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No. 50827-3
(Pierce County No. 16-2-13511-6)

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

HAROLD KALLES,
Plaintiff-Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,
Defendant-Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This case presents three issues: *first*, does State Farm Mutual Auto Insurance Company's ("State Farm") standard form insurance policy provide uninsured motorist coverage property damage coverage ("UIM PD") which is consistent with the compensatory damages that are recoverable under Washington law? (See WPI 30.16 ("Reasonable compensation for any loss of use of any damaged property"); RCW 4.56.250(1)(a) ("Economic damages" means objectively verifiable monetary losses, including ... loss of use of property)).

Second, if the State Farm policy which promises to pay "any *person* entitled to recover compensatory damages as a result of property damage of an insured," (CP 82), under an insuring agreement stating "We will pay compensatory damages for property damage an insured is legally entitled to recovery from the owner or driver of an *under-insured motor vehicle*" *Id.* (bold/italics in original, underlining emphasis added) were to be found by this Court to *not* cover "loss of use," this Court faces a second issue; that being, whether this would impermissibly reduce the statutorily required UIM coverage for those "legally entitled to recover damages ...because of...property damage." (RCW 48.22.030(2) coverage

required to cover the “*applicable damages* which the covered person is legally entitled to recover.” RCW 48.22.030(1) (emphasis added)).¹

Third, if this Court were inclined to hold that the statutory language “damages...because of...property damage” does *not* include “loss of use” within its scope, that interpretation would also apply to the materially identical *liability* coverage in State Farm’s policy which promises “we will pay damages an insured becomes legally liable to pay because of: (b) damage to property.” CP 68. If so, would such an interpretation of the “because of” trigger language make State Farm’s policy language violative of RCW 46.29.090, which requires liability policies to (at a minimum) cover “ten thousand dollars *because of* injury to or destruction of property of others,” which would be strongly contrary to reasonable policyholder expectations.

Rather than addressing its actual policy language, and the language of the RCW, State Farm successfully and repeatedly argued below – despite having paid for reduction in value of Plaintiff’s vehicle - that

¹ RCW 48.22.030(3) further defines what may 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.” State Farm’s policy includes the broader trigger stating that “Property Damage means physical damage to or destruction of: (1) your car or a newly acquired car; or (2) property owned by the insured while that property is in the passenger compartment of your car or a newly acquired car.” R82. The difference between the two alternative situations – separated by an “or” - would exist with a phantom vehicle, with no resulting damage to the car, but damage to property inside of the vehicle.

“Plaintiffs’ State Farm UIM PD policy covers, ‘property damage an insured is legally entitled to recover’.” CP102. Having argued very different policy language *than actually found in State Farm’s policy* (which provides for **“compensatory damages as a result of”** and **“compensatory damages for”** *right before* this phrase taken out of context), State Farm argued successfully below that “damage characterized as loss of use is different than physical damage to a vehicle.” CP 102. As discussed below, this argument must be rejected by this Court, because it is both inconsistent with the actual policy and statutory trigger language (i.e., “because of”; “for”; “as a result of”), because any ambiguity in the policy language must be construed against State Farm, and also because such a reading of the policy is inconsistent with the reasonable anticipation of policy holders.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred in declining to find coverage for loss of use under State Farm’s policy language that provided coverage for “compensatory damages for property damage” and “compensatory damages as a result of property damage.”
2. The Superior Court erred in failing to find that the language of RCW 48.22.030(2): “legally entitled to recover damages ...because of...property damage” required coverage for damages for loss of use.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether State Farm’s insuring agreement, which provides uninsured motorist coverage property damage coverage (“UIM PD”)

which promises to pay “compensatory damages for property damage an insured is legally entitled to recovery from the owner or driver of an under-insured motor vehicle” is consistent with the compensatory damages that are recoverable under Washington law and RCW 48.22.030.

2. Whether the term “as a result of” in the insuring agreement which promises to pay “compensatory damages as a result of *property damage* of an insured,” and the word “for” in the insuring agreement which promises to pay “compensatory damages for property damage an insured is legally entitled to recovery from the owner or driver of an under-insured motor vehicle” trigger State Farm’s obligation to compensate its insureds for damages related to the loss of use of their vehicles.

3. Whether a State Farm insured, who under UMPD coverage is promised “compensatory damages for property damage an insured is legally entitled to recovery from the owner or driver of an under-insured motor vehicle,” should reasonably expect to receive compensation for the loss of use of his/her vehicle.

4. Whether the Superior Court’s interpretation of the State Farm insuring agreement would undercut the liability coverage, leaving insureds without coverage for additional consequential damages which flow from the advent of the property damage.

IV. STATEMENT OF THE CASE

On June 20, 2014 Plaintiff’s 2013 Land Rover LR4, a vehicle which he had purchased fifteen days earlier in Connecticut for \$66,803.75 and had shipped to Washington State, was hit by an uninsured motorist. CP 31. Rather than totaling the nearly new Land Rover, State Farm elected to repair the vehicle at a cost of \$39,313.14. CP 98. Because the vehicle had suffered substantial loss in market value, and State Farm admits that “diminished value” is covered under its UIM PD coverage,

State Farm offered – with no supporting estimate of loss - \$18,000.00 to resolve the diminished value claim while Plaintiff’s vehicle was being repaired. CP100. Plaintiff, in turn, presented an estimate of diminished value loss of \$29,261.00. CP 34.

State Farm elected to repair Plaintiff’s vehicle when the repair costs *plus* the resulting “diminished value” was either \$68,574.14 (102.6% of the vehicle’s pre-loss value) or \$57,313.14 (86% of the vehicle’s pre-loss value) depending on which diminished value estimate was considered. Not only should the vehicle have been totaled under Washington Law (see WAC 284-30-320(15)) but the repair process deprived Plaintiff of the use of his vehicle for 143 days. CP 33, 11, and 98. A similar, but less premium vehicle (for example, a Chevy Tahoe) would have cost \$11,121.26 to rent during the period Plaintiff was without the use of his Land Rover LR4. CP 33. Despite State Farm’s electing to repair (not total) Plaintiff’s vehicle, State Farm denied Plaintiff coverage for loss of use of the vehicle (143 days) under Plaintiff’s UIM PD coverage and Plaintiff’s car rental coverage. CP 66.

Had State Farm *not* refused to pay Plaintiff for loss of use resulting from the 143 days he was without his vehicle, and actually paid for loss of use, the repair cost + diminished value + loss of use would have been \$79,695.40 (119.3% of the vehicle’s \$66,803.75 pre-loss value when using

Plaintiff's diminished value estimate) or \$68,434.40 (102.4% of the vehicle's pre-loss value when using State Farm's diminished value offer).

Plaintiff filed suit and moved for summary judgement on coverage for loss of use. The Superior Court denied the motion. CP 129-30. Plaintiff's motion for reconsideration, or alternatively to certify the Court's construction of the policy for discretionary review, was also denied by the Superior Court. CP 144. The parties subsequently confidentially resolved their dispute over the amount of diminished value on Plaintiff's vehicle, and stipulated to dismissal for appeal of the Superior Court's ruling on coverage for loss of use. CP 146.

V. ARGUMENT

A. Standard of Review

The construction of the language of a standard form insurance policy, such as here where there are no factual issues, is a question of law, and the interpretation of the statutory minimum coverage requirements as to both UIM and Liability coverages is a question of law. *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 271, 267 P.3d 998 (2011). Both issues are reviewed de novo. *American Legion Post No. 32 v. City of Walla Walla*, 5-6, 802 P. 2d 784 (1991) ("Interpretation of a statute is solely a question of law"); *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 730-31, 837 P.2d 1000 (1992) ("interpretation of an insurance

contract is a matter of law (citation omitted). Where there are no relevant facts in dispute, the applicable standard of review is de novo review of lower court decisions regarding insurance coverage.”). “This court engages in the same inquiry as the trial court when reviewing a decision regarding summary judgment.” *McDonald*, 119 Wn.2d at 730 (citing *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 682, 801 P.2d 207 (1990)).

B. State Farm’s Policy Provides Coverage for Loss of Use.

The rules applicable to insurance coverage language disputes are well established: “a clause is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable.” *American National Fire Ins. Co v. B&L Trucking and Const. Co*, 134 Wn.2d 413, 951 P.2d 250, 256 (1998). This Court must “view an insurance contract in its entirety and cannot interpret a phrase in isolation.” *Moeller*, 173 Wn.2d at 271. Further, “[w]hen construing the policy, the court should attempt to give effect to *each* provision in the policy.” *Moeller*, 173 Wn.2d at 271-72 (quoting *Allstate Ins. Co., v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997); (italics in original)).

Where, as here, there exist undefined terms, the terms “are given their ordinary and common meaning, not their legal, technical meaning.” *Moeller*, 173 Wn.2d at 272 (citing *Peasley*, 131 Wn.2d at 424). This Court “must be read as the average person would read it; it should be

given a ‘practical and reasonable rather than a literal interpretation’, and not a ‘strained or forced construction’ leading to absurd results.” *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 907, 726 P.2d 439 (1986). The “reasonable expectations” of the insured is key and “the contract as a whole must be read as the average person would read it; it should be given a practical and reasonable rather than a literal interpretation, and not a strained or forced construction leading to absurd results.” *Moeller*, 173 Wn.2d at 272 (internal quotes omitted); (quoting *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 340, 738 P.2d 251 (1987)). As the *Moeller* court aptly observed, “the lens through which we view this question is from the point of view of the consumer.” *Id.* at 275.

Of course, if after reading the policy as a whole, two reasonable interpretations exist, ambiguities “are resolved against the drafter-insured and in favor of the insured.” *American National Fire Ins. Co v. B&L Trucking and Const. Co.*, 134 Wn.2d 413, 428, 951 P.2d 250 (1998) (citing multiple cases). In contrast, “exclusions should be construed strictly against the insurer” *Queen City Farmers, Inc., v. Central Nat’l Ins. Co. of Omaha*, 126 Wn.2d 50, 74, 882 P.2d 703 (1995), and “will not be extended beyond their clear and unequivocal meaning.” *Stuart v. American States Ins. Co.*, 134 Wn.2d 814, 818-19, 953 P.2d 462 (1998). As recently summarized by this Court in *Moeller v Farmers Ins. Co. of*

Wash., 155 Wn. App. 133, 141, 229 P.3d 857 (2010), *affirmed*, 173 Wn.2d 264, 267 P.3d 998 (2011):

[W]e resolve any remaining ambiguity against the insurer and in favor of the insured. *Quadrant Corp. [v. Am. States. Ins. Co.]*, 154 Wn.2d[, 165,] 172, 110 P.3d 733 (2005). Our analysis differs, depending on whether an inclusionary or exclusionary clause is at issue. *See Mercer Place Condo. Ass’n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 602-03, 17 P.3d 626 (2000). We liberally construe inclusionary clauses, providing coverage whenever possible. *Ross v. State Farm Mut. Auto. Ins. Co.*, 132 Wn.2d 507, 515-16, 940 P.2d 252 (1997). In contrast, we strictly construe exclusionary clauses against the drafter. *Quadrant Corp.*, 154 Wn.2d at 172.

Here, as noted above, State Farm’s policy promises to pay “any *person* entitled to recover **compensatory damages as a result of property damage** of an insured”, CP 82, under an insuring agreement stating “We will pay **compensatory damages for property damage** an insured is legally entitled to recovery from the owner or driver of an *under-insured motor vehicle . . .*” CP 82 (bold/italics in original, underlining emphasis added).

State Farm posited below, (CP102), that its policy simply covered “*property damage*” which is specifically defined: “***Property Damage*** means physical damage to or destruction of: (1) your car or a newly acquired car; or (2) property owned by the insured while that property is in the passenger compartment of your car or a newly acquired car.” CP 82.

As State Farm argued, following logic that belied its own policy language, that “loss of use is different than physical damage to a vehicle.” CP102.

Yet State Farm’s strained interpretation of the policy language ignores, and makes *meaningless*, the entire phrases “**compensatory damages for**” and “**compensatory damages as a result of**” which proceed and modify “**property damage**” in the UIM PD coverage. Because neither phrase is defined by the policy, the Court must consider these terms’ “ordinary and common meaning,” *Moeller*, 173 Wn.2d at 272 (citing *Peasley*, 131 Wn.2d at 424), from the “point of view of the consumer.” *Id.* at 275.

The key term, “for” in the covering clause is vague – and has multiple meanings, one of which is “because of.” *Merriam-Webster*, Def. 3 (available as of December 13, 2017 at <https://www.merriam-webster.com/dictionary/for>). The further key term, “as a result of” is also undefined, but has a similar meaning: “because of something” *Merriam-Webster* (available as of December 13, 2017 at <https://www.merriam-webster.com/dictionary/as%20a%20result>).

State Farm further promises to pay its insureds “compensatory damages” [not “**property damage**” as State Farm’s interpretation erroneously assumes]. “Compensatory damages” means “money awarded to a victim to make up for an injury, damage, etc.” *Merriam-Webster*

(available as of December 13, 2017 at <https://www.merriam-webster.com/dictionary/compensatory%20damages/>). The term is broad:

“‘Actual damages’ are synonymous with compensatory damages.”

Martini v. Boeing Co., 137 Wn.2d 357, 367, 971 P.2d 45 (quoting *Black’s Law Dictionary* 35 (6th ed. 1990)). This “encompass[es] all elements of compensatory awards.” *Martini*, 137 Wn.2d at 367 (quoting *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 530, 554 P.2d 1041 (1976)).

Given the language above, the reasonable consumer would therefore expect – when the terms are read together, using (as required) the typical meanings - that State Farm’s promises to pay “any person entitled to recover compensatory damages as a result of property damage of an insured”, (CP 82), and “[w]e will pay compensatory damages for property damage an insured is legally entitled to recovery from the owner or driver of an under-insured motor vehicle” (CP 82) would *provide/include the same elements of damages that would be recoverable from the at-fault tortfeasor under Washington law*. This would include compensation for Loss of Use. WPI 30.16 (“Reasonable compensation for any loss of use of any damaged property”); RCW 4.56.250(1)(a) (“‘Economic damages’ means objectively verifiable monetary losses, including...loss of use of property”). The reasonable insured would certainly not expect to be left without the use of his/her property for 143

days where the insurer chooses to repair the property, rather than as should have been done, totaling it.

The argument that the terms “for” and “as a result of” which both mean “because of” are trigger language, is further supported by additional language in State Farm’s UIM PD policy, which treats “*property damage*” not as what is recoverable (i.e. the same thing as the undefined term “compensatory damages”), but rather as what is required to trigger coverage. As is typical for UIM coverage, State Farm has defined the two questions which must be answered in the clause “Deciding Fault and Amount” (CP 119) which states that:

“the *insured* and *we* must agree to the answers to the following two questions:

- (1) Is the insured legally entitled to recover compensatory damages from the owner or driver of the underinsured motor vehicle?
- (2) If the answer to i.e. (1) above is yes, then what is the amount of compensatory damages that the insured is legally entitled to recover from the owner or driver of the underinsured motor vehicle?

CP119. Notably, the question of “amount” to be paid under the policy is not phrased as how much “*property damage*” is to be recovered (as State Farm would now have it) or what “*property damage*” is to be recovered; instead, State Farm has unambiguously stated – in language it itself drafted - that the question as to the *amount* to be paid to the insured under the policy; i.e. the *scope of coverage*, is “the amount of compensatory

damages that the insured is legally entitled to recover.” *Id.* This clause is only consistent with what is recoverable under the policy being “compensatory damages” “because of” or “for” or “as the result of” triggering “*property damage*” as Plaintiff argued below, not the recovery being limited to simply the *property damage* itself as State Farm has argued.² Plaintiff’s interpretation, rejected by the Superior Court, fits all of the language of the policy, and aligns with the reasonable consumer’s understanding/expectation that they would recover under their State Farm policy what they would have received from the at-fault driver. State Farm’s explanation does not work with its own policy language, and must be rejected as what it requires (i.e., leaving the insured with unpaid “compensatory damages” which they could collect from the at-fault party, but *not* under their own UIM PD coverage), does not comply with the reasonable interpretation of the UIM PD coverage language.

Not only does the policy structure compel rejection of State Farm’s attempted construction, but well-established rules of construction and prior case law prevent giving the phrase “compensatory damages” the

² Plaintiff further notes, as discussed above, that consistent with the rule stated in WPI 30.12 (“The reasonable value of necessary repairs to any property that was damaged plus the difference between the fair cash market value of the property immediately before the occurrence and its fair cash market value after it is repaired”) State Farm offered diminished value to Plaintiff while his car was being repaired. Diminished value, which is a *market value loss*, does not fit within State Farm’s own interpretation of its policy as only paying for “physical damage to a vehicle,” CP102, but it is consistent with both Plaintiffs trigger argument and also State Farm’s “fault and amount” clause.

same meaning as the defined bolded term “**Property Damage**” found in the very same sentence. Identical language in a policy “must have the same meaning,” *Weyerhaeuser Corp. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 670, 15 p.3d 115, 124 (2000); in contrast, “neither should different language be read to mean the same thing.” *Densley v. Dept. of Retire. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007). Further, any construction must give separate effect to each word in a policy, not write them out of the policy. *Moeller*, 173 Wn.2d at 272. The above rules would be violated if “compensatory damages” were interpreted to mean the same thing as “**Property Damage**.”

This Court, however, need not rely solely on rules on construction or the structure of the policy to find that “compensatory damages” does not mean the same thing as “**Property Damage**.” *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 784 P.2d 507 (1990) considered the meaning of “damages” in an insurance policy, finding it had the common sense meaning found in dictionaries, (i.e. “the estimated reparation in money for detriment or injury sustained” and “the amount required to pay for a loss.”). *Id.* at 877-8. This is not the same thing as the defined term “Property Damage” in the limits of liability clause, and it therefore does not act as a loss of use exclusion.

The same conclusion was reached in *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 38 P.3d 322 (2002), which construed functionally identical “legally obligated to pay as damages *because of*...property damage” language, *Id.*, 145 Wn.2d at 428 - 429 (emphasis added), finding that it triggered broader coverage than simply “property damage” reasoning:

The Court of Appeals seemingly confused the concept of "property damage" with that of "damages." ... In *Boeing [Co. v. Aetna Cas. & Sur. Co.]*, 113 Wash.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.*

Id. at 428. “Property damage” was further found to be the triggering language, not a limitation on recoverable damages in *American National Fire Ins. Co., v. B&L Trucking & Constr. Co., Inc.*, 134 Wn.2d 413, 951 P.2d 250 (1998) wherein the court addressed a liability policy which covered what the insured might become “legally obligated to pay as damages because of ...property damages.” The insured argued that “the policy language should be interpreted in the following manner: if the

insured's liability is "because of" property damage during the policy period, the insurer is then responsible for all sums the insured is legally obligated to pay. In other words, once a policy is triggered, that policy remains on the risk for continuing damage.” 134 Wn.2d at 423. The Supreme Court agreed, noting that:

“The average person purchasing insurance would construe the policy language to provide indemnity for an injury once the policy was triggered. Because the language is, at the least, ambiguous, and because we discern no extrinsic evidence from the record indicating an intent by both parties to exclude coverage, we must resolve the ambiguity in favor of the insured.”

Id. at 428 -429. The exact same reasoning applies to the request for the payment of loss of use as “compensatory damages”: “***property damage***” is the *trigger*, it is not a *limitation* on damages that are to be paid.³

For State Farm’s argument to make any sense, this Court would need to rewrite the insuring agreement by substituting the defined term “***property damage***” in place of “compensatory damages.” Yet “courts do

³ Other cases have also viewed “property damage” as being the *trigger* for coverage, not a limit on coverage. See e.g. *Griffin v. Allstate Ins. Co.*, 108 Wn.App. 133, 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). Cases looking at the same question from the opposite perspective have reached the same conclusion. *Hayden v Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 1 P.3d 1167 (2000) held that a policy exclusion for loss of use of property *that has not been physically injured* precluded liability coverage for “damages because of property damage.” Plaintiff notes that he is not suggesting that State Farm’s policy or the materially identical language of RCW 48.20.030 requires UIM PD loss of use coverage without there first being “property damage” to the car or its contents.

not have the power, under the guise of interpretation, to rewrite contracts.” *Panorama Village v. Allstate Ins. Co.*, 144 Wn.2d 130, 137, 26 P.3d 910 (2001). The reasoning which compels rejection of State Farm’s proposed construction is well-established: “The industry knows how to protect itself and it knows how to write exclusions and conditions. If Allstate intends "hidden" to mean "unknown," it must say so. Further, to the extent the term is ambiguous, it must be construed against the insurer.” *Id.* at 141 (internal citations omitted).

Plaintiff finally notes that prior Courts which have addressed the same issues in reasoned opinions have reached a conclusion consistent with Plaintiff’s argument that “property damage” is a trigger, not a limitation on coverage. In *Shin v. Esurance Ins. Co.*, C8-5626 RBL, 2009 WL 688586, at *1 (W.D. Wash. Mar. 13, 2009), Judge Robert B. Leighton rejected argument which State Farm presents here, noting that:

UIM coverage policies are evaluated to ensure that statutorily mandated coverage is neither whittled away nor eroded . . . The coverage in question allows an insured to recover all damages he or she is legally entitled to recover *because of*, among other things, physical property damage. In contrast to Defendants’ stance that this language constitutes a contract that limits recovery to damages for physical damage, Ms. Shin argues that once there is physical damage, an insured is entitled to recover all damages that flow therefrom. . . . Defendants’ proffered interpretation is neither obvious from a plain reading, nor clearly supported by case law. First, the language “because of” tends to run contrary to Defendants’ assertions. The

phrase can take on several meanings, including by reason of, on account of, or resulting from. All of these meanings run contrary to the idea that the contract limits recovery to compensation for physical damage.

Shin at *6. Judge Leighton expanded upon this reasoning in *Degenhart v AIU Holdings, Inc.*, No. C10-5172RBL, 2010 WL 4852200 (W.D. Wash. Nov. 26, 2010), reasoning that “[t]he UIM statute requires insurers to offer UIM coverage for insureds who are otherwise entitled to damages **because of** property damage resulting from an accident caused by an underinsured motorist. To **trigger** entitlement to coverage, physical damage to the vehicle must occur.” *Id.* (emphasis added).

Consistent with the policy language, and cases interpreting materially identical language, this Court should find there has been no exclusion from coverage of “loss of use” in State Farm’s policy.

C. Were State Farm’s Policy Language Found To Exclude “Loss Of Use,” It Would Contravene RCW 48.22.030.

In Washington State, unlike in most other States, UIM PD coverage is *mandatory* coverage, unless it is expressly declined in writing. UIM PD is made available “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* ... property damage, resulting therefrom.” RCW 48.22.030(2) (emphasis added). This statutorily-prescribed coverage applies when the at fault tortfeasor does not have liability insurance (or sufficient insurance) to cover the “*applicable damages* which the covered person is legally entitled to recover.” RCW 48.22.030(1) (emphasis added). As with State Farm’s policy language, what triggers coverage, (i.e., the words “property damage”), means “physical damage to the insured motor vehicle.” RCW 48.22.030(3). The plain and undisputable language of RCW 48.22.030 shows that it is designed to protect Washington insureds from uninsured or underinsured motorists by allowing them to collect their “legally entitled damages” from their own insurer under UIM PD.

The exact same reasonable definitions, and the same authority finding “property damage” to be a trigger for “damages” discussed above as to State Farm’s materially identical policy language, applies directly to the language of RCW 48.22.030. The only difference is that RCW 48.22.030 uses the words “because of” – which, while it means the exact same thing as “for” or “as a result of” as shown above - is the same language construed in prior cases as being trigger language for the broader coverage of “damages” or “compensatory damages.” *Boeing Co.*, 113 Wn.2d at 877-8; *Overton*, 145 Wn.2d at 428; *American National Fire Ins.*

Co., 134 Wn.2d at 423; *Shin*, 2009 WL 688586, at *6; *Degenhart.*, No. C10-5172RBL, 2010 WL 4852200; *Martini*, 137 Wn.2d at 367. The same construction must be given here.

To the extent that there is any question about the meaning of the words in the UIM statute, similar principles apply: the UIM statute, and policies offered thereunder, must be construed liberally. *Allstate Ins. Co. v. Hammonds*, 72 Wn. App. 664, 671, 865 P.2d 560 (1994), *review denied*, 124 Wn.2d 1010, 879 P.2d 292. Courts consider contract principles, public policy, and legislative intent when deciding UIM cases. *McIllwain v. State Farm Mut. Auto. Ins. Co.*, 133 Wn. App. 439, 446, 136 P.3d 135 (2006), *review denied*, 159 Wn.2d 1020, 157 P.3d 404. As this Court has noted: “[u]nderlying the UIM statute is a strong public policy to ensure coverage for innocent victims of uninsured drivers.” *Cherry v. Truck Ins. Exchange*, 77 Wn. App. 557, 561, 892 P.2d 768 (1995), *review denied*, 127 Wn.2d 1012.

Where, as here, the statute provides coverage for “legally recoverable damages” the “UIM insurers cannot reduce statutorily mandated UIM coverage through language in the insurance policy.” *McIllwain*, 133 Wn. App. at 446. 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). As a result, any purported exclusion or coverage term that sees that limits coverage mandated by statute is void. *Id.* at 87 (“[W]here the [UIM] endorsement does not provide protection to the extent mandated by the [UIM] statute, the offending portion of the policy is void and unenforceable.’ *Britton [v. Safeco Ins. of Am.]*, 104 Wn.2d 518, 531, 707 P.2d 125 (1985)”); see also *Elovich v. Nationwide Ins. Co.*, 104 Wn.2d 543, 552-53, 707 P.2d 1319 (1985) (invalidating ‘consent to settle’ clause”).

Under both State Farm’s policy and the UIM statute, “Physical damage to the insured motor vehicle” causes a collision repair bill. As with Plaintiff’s vehicle, State Farm pays the collision repair bills without dispute. State Farm further pays for diminished value, which is recoverable under WPI 30.12. In doing so, State Farm is not covering “physical damage to the insured motor vehicle.” Rather, State Farm is paying money to indemnify its policyholder for a *compensatory damage* or *damage* thereof recoverable under RCW 4.56.250(1); *Bader v. Martin*, 160 Wash. 460, 463, 295 P. 160 (1932); and WPI 30.10. This fulfills the statutory obligation to cover the “*applicable damages* which the covered person is legally entitled to recover.” RCW 48.22.030(1).

State Farm’s argument that it can separate out “loss of use” and not pay it, is not only inconsistent with the policy language State Farm

drafted, and State Farm’s own practice in settling claims, but also with the statutory language “*legally entitled to recover damages ...because of ...* property damage, resulting therefrom.” RCW 48.22.030(2) (emphasis added) and the obligation to cover the “*applicable damages* which the covered person is legally entitled to recover.” RCW 48.22.030(1) (emphasis added). State Farm’s argument that this Court must leave Mr. Kalles with uncompensated “*damages*” – those which flow directly from the damage to his vehicle, “*damages*” the statute *requires* to be covered, “*damages*” that Mr. Kalles would be able to recover were the at-fault party insured, does not match either the language, the legislative intent, or the reasonable insureds’ expectation/understanding of what would occur when a claim is made under UIM PD coverage.

Plaintiff finally notes the wider impact of a ruling from this Court that statutory language stating that “legally entitled to recover damages ...because of ... property damage, resulting therefrom” only covers the “physical damage to the insured motor vehicle.” As noted above, State Farm’s liability provision mirrors the language of the UIM statute, stating that State Farm: “will pay damages an insured becomes legally liable to pay *because of*: (b) damage to property.” CP 68. Were this Court to adopt State Farm’s arguments below to disregard “because of” and the undefined term “damages” and hold that the policy and the UIM statute

simply covered “property damage” (with is the same thing as “damage to property”), it would mean that State Farm’s liability coverage would only pay to cover the *property damage* caused by its insureds, leaving the insured with no coverage for additional consequential damages which flow from the advent of the property damage, not only “loss of use” damages, but things like towing or storage charges. All are *damages* which the insureds would clearly be liable for as a tortfeasor. WPI 30.16 (“Reasonable compensation for any loss of use of any damaged property”); RCW 4.56.250(1)(a)(“Economic damages’ means objectively verifiable monetary losses, including...loss of use of property”); *Straka Trucking v. Estate of Peterson*, 98 Wn. App. 209, 211, 989 P.2d 1181 (1999); *cf. Holmes v. Raffo*, 60 Wn. 2d 421, 429, 374 P.2d 536 (1962) (pre RCW 4.56.250(1)(a) rule)).

Obviously, such a result would be a major surprise to insureds, who likely, as have insurers in Washington for generations, have understood that RCW 46.29.090 which requires liability policies to cover, at a *minimum*, “ten thousand dollars **because of** injury to or destruction of property of others” (emphasis added) covered *all damages* which resulted from damage to property. It would also violate the well-established rules that identical language in a policy “must have the same meaning,” *Weyerhaeuser Corp. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 670,

15 p.3d 115 (2000), and that in statutory interpretation construction of a phrase must be “harmonized” with other provisions using the same term so as to “avoid absurd results.” *State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989) under the “statutory construction canon to construe identical words alike.” *State v. Roggenkamp*, 153 Wn.2d 614, 635, 106 P.3d 196, 206 (2005) (Sanders, J., dissenting). Under the RCW “every provision must be viewed in relation to other provisions and harmonized if at all possible to insure proper construction of every provision.” *State v. SP*, 110 Wn.2d 886, 890, 756 P.2d 1315 (1988).

What State Farm argued below, and was implicitly adopted by the Superior Court (which did not explain its reasoning) is not only inconsistent with State Farm’s own policy language, but also would produce absurd and clearly unintended outcomes for insures under both the UIM PD and liability coverages, and as such must be rejected by this Court.

VI. CONCLUSION

This Court should REVERSE the Court’s denial of summary judgement and find coverage for loss of use under State Farm’s policy

language.

RESPECTFULLY SUBMITTED this 13th day of December, 2017.

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CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 13th day of December, 2017, I filed the above and foregoing document with the Clerk of the Court of Appeals, Division II, State of Washington, and served a copy on counsel for Defendants-Respondent via e-mail, as follows:

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