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

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

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HAROLD KALLES,  
Plaintiff-Appellant,

v.

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

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REPLY BRIEF

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## I. INTRODUCTION

Other than listing the applicable policy language from its policy on pages 4, 6, 10 with one telling error,<sup>1</sup> State Farm’s brief essentially ignores and fails to address the actual language of its own UIM policy. While State Farm agrees in passing that this Court “must consider an insurance policy as a whole” (Resp. Br. at 6, citing *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 172, 110 P.3d 733 (2005)), State Farm’s entire argument fails to address, and ignores what this requires.

As Plaintiff showed (App. Br. at 7) this Court must “view an insurance contract in its entirety and cannot interpret a phrase in isolation.” *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 271, 267 P.3d 998 (2011). 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)).

State Farm ignored the requirements for policy interpretation and pretends that its policy’s coverage clause is just two words: “physical

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<sup>1</sup> On page 11 of its brief State Farm claims that its arbitration provision states: “what is the amount of compensatory **damage** that the *insured* is legally entitled to recover.” (bold italics in original, red emphasis added). Yet, as Kalles noted in his brief, App. Br. at 12, and as the Record CP. 119 shows, the actual phrase in State Farm’s policy is “compensatory **damages**” (emphasis to “s” added). As Kalles further showed, and State Farm never addresses, multiple decisions of Washington Courts have noted the term “damages” is not the same thing as “damage” or “property damage” (i.e., with no “s”) in an insurance policy. App. Br. at 14-15

damages.” (Resp. Br. at 6) (underlining added). Yet, this phrase: “physical damages” *is not found anywhere in State Farm’s UIM policy!* In turn, State Farm ignores the two key phrases *that are actually in the policy.*

Plaintiff demonstrated that while the *trigger* for coverage is the existence of “property damage” (no added “s”), this does not define what is, nor limit, the *scope* of the coverage provided by the policy. In the very same clause, *in words that State Farm ignores*, it is clear what is covered: immediately after the words “we will pay” the policy states “compensatory damages for *property damage*.” (App. Br. at 1) (underlining added).

The Policy’s definition section further provides that those who are covered under the defined term “*Insured*” include “any person entitled to recover compensatory damages as a result of *property damage*” (App. Br. at 1; CP 82) (underlining added). Finally, the Policy in its arbitration clause, (see *supra*, n.1), identifies the coverage available as being the “amount of compensatory damages that the insured is legally entitled to recover” (emphasis added). None of these three sections of the UIM policy say the question is how much “property damage” or “physical damages” can be recovered.

Plaintiff laid out in detail how the undefined and yet clear term “compensatory damages” *found three times* in the relevant UIM section of State Farm’s policy includes “loss of use” under well-established meanings, prior legal opinions, and as a matter of reasonable consumer expectations. Moreover, the term “compensatory damages,” not the trigger language (i.e., “property damage”), establishes the *scope* of coverage. (App. Br. at 10-17). What is State Farm’s answer? State Farm has none, and makes no effort to provide a reasonable explanation of how coverage for “compensatory damages” does not include loss of use.<sup>2</sup> Given the lack of any reasonable counter-explanation for the policy language in question, coverage exists as a matter of law.

As Plaintiff further showed, the policy does not say that State Farm will pay only for “property damage,” it says that it will pay “compensatory damages” “*for*”/“*as a result of*”/and under the statutory language “*because of*” “***property damage.***” State Farm has no response to the showing that

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<sup>2</sup> State Farm only mentions this key term in the policy once in its brief (Resp. Br. at 12) arguing that Plaintiff having noted the phrase is also in the arbitration clause, was “reading the phrase in isolation.” Not only does this not address what the phrase means – as Plaintiff showed it established the scope of coverage – but it entirely misconstrues Appellant’s argument: the same clause “compensatory damages” is used *three places* in the UIM policy to describe what is recoverable, and this consistent use of the term shows it *unambiguously* defines what is covered, “compensatory damages” not “property damage.”

these trigger words have the same meaning and that they as a *legal matter*, “trigger” language for coverage. (App. Br. at 14-18). Without addressing what the many cases cited by Plaintiff hold, State Farm asserts that they should be ignored because they did not involve UIM coverage (Resp. Br. at 14-15). Yet, multiple decisions from the Washington Supreme Court and Courts of Appeal make manifest that the clause “damages because of/for/as a result of...property damage” allows for the recovery of *all damages* resulting from the triggering event of “property damage;” it does not act to limit the coverage to the property damage itself.

Having failed in its obligation to present even a colorable argument why the actual language of its UIM policy, read in its entirety, limits coverage to “physical damages” as it claims, State Farm likewise never explains how the functionally identical language in RCW 48.22.030(2) (“legally entitled to recover damages...because of...property damage”) and the statutory mandate to cover all “applicable damages which the covered person is legally entitled to recover” (RCW 48.22.030(1)) somehow prevents recovery of *all damages*, and instead limits recovery to “property damage” only.

Having completely ignored the above-referenced statutory provisions, State Farm then (Resp. Br. at 17-19) fails to explain the meaning of the statutory language “physical damage to the insured motor

vehicle unless the policy specifically provides coverage for the contents thereof,” simply *assuming* that it is a limit on coverage. It is not. As discussed earlier (App. Br. at 2 n.1, 9-10), this language simply allows the insurer to define the triggering events to include damage to the vehicle and its contents as in State Farm’s policy.<sup>3</sup> The very way that State Farm argues the triggering events cause coverage to arise shows that its construction of the statutory language as a *limitation* of coverage, once triggered, is unreasonable.

Given that Plaintiff has provided the only reasonable construction as to both State Farm’s policy and the UIM provisions, the Superior Court should be reversed, and this case remanded.

## II. REPLY ARGUMENT

### A. *State Farm Identifies No New Provisions or Facts.*

State Farm ignores the impact of its conduct below, and of its proposed construction of its policy. Plaintiff was left without the use of his vehicle for 143 days, while State Farm, over Plaintiff’s objections, elected to repair a vehicle that should have been a total loss. (App. Br. at 4-6). Adopting State Farm’s construction of the policy will leave Plaintiff

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<sup>3</sup> State Farm’s policy states: ““**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.” (App. Br. at 9, quoting R82).

without a way to recover the “applicable damages which the [insured] is legally entitled to recover” (RCW 48.22.020(1)) and leave him with uncompensated loss as a result of his vehicle being hit by an uninsured driver.

State Farms’ only response is to claim (citing CP 98) that it offered Plaintiff a vehicle and he declined. State Farm only cites to its brief for this contention, and the document the brief cites (CP 113-114) a declaration from State Farm’s lawyer *does not say this or support this statement*. The actual evidence in the record is directly contrary of what State Farm asserted in its brief. As the record shows, when Plaintiff sought coverage for loss of use, State Farm rejected the claim, writing to him that “[t]here is no benefit for loss of use through your Underinsured Motor Vehicle Property Damage or Car Rental Coverage.” CP 66.

***B. State Farm’s Policy Provides Coverage and Has No Exclusion for Loss of Use.***

Having (as discussed above) ignored the language of its own insuring agreement, which provided coverage for “**compensatory damages as a result of property damage** of an insured”, RP 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***” RP 82 (bold/italics in

original, red/underlining emphasis added), State Farm starts (Resp. Br. at 6-7) by arguing *ipse dixit* that “loss of use” is not “physical damage” and therefore not covered by the policy.

How does State Farm support its contention? State Farm asserts loss of use is “**general damages**,” bolding the term as if it somehow matters, and cites to *Holmes v. Raffo*, 60 Wn.2d 421, 429, 373 P.3d 536 (1962). What this has to do with construing State Farm’s actual policy language is never explained. In any event, State Farm is wrong: loss of use is no longer an item of “general damages.” Rather, as Plaintiff showed (App. Br. at 11) under RCW 4.56.250(1)(a): “[e]conomic damages’ means objectively verifiable monetary losses, including...loss of use of property.”<sup>4</sup>

Short of this less than a page long inchoate argument, State Farm makes no effort to explain what the language in its policy – read together, applying the terms “ordinary and common meaning,” and giving effect to

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<sup>4</sup> The only citation State Farm provides *Ruffo*, to support its claim, is highly questionable. In 1962, Washington characterized a private party’s loss of use claim (as distinct from a claim for rental reimbursement, which was a form of special damages) as general damages for “inconvenience.” *Holmes*, 60 Wn.2d at 429-30. In 1986, 24 years later, the Washington legislature, in the 1986 Tort Reform Act, replaced the terms “special” and “general” damages with “economic” and “non-economic” damages. RCW 4.56.250(1)(a) *and included loss of use in its definition of economic damages*.

each term (*Moeller*, 173 Wn.2d at 271-2) – means.<sup>5</sup> State Farm offers no counter construction other than that the policy covers only “physical damages,” *a term found nowhere in the policy*.

While State Farm attacks (Resp. Br. at 10-13) Plaintiff having pointed to other clauses of the policy, it misconstrues the point Plaintiff makes. State Farm argues that the policy only covers, and must be interpreted to cover, “physical damage.” Yet, in other sections of the UIM policy, *where what is covered is stated*, the policy does not say “physical damages;” instead, the policy says that what is covered is “compensatory damages as a result of *property damage*” (CP 118) and that the damages issue for arbitration involves “what is the amount of compensatory damages” that can be recovered. (CP 118). State Farm drafted the policy, and notably did not say that what was covered was only “physical damages.” These provisions, taken together, show that Plaintiff’s construction of the policy is consistent and reasonable, and that State Farm’s is not.

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<sup>5</sup> State Farm does not address that Plaintiff’s interpretation of the policy comports with dictionary definitions (App. Br. at 10-11), that the interpretation is consistent with those given identical terms in policies in prior cases (*id.* at 11, 13) nor does State Farm address that its interpretation does not comport with a reasonable insured’s expectation. (*Id.* at 13-16). These points are conceded.

Next, (Resp. Br. at 13-14), State Farm misconstrues Plaintiff's showing that the words "for," "because of" and "as a result of" are all "trigger" language. Plaintiff does not suggest that the differences in them create "ambiguity;" rather, Plaintiff notes that while none of these words are defined by the policy, they all mean basically the same thing; in State Farm's own words in the policy "as a result of." RP 82. As such, the only reasonable interpretation of the policy is that the coverage clause "[w]e will pay compensatory damages for *property damage*" means exactly what it says; (i.e., State Farm will pay "compensatory damages"), which in Washington State includes loss of use. (App. Br. at 11-12).

For reasons that are not clear, State Farm further cites *Moeller, supra*, and *Ibrahim v. AIU Ins. Co.*, 177 Wn. App. 504, 312 P.3d 998 (2013), claiming they show that "'physical damage' includes diminished value." This has absolutely nothing to do with this case, and as noted above, this language is not in State Farm's policy. In any event, *Moeller* did not involve UIM coverage, but rather the construction of an alleged exclusion from coverage in a "limits of liability" clause, a clause also in the policy in *Ibrahim*, 177 Wn. App. at 507, but not in State Farm's

policy.<sup>6</sup> The *Moeller* Court found that the limits of liability clause did not exclude diminished value, reasoning that the language:

does not convey to the average policyholder that the value of coverage may be less if Farmers repairs a vehicle rather than replacing or ‘totaling’ it. Rather, the reasonable expectation I that following repairs, the insured will be in the same position he or she enjoyed before the accident.

173 Wn.2d at 275. While the language at issue in *Moeller* was different, the reasoning of *Moeller* applies directly to this case. To paraphrase, nothing in State Farm’s UIM policy would suggest to an insured that State Farm could elect to repair (versus replace) the vehicle, leaving the insured in a much worse position (without a vehicle for 143 days) than they were before the accident, and as such the language does not exclude coverage.

Finally, State Farm asserts that two opinions by Judge Ronald B. Leighton, *Shin v. Esurance Ins. Co.*, C8-5626 RBL, 2009 WL 688586, at \*1 (W.D. Wash. Mar. 13, 2009) & *Degenhart v AIU Holdings, Inc.*, No. C10-5172RBL, 2010 WL 4852200 (W.D. Wash. Nov. 26, 2010) “rejected a trigger theory.” (Resp. Br. at 15-17). Plaintiff quoted from both opinions (App. Br. at 17-18) which are included in the record (CP 85-96) showing that both times Judge Leighton explained why the trigger

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<sup>6</sup> *Ibrahim* turned on the claim by the Plaintiff that he sought to recover “stigma” and a finding that the policy did not cover such a loss. Neither issue is before this Court, and *Ibrahim* is irrelevant.

language found in the UIM policies in those cases required him to reject the argument that the policy only covered “physical damage.” See CP 95 (*Shin*, involving “because of” language which the Court finds to mean the same thing as “resulting from”)<sup>7</sup>; CP 88 (*Degenhart*, “to trigger entitlement to coverage, physical damage to the vehicle must occur”).

As Plaintiff demonstrated (App. Br. 14-16 and n.3)<sup>8</sup> multiple Washington Appellate decisions, and not just Judge Leighton, have found language materially identical to that in State Farm’s UIM policy to be a “trigger” for coverage, not a limit to “physical damage.” Additionally, the fact that the policy covers by its *express* terms “compensatory damages,”

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<sup>7</sup> Rather than addressing Judge Leighton’s reasoning, State Farm suggests this Court should ignore it because in dicta Judge Leighton said he had “reservations about this lawsuit’s long-term viability.” Putting aside that this has nothing to do with the Court’s reasoning, the matter was ultimately resolved as a certified class action, suggesting these concerns were not ultimately an issue. See *Shin v. Esurance*, C8–5626-RBL (W.D. Wa) Dkt# 41 & 75.

<sup>8</sup> As noted above at 3-4, State Farm does not address the reasoning of the five cases Plaintiff cites, nor their holdings, and simply dismisses them as not involving UIM PD. Yet, the words in an insurance policy do not change their common sense and reasonable meaning based upon the type of insurance, and the holdings as the difference between “damages” and “property damage” with the second being a “trigger” while the first is what is covered in *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 428-29, 38 P.3d 322 (2002) and *American National Fire Ins. Co., v. B&L Trucking & Constr. Co., Inc.*, 134 Wn.2d 413, 423-29, 951 P.2d 250 (1998) compel rejection of State Farm’s argument.

which include loss of use, requires this Court to construe State Farm's policy to cover, and not exclude, loss of use.

***C. A Finding That State Farm's Policy Language Excludes "Loss of Use" Would Contravene RCW 48.22.030.***

Plaintiff showed in his opening brief (App. Br. at 18-22) how the same basic rules of construction which require this Court to find that coverage for "compensatory damages" is not excluded by the "because of/for/as a result of *property damage*" trigger language under the policy apply equally to construing the minimum grant of coverage required by RCW 48.22.030. State Farm has no response in its opposition. Nor does State Farm respond to Plaintiff's showing (App. Br. at 22-24) that the construction it argues for (i.e., that the policy language in question only covers "physical damage") would also present issues with the requirements for minimum liability coverage, and as such the proposed construction of the statutory language is illogical and unreasonable.

State Farm further does not discuss the legislative policies which apply, and how State Farm's proposed construction of the UIM language would allow an insured to have substantial uncompensated loss after a UIM accident, a fact which compels a finding that the statutory trigger language is not a limitation on coverage: "underlying 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; *see also Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 86, 794 P.2d 1259(1990) (“where 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”) (internal citations and quotations omitted).

Rather than addressing how its proposed statutory construction fits within the language of RCW 48.22.030 (it does not), or address how it treated what it contends is an exclusion as the trigger in its own policy (by allowing coverage to be triggered by either damage to the vehicle or the contents therein, *see above at 4-5*)<sup>9</sup> State Farm simply attempts to justify

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<sup>9</sup> As Plaintiff has shown, RCW 48.22.030(3) allows an insurer to limit or expand the trigger for coverage for those “legally entitled to recover damages ...because of...property damage” RCW 48.22.030(2) of the “***applicable damages*** which the covered person is legally entitled to recover.” RCW 48.22.030(1) (emphasis added) from just the vehicle, to the contents thereof. Under RCW 48.22.030(3) coverage triggered by “physical damage to the insured motor vehicle” (the facts before this Court) *is mandatory*. Coverage – such as that provided by State Farm’s own policy – for “the contents thereof” is discretionary. So as to fully explain the statutory language, RCW 48.22.030(3) further says that the insurer can, in addition to “the contents thereof” also cover damages arising from “other forms of property damage.” While State Farm’s policy does not cover these losses, this “other forms of property damages” encompasses UIM policy language where coverage is triggered by damage to a trailer or attached camper. *See e.g. Getz v. Progressive Specialty Ins. Co.*, 106 Wn. App. 184, 22 P.3d 835, 837 (2001) (UIM covers “utility trailer”); *Schelinski v. Medwest Mut. Ins.*, 71 Wn. App. 783, 786, 863 P.2d 564 (1993) (UIM does not cover “trailer”).

an exclusion, citing only to *Ibrahim*, supra. Yet, *Ibrahim* – the only case cited by State Farm - neither discussed the statutory language at issue, nor whether loss of use fell outside of the coverage mandated by RCW 48.22.030.<sup>10</sup>

*Ibrahim* involved a claim for diminished value, under very different UIM policy language stating only “we will pay for *property damage*” (177 Wn. App. at 507). The policy neither promised to pay “compensatory damages” nor after this phrase did the policy include the for/because of/as a result of trigger language. *Ibrahim* completely undercuts State Farm’s argument that its policy, with very different language, means what the AIU policy actually expressly said in *Ibrahim*. This brings to mind the holding in *Panorama Village v. Allstate Ins. Co.*,

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This interpretation – that RCW 48.22.030(3) defines what the coverage applies to (just the vehicle? contents? trailers?) and does not limit the recovery is consistent with UIM decisions in a bodily injury context where the insurer can limit what triggers coverage. See e.g. *Vasquez v. American Fire & Cas. Co.*, 174 Wn. App. 132, 298 P.3d 94 (2013) (finding the policy does not cover a non-named driver for damages sustained as a pedestrian, unrelated to the insured vehicle).

<sup>10</sup> State Farm (Resp. Br. at 19) improperly, and in direct violation of GR 14.1, cites a 2003 Division One opinion marked expressly as “do not publish.” That decision involved a *pro-se* litigant, who was a disgruntled former State Farm agent, and the opinion did not substantively or persