran merely described what was in the waiver form. (Brief of Resp. at p. 32). Zurich's argument disregards the plain phrasing of the issue presented in Cochran that specifically relied upon the fact that the form signed did inform the insured of the right to UIM coverage at the policy's liability limit. Cochran, 116 Wn.App. at 640. The court specifically phrased the issue as:

Does an insured's express written request for an alternate UIM coverage amount, made in a document that advises the insured of its right to select UIM coverage in an amount equal to the policy's liability limit, satisfy, the rejection requirements of RCW 48.22.030(4)?

Id. To conclude, as Zurich apparently does, that this Court did not rely upon the fact that the waiver document included an "offer" would be to, improperly, render the majority of the issue statement superfluous. Cochran decided the issue of whether a waiver, included within a document containing an advisement of the right to UIM coverage, constituted an effective waiver under RCW 48.22.030; *i.e.*, the

determination of waiver turned upon the fact that the form did include an advisement of rights. Zurich's conclusion otherwise is not supported by the reasoning by this Court in Cochran.

Zurich also contends that Cochran stands for the proposition that any writing which "shows the amount the insured has in mind" is all that is required under Washington law. (Brief of Resp. at p. 15) Zurich's argument is premised on the trial court's reasoning; not the reasoning adopted by this Court. Cochran, 116 Wn.App. at 641. This Court did not "adopt" the reasoning of the trial court, instead, after *de novo* review, this Court determined that:

Having been advised of the statutory maximum UIM limits requirement, CTE's choice of \$60,000 on the UIM selection form followed advisement of the right to UIM coverage up to the maximum policy limits. Thus, it evidenced the insured's intent to reject UIM coverage above the \$60,000 amount requested. The writing is sufficiently specific and unequivocal to establish that CTE knowingly requested that Great West set the policy's UIM limits at \$60,000 and thereby rejected statutory UIM limits identical to the policy's liability limits.

Id. at 644-645. This Court held that the insured's selection of \$60,000 UIM limits on a form that advised the insured of his right to limits of UIM coverage equal to liability limits was sufficient to constitute a written rejection. That reasoning is binding on this Court, not, as contended by Zurich, the partially quoted reasoning of the trial court.

Zurich's "summary form", unlike the form in Cochran, fails to advise the insured of his right to statutory UIM coverage. The form in Cochran also, in stark contrast to the "summary form", stands on its own as the rejection of statutory UIM coverage and is limited to Washington state; *i.e.*, the summary form relies upon extrinsic documents to support the rejection and, broadly, purports to "waive" coverage on a nationwide basis. The "summary form" bears no resemblance to that accepted in Cochran and, instead, is devoid of the elements relied upon by Cochran to establish a knowing rejection of statutory limits.

Zurich also relies upon the waiver in Marks v. Washington Insurance Guaranty Association, 123 Wn.App. 274, 94 P.3d 352 (2004) and states that, the waiver was effective, "despite the fact that the signature was illegible and the name of the person who signed it was not included." Even though, in a footnote, Zurich acknowledges that the "signature" issue was not pertinent to the analysis, it is apparent that Zurich is, somehow, contending that the Marks form contains less information than that in the "summary form" at issue here. (Brief of Resp. at p. 15) In fact, this Court, in Marks, confirmed that the material inquiry is whether the writing at issue is a valid rejection under the Washington statute; not, as heavily relied upon by Zurich, what the "after the fact" statements of intent by the parties indicate the writing means. Marks, 123

Wn.App. at 282 (confirming that Cochran, *supra* held that “any factual question of the insured’s intent was irrelevant.”).

A review of the form accepted in Marks further establishes that the “summary form”, the only “writing” at issue here, does not establish a knowing rejection of statutory UIM limits. Id. at 356. Witness the detail of the waiver form which includes, akin to Cochran, notice of the right to statutory UIM coverage:

I acknowledge that:

(1) Reliance Insurance Company is required by statute to offer me Uninsured Motorists Coverage and/or Underinsured Motorists Coverage equal to the bodily injury limits of liability of my policy with the option to reject these coverages or to select a lower limit of Uninsured and/or Underinsured Motorist Coverage.

Marks, 123 Wn.App. at 278-279.

Zurich’s “summary form”, which summarizes UIM coverage for fifty states, does not compare with the detailed advisements contained within the form in Marks which is why Zurich shies away from quotation of the form. Notably, even the language Zurich relies upon from Marks (“the form is sufficiently complete and the decision maker sufficiently informed”) establishes that the form in Marks evidenced, facially, that the decision maker was informed of his rights before signing. The Zurich “summary form” contains no such advisement and, under Marks, there is

no authority for the proposition that this Court can go beyond the “summary form” to determine whether the insured was appropriately informed.

Zurich also relies upon the waiver form described in the recent Division Three case of American Commerce Insurance Company v. Ensley, 153 Wn.App. 31, 220 P.3d 215 (2009) to support its position, however, Ensley, like the case law preceding it, similarly establishes that Washington courts require that valid rejection forms include an “offer” of statutory UIM coverage. In Ensley, the court held that the insurer “had to offer UIM coverage with the same level of liability coverage when the policy was issued.” Id. at 39. The facts of Ensley indicate that the form offered “included a preprinted statement verifying that the insurer offered the policyholder UIM coverage and that the policyholder understood that she must choose limits lower than or equal to her Bodily Injury Liability Limits.” The Zurich “summary form” does not contain the “offer” element that is contained within the Ensley form.

3. *There is no Washington case which holds that an inadequate written rejection is acceptable if considered in conjunction with statements of intent.*

As the “summary form” does not compare, in any way, with the level of detail set forth in the forms analyzed in Cochran, Marks, and Ensley, Zurich, of necessity, places heavy reliance upon the statements of

intent set forth in the testimony by USB's representative, Jerry Boness. By so doing, Zurich implicitly acknowledges that the "summary form" on its own is insufficient to support a waiver.

Zurich's heavy reliance upon the Court of Appeals' cases to support its position that the inadequate summary form can be supplemented by "after the fact" statements of intent is not supported by a review of the case law addressing intent; nor, more importantly, is Zurich's argument consistent with the Supreme Court's pronouncements on the issue. Quite the contrary, our Supreme Court has emphasized that, even where the insured intended to waive statutory UIM coverage, that intention does not override the requirement of a valid, written rejection. Clements, 121 Wn.2d at 252.

Zurich relies upon Galbraith v. National Union Fire Insurance, 78 Wn.App. 526, 897 P.2d 417 (1995) to support the conclusion that "when there is a writing rejecting UIM coverage, the court may consider the writing and other extrinsic evidence of the insured's intent to determine the effectiveness of the rejection." (Resp. Brief at p. 17) A review of Gallbraith and, indeed, all Washington cases addressing "intent", establishes that there is no case which allows an insufficient writing, as with Zurich's "summary form", to stand as an effective waiver solely upon consideration of extrinsic evidence of intent. This underscores the fact that

the critical consideration is whether the “writing” is sufficient to evidence a valid waiver; *i.e.*, the intent of the parties cannot be permitted to override the “writing” requirement. See, generally, Clements, supra.

In Galbraith, the insured’s broker issued a binder to the insurer stating that the insured intended to purchase “Minimum Limits” of UIM coverage. Galbraith, 78 Wn.App. at 528. The insurer then issued a policy to the insured with coverage at “statutory” limits, which, according to the insurer, constituted \$25,000 (the minimum statutory limit for liability coverage). Id. The court reasoned that it was clear that the parties “did not intend” statutory UIM limits of \$1million, however, the request for “minimum” limits was meaningless because, Washington has no requirements for UIM coverage. Id. Thus, as the evidence before the court conflicted, even though the insured did not intend the higher limits of \$1million, that limit would be imposed, as a matter of law, upon the insurer. Id. Contrary to Zurich’s argument that intent controlled, in fact, the Galbraith court relied solely upon the “documents” submitted to establish that the amount of coverage would be imposed at the million dollar limit. Id. at 419-420 (holding, “[n]or do the documents show that Alcatel understood or intended that the “minimum limits” for UIM coverage would be equivalent to the statutory minimum limits for liability coverage”). As such, the court relied upon the documentary evidence and,

specifically, held that, as a matter of law, the insured's intent was not pertinent to the analysis. If intent had been critical to the inquiry, the court would have reversed the case with direction to consider testimony from the parties and allow for a fact finder to render a determination on what was, in fact, intended. This did not occur.

Zurich's argument, which, at first blush could be compelling, is that Humleker is trying to undermine the intent of the parties by claiming that the "summary form" does not "select" \$60,000 in UIM coverage for Washington State. Zurich goes as far to state "Humleker contends that what looks like a duck, walks like a duck and talks like a duck, is a dog." (Brief of Resp. at p. 21). Zurich's witty comment misses the point, UIM coverage at statutory levels is afforded unless the insurer can prove that coverage was made available then rejected, in writing, by the insured. The only writing at issue, the "summary form" does not establish these elements, as such, coverage is at statutory levels. In short, just because, according to Zurich, the written requirements for rejection were followed, does not mean this is so. See, Stemple v. Zurich, 584 F.Supp.2d 1304,1311 (holding "it appears that Zurich believed that signing the summary form was an effective waiver", however, the court ultimately held that the form was insufficient). The statements of intent, drafted by

Zurich, after the amount of insurance coverage became an issue cannot be used to undermine the statute.

If we accept Zurich's position, the reasoning of the Supreme Court in Clements requiring that the written rejection of insurance coverage be accomplished through an "affirmative and conscious act" would be rendered meaningless. In Clements, the Court held that, although, the policy issued actually conformed with the insured's stated intent, there was no written rejection which complied with the statutory requirements. Clements, 121 Wn.2d at 253. In short, the Clements decision actually thwarted the intent of the contracting parties because, as is obvious, the law as set forth by the UIM statute, does not permit parties to amend the law to serve their own purposes. Here, that is precisely what Zurich seeks to do by arguing that its "summary form" which, Zurich concedes, fails to, on its own, serve as a "written rejection" of statutory UIM coverage.

In Stemple v. Zurich, 584 F.Supp.2d 1304 (D. Kansas, 2008), the Kansas District Court rejected the "summary form" used by Zurich as legally insufficient to constitute an "affirmative, unequivocal act" and, accordingly, held that Zurich was not entitled to entry of summary judgment on the issue of whether UIM coverage had been waived. Amazingly, despite the fact that its "summary form" has been held insufficient in Kansas, Zurich continues to use the form. Of course Zurich

argues that, even though the same form was under consideration, the Stemple case is entirely distinguishable from the current case.

Zurich, throughout its briefing, relies heavily upon the principle that the “summary form” indicates the “amount of UIM coverage the insured has in mind”. See, e.g., (Resp. Brief at p. 45) Under Zurich’s logic, the “summary form” meets this requirement because it indicates that USB wanted \$60,000 in UIM coverage. (Id.) This argument, as relates to the summary form, was specifically considered, and rejected, in Stemple.

The court stated:

The court notes that Kansas case law, as discussed above, requires the written rejection be the product of an affirmative, unequivocal act specifically effectuating the insured's rejection of excess coverage. Taking into account that rejection provisions are to be narrowly and strictly construed, the court holds that the Summary Form is not an affirmative, unequivocal act as it repeatedly references coverage elections made on individual state selection forms, not the Summary Form itself. **The Summary Form does no more than affirm elections made on the individual state forms. Thus, because no individual state form was completed for Policy No. TRK 9299369-05, there was no election to affirm.**

Stemple v. Zurich American Ins. Co., 584 F.Supp.2d 1304, 1311

(D.Kan.,2008)(emphasis added.) This inherent problem with Zurich’s argument is never addressed in Zurich’s briefing; in essence, how can the summary form show what the insured “has in mind” if it relies upon a

form upon which the insured never made the “election”? The answer is simple, the “summary form” does not show what the insured has in mind and, as such, fails under even Zurich’s liberal view of the rejection requirements.

Zurich’s attempts to distinguish Stemple are unavailing. Zurich argues primarily that the Stemple court merely determined that the summary form was insufficient “by itself” to establish a waiver. Contrary to this argument, Zurich continues to state that the “summary form” is sufficient on its own to constitute a written waiver, however, as back up; Zurich claims that its self serving declaration testimony establishes that the “summary form” does effectively waive statutory UIM limits. Zurich cites to no case which held that an insufficient written rejection, when supplemented by testimony of the parties, can somehow become sufficient. Isn’t that the point of having a clear written rejection?

Zurich argues that this case differs significantly from the Stemple case because, in Stemple, the insured [employer] signed a valid, written rejection form for UIM coverage for its fleet of business automobiles, however, did not do so for its fleet of trucks (including the truck involved in the subject accident). Stemple, at 1312. Contrary to Zurich’s contention, Stemple did not consider this fact dispositive. Stemple, supra at 1312. Moreover, more compelling than Stemple there is no valid written

rejection form for any policy issued to USB. As such, unlike in Stemple, there is no written showing of USB's intent to **reject** statutory UIM coverage.

C. Determining what USB did intend from the writings submitted is impossible.

Zurich must argue that the "summary form" is, on its face, a valid written rejection as per the requirements of the UIM statute; however, Zurich's argument is undercut by its repeated statements that, to determine what the "summary form" means, one must look to documents extrinsic to the "summary form". Simply stated, if, as Zurich contends, the "summary form" is facially sufficient then, why is it necessary to consider extrinsic documentation? Zurich's arguments are fatally flawed because, when all documents submitted by Zurich are considered, the result is an ambiguous mess. Accordingly, ascertaining what the insured, USB, did intend is impossible to determine from the writings produced by Zurich.

Zurich begins with the premise that, "there is no question regarding the amount of coverage USB requested for UIM insurance in Washington-it was \$60,000." (Resp. Brief at p. 45) However, Mr. Boness's testimony is ambiguous on this point. Mr. Boness testifies that, his intent was that "we [USB] would elect the minimum amount of coverage **required** by each of the respective states." (CP 328)(emphasis

added.) The “summary form” itself is entitled “State Min UM/UIM” which, under a plain meaning approach, establishes that the insured is “selecting” the minimum amount of coverage required. (CP 195) In Washington, there is no minimum amount of UIM coverage required. Galbraith, 78 Wn.App. at 531. As such, both the “summary form” and the testimony of Mr. Boness are ambiguous as to whether the insured’s intent was to select \$60,000 in UIM coverage or \$0 in UIM coverage.

In response to the ambiguity inhering in the submitted testimony and the summary form, Zurich, amazingly, relies upon **additional** extrinsic evidence to explain what Zurich means when it uses the term “State Min”. (Resp. Brief at p. 35) Expressly, Zurich submits, yet another, declaration from Mr. Curt Shipton (underwriter) for the proposition that when an insured requests “minimum” coverage, that means, according to Zurich, that the insured wants the “minimum” coverage permitted by the ISO in each state. (Id.) Zurich goes on to submit, yet more, extrinsic evidence; “Option I form” which states “Rejection/Minimum Mandatory Coverage” to attempt to explain the confusion. (Id.)

Washington law is clear on the point that, where there is ambiguity in a purported UIM “waiver”, statutory UIM limits are imposed. Galbraith, 78 Wn.App. at 532. In Galbraith, analogous to the current case, the insured requested “minimum limits” of UIM coverage. Id. The court

reasoned that the request for “minimum limits” was “arbitrary” in the context of UIM coverage. Id. Perhaps most critically, there was no showing, from the documentation submitted that the insured “understood or intended that the ‘minimum limits’ for UIM coverage would be equivalent to the statutory minimum limits for liability coverage.” Id. It was clear that the insured did not intend for UIM coverage at statutory UIM limits, however, because the evidence did not establish that the insured knowingly waived statutory limits, the Galbraith court imposed statutory limits by operation of law. Id.

Galbraith is on point with the facts of the current case and exemplifies the rule that any ambiguity manifest in the submissions of the parties, as is rampant in the current case, requires imposition of UIM coverage at statutory limits.

D. The Washington Form does not change the analysis.

Zurich does not dispute that, even if considered, the Washington form fails to meet the requirements for specificity set forth in Washington law. In short, there is no Washington case which holds that a form which fails to provide the insured with a meaningful choice regarding UIM coverage is sufficient to comply with the requirements of RCW 48.22.030.

Zurich’s argument with regard to consideration of the Washington form is that it should not be considered for purpose of evidence of “written

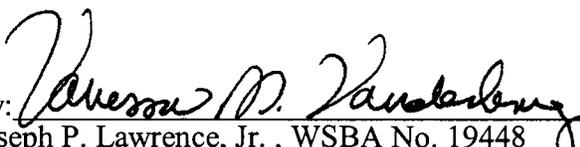
waiver” but, instead, should be considered as evidence of “notice” to USB. (Resp. Brief at p. 48). This begs the question, if, as repeatedly contended by Zurich, the “summary form” is acceptable on its face, why does the Washington form need to be considered? If Zurich seeks admission of the form for purposes of showing that USB, through Boness, “knowingly” signed the “summary form”, then the form is only relevant if the facts establish that Boness saw the Washington form. There is no such evidence. Zurich, therefore, presents no basis for consideration of the Washington form.

III. CONCLUSION

For all the foregoing reasons, Humleker respectfully requests reversal of the trial court’s decision and remand for entry of judgment and award of attorneys’ fees in his favor.

Respectfully submitted this 13th day of May, 2010.

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By: 
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Of attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I sent by delivery a true copy of this document as follows:

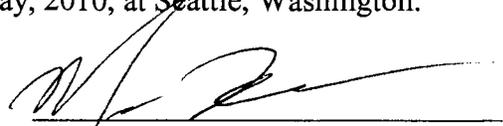
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206-682-7100

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DATED this 14th day of May, 2010, at Seattle, Washington.



Megan Fensterman, Legal Assistant to
Joseph P. Lawrence, Jr., WSBA No. 19448
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