

**NO. 41371-0-II**

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

CONSOLIDATED CASES

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JENNIFER HELGESON and ANDREW HELGESON,  
Appellants,

v.

VIKING INSURANCE COMPANY OF WISCONSIN, a foreign corporation,  
d/b/a SENTRY INSURANCE, d/b/a, DAIRYLAND INSURANCE,

Respondent.

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VIKING INSURANCE COMPANY OF WISCONSIN, a foreign corporation,  
Respondent,

v.

JENNIFER HELGESON and JOHN DOE HELGESON, and their marital  
community, and ANDREW HELGESON,  
Appellants.

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**REPLY BRIEF OF APPELLANTS**

February 18, 2011

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Gerald A. Kearney, WSBA 21819  
LAW OFFICES OF GERALD A.  
KEARNEY, PLLC  
PO Box 1314  
Kingston, WA 98346  
Tel: (360) 297-8500  
Fax: (360) 297-8511  
gerry@kitsapattorney.com  
Attorneys for Appellants

Natalie K. Rasmussen, WSBA 42250  
LAW OFFICES OF GERALD A.  
KEARNEY, PLLC  
PO Box 1314  
Kingston, WA 98346  
Tel: (360) 297-8500  
Fax: (360) 297-8511  
natalie@kitsapattorney.com  
Attorneys for Appellants

EM 2-18-11

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## I. REPLY ARGUMENTS

A. *Viking's arguments regarding the distinctions between grants of coverage and exclusions from coverage ignore the fact that Washington State courts have consistently invalidated insurance contract provisions which foreclose a named insured's or her family members' only source of UIM coverage.*

Washington State courts have repeatedly invalidated insurance contract language which leaves the named insured or her family members without any possible source of Underinsured Motorists (UIM) coverage. Such insurance contract language, whether in an initial grant of coverage or an exclusion, is void as against the UIM statute's public policy of ensuring a second, floating layer of protection for those who are injured by automobile accidents. *See Greengo v. Pub. Emp. Mut. Ins. Co.*, 135 Wn.2d 799, 959 P.2d 657 (1998).

*Tissell v. Liberty Mut. Ins. Co.*, 115 Wn.2d 107, 795 P.2d 126 (1990), is analogous to the facts of this case and demonstrates an instance where an insurance contract provision was declared invalid because it foreclosed the accident victim's only source of UIM coverage. *Tissell* examined the validity of two insurance contract provisions, one of which operated to deny UIM coverage when a person was injured while occupying a vehicle which was also covered by the primary liability

portion of the insurance policy.<sup>1</sup> Id. at 109. The Washington State Supreme Court invalidated this insurance contract provision in Tissell, even though the same provision was upheld in a previous case. Id. at 110-11 (citing Millers Cas. Ins. Co. v. Briggs, 100 Wn.2d 1, 665 P.2d 891 (1983)). The provision was invalidated in Tissell because in that case, the provision operated to foreclose the appellant, who was the named insured, her only source of UIM coverage. Id. at 111-12; 119-20. The court explained that whereas it is reasonable to expect a third party to the insurance contract to secure her own UIM coverage if she wished to be covered, the appellant in Tissell could not reasonably be expected to purchase UIM coverage elsewhere because the policy at issue was the appellant's policy. Id. Thus, because the insurance policy language at issue foreclosed the appellant's only source of UIM coverage, the policy language was void as against public policy. Id. at 111-12; 119-20.

After deciding Tissell, the Washington State Supreme Court in Greengo reexamined the reasoning behind the Tissell decision and emphasized that an insurance contract provision which forecloses every source of UIM coverage for an accident victim is void as against public policy. As explained by the Greengo court, "the dispositive criterion in Tissell was whether the policy exclusion would operate to foreclose any

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<sup>1</sup> Viking's brief incorrectly suggests that the only insurance contract provision at issue in Tissell was a so-called "family member exclusion." (Br. of Respd't at 12).

possibility of UIM recovery. By foreclosing the plaintiff's only source of UIM benefits, the exclusion [in Tissell] would have undermined the public policy of providing a second layer of recovery." Greengo at 811. Thus, the reason that the insurance contract provision was invalidated in Tissell was because the provision foreclosed the appellant's only source of UIM benefits.

As made clear by the Washington State Supreme Court, an insurance contract provision, whether the provision is defined as a grant or an exclusion, must be declared void as against public policy if the provision leaves the victim without any UIM coverage. Like the insurance policy provision at issue in Tissell, the Endorsement in the insurance policy Viking sold Mrs. Helgeson is void as against public policy. The Endorsement is void as against public policy because it forecloses Andrew Helgeson's only source of UIM coverage. The Endorsement forecloses Andrew Helgeson's only source of UIM coverage by amending the scope of who is insured under the policy to exclude the named insured's, Mrs. Helgeson's, family members from UIM coverage. The Endorsement thus amends the definition of who is insured under the policy such that Mrs. Helgeson's family members, including her minor children, are excluded from UIM coverage. As a minor at the time he was injured, Andrew could not contract elsewhere for UIM coverage—his mother's policy was his

only source of UIM coverage. The Endorsement thus foreclosed Andrew's only source of UIM coverage. This fact renders the Endorsement void as against public policy.

Both cases cited by Viking for support of its proposition that the Endorsement is valid are distinguishable because the insurance policy language at issue did not foreclose the accident victim's only source of UIM coverage.

Farmers Ins. Co. v. Miller, 87 Wn.2d 70, 71-72, 549 P.2d 9 (1976) dealt with an insurance contract provision which denied UIM coverage for any family members of the named insured who owned an automobile not covered by the UIM policy at issue. Because the exclusion only operated when the family member owned an automobile, the family member would be able to have his or her own UIM policy. Therefore, the exclusion did not foreclose the automobile owning family member's only possible source of UIM coverage.

Similarly, the insurance policy language at issue in Wheeler v. Rocky Mountain Fire and Casualty Co., 124 Wn. App. 868, 103 P.3d 240 (2004), did not foreclose the accident victim's only possible source of UIM coverage. Wheeler dealt with an insurance contract provision which provided coverage for the named insured's family members, including foster children. Id. at 871. The insurance company in Wheeler denied

UIM coverage to the appellant, because the appellant, having reached the age of 18 at the time relevant to the case, was no longer the named insured's foster child under Washington State Law. Id. The appellant was therefore, no longer a member of the named insured's family. The appellant was free to contract for her own insurance, and, having reached the age of majority, was capable of doing so. Thus, the language at issue in Wheeler did not foreclose the appellant's only possible source of UIM coverage.

Both Farmers Ins. Co. and Wheeler involved insurance contract language which did *not* foreclose the accident victims' only source of UIM coverage. As such, both Farmers Ins. Co. and Wheeler are distinguishable from Tissell and the facts of this case because both the insurance policy provision at issue in Tissell and the Endorsement in the insurance policy Viking sold Mrs. Helgeson foreclose the accident victims' only source of UIM coverage. As in Tissell, and unlike Farmers Ins. Co. and Wheeler, the Endorsement in the policy Viking sold Mrs. Helgeson should be declared void as against public policy.

**B. The definitions in RCW 48.22.005 are incorporated into the UIM statute, RCW 48.22.030.**

Not only is the Endorsement void as against public policy, the Endorsement is also void because it violates express statutory language.

Contrary to what Viking argues in its Brief, there is no indication that the Washington State Legislature intended the definitions of RCW 48.22.005 to apply only to Personal Injury Protection (PIP) coverage.

Under the rules of stator interpretation, multiple statutes which deal with the same subject matter are to be read in harmony with each other as much as possible. Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., 168 Wn.2d 421, 433, 228 P.3d 1260 (2010). Reading the chapters of RCW 48.22 harmoniously demonstrates that the definitions of RCW 48.22.005 are incorporated into RCW 48.22.030, the UIM statute.

RCW 48.22 is entitled “Casualty Insurance” and deals with much more than merely PIP coverage. If the Legislature intended RCW 48.22.005 to apply only to PIP coverage, they would not have placed it within this broader casualty insurance section with only “Definitions” as the statute title. Instead, they would have titled the statute “PIP coverage – Definitions” as they did with other statutes.<sup>2</sup> Furthermore, RCW 48.22.005 begins by stating “Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.” If the Legislature intended the definitions to only apply to PIP coverage, they would not have stated that the definitions apply throughout the entire chapter. Thus, looking at the entire statutory scheme demonstrates that

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<sup>2</sup> For example, *see* RCW 48.22.110, which is titled “Vendor single-interest or collateral protection coverage –Definitions.”

the legislature intended the definition of “insured” to apply to all insurance coverages in chapter 48.22, not just PIP coverage.

In addition, the legislative history behind the enactment of RCW 48.22.005 indicates that the definitions contained in the statute apply throughout RCW 48.22, not just to the PIP coverage statutes. While Viking is correct in pointing out that the 1993 bill behind RCW 48.22.005 was described as “[r]egulating the mandatory offering of personal injury protection benefits,” this description is only part of the bill’s overall description. In whole, the bill’s description reads “AN ACT Relating to mandatory offering of personal injury protection insurance; adding new sections to chapter 48.22 RCW; creating a new section; and providing an effective date.” *See* Laws of 2003 ch. 242, CP 163. Thus, the Legislature intended that the 1993 bill relate to more than just PIP coverage. The Legislature intended that the bill alter RCW Chapter 48.22 as a whole by creating new sections with definitions that apply throughout the chapter, not just to PIP coverage. The legislative history thus confirms what the text of the statutes indicates: that the definitions in RCW 48.22.005 apply throughout RCW 48.22.

**C. Viking's refusal to extend UIM coverage to Andrew Helgeson is an unreasonable denial of a claim for coverage and a misrepresentation of a policy provision and therefore, a violation of the Insurance Fair Conduct Act.**

Under the Insurance Fair Conduct Act (IFCA), an unreasonable denial of a claim for coverage is a violation of the act and entitles the claimant to an award of actual damages, costs, and attorney's fees. RCW 48.30.015(1). While it is true that a denial is reasonable if it is performed in good faith and under an arguable interpretation of existing law, *see Shields v. Enter. Leasing Co.*, 139 Wn. App. 664, 676, 161 P.3d 1068 (2007), Viking's denial of Andrew Helgeson's claim was not made in good faith and was therefore, unreasonable.

Viking's denial of Andrew Helgeson's claim was not made in good faith because Viking sold Mrs. Helgeson an insurance policy which contained a void and illegal Endorsement. Viking knew or should have known that the Endorsement was illegal because the same Endorsement in the policy Viking sold Mrs. Helgeson has been declared invalid in at least one other state with automobile insurance laws almost identical to the automobile insurance laws in Washington State. *See Viking Ins. Co. of Wisconsin v. Perotti*, 308 Or. 623, 784 P.2d 1081 (1989).<sup>3</sup> Thus, Viking's

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<sup>3</sup> In *Viking*, the Oregon Supreme Court invalidated a Broad Form Named Driver Endorsement in an insurance policy because the Endorsement limited insurance coverage to only the named insured. *Viking* at 625. This limitation on coverage did not meet the minimum requirements of Oregon's Financial Responsibility Law (FRL), which are

denial of coverage to Andrew Helgeson is in bad faith because it is made under policy language which Viking either knows or should know is invalid in Washington State.

Furthermore, by selling a policy to Mrs. Helgeson which violates express statutory language and public policy, Viking misrepresented policy provisions in violation of the IFCA. RCW 48.30.015(5)(b). Under the Washington Administrative Code, “fail[ing] to disclose to first party claimants all pertinent benefits, coverages, or other provisions of an insurance policy...under which a claim is presented” constitutes misrepresentation of policy provisions. WAC 284-30-350(1). As explained in the Appellants’ Brief and in this Reply, the Endorsement under which Viking denied Andrew Helgeson’s coverage is against public policy and express statutory language and therefore, void. Andrew Helgeson is in fact entitled to UIM benefits under the insurance policy Viking sold Mrs. Helgeson. By refusing to extend UIM coverage which is in fact available to Andrew Helgeson, Viking concealed UIM benefits from Andrew Helgeson and thus, misrepresented the policy provisions.

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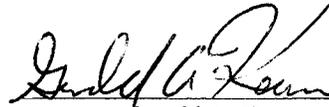
almost identical to Washington’s Financial Responsibility Act (FRA). *Compare* Or. Rev. Stat § 806.010-806.300 *with* RCW 46.29.

Viking's unreasonable denial of Andrew Helgeson's claim and misrepresentation of the policy provisions constitutes a violation of the IFCA.

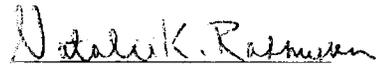
## **II. CONCLUSION**

For the reasons set out above, Jennifer Helgeson and Andrew Helgeson respectfully request that the Court of Appeals reverse the trial court's decision granting Viking Insurance Company's Motion for Summary Judgment. The Helgesons further request that this Court grant their Motion for Summary Judgment: (1) voiding the Broad Form Named Driver Endorsement contained in the Viking Policy; (2) finding Viking in breach of its insurance contract with Jennifer Helgeson; (3) declaring that Viking is in violation of the Insurance Fair Conduct Act; and (4) awarding the Helgesons the costs and attorney fees of this action.

*Respectfully submitted this 18<sup>th</sup> day of February, 2011.*



Gerald A. Kearney  
Attorney for Jennifer Helgeson  
and Andrew Helgeson  
WSBA No. 21819



Natalie K. Rasmussen  
Attorney for Jennifer Helgeson  
and Andrew Helgeson  
WSBA No. 42250

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**DECLARATION OF SERVICE**

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**DECLARATION OF SERVICE**

I hereby certify, under penalty of perjury of the laws of the State of Washington, that on this date I delivered true and correct copies of the within document and the following additional documents:

1. Reply Brief of Appellant

To the following attorney of record:

Patrick Paulich  
Attorney at Law  
1300 Puget Sound Plaza  
1325 Fourth Avenue  
Seattle WA 98101

on February 18, 2011 by United States Mail

I declare under oath and penalty of perjury that the foregoing statements are true and accurate.

SIGNED at Kingston, Washington on this 18<sup>th</sup> day of February, 2011.



Susan Miedema, Secretary to the  
LAW OFFICES OF GERALD A. KEARNEY, PLLC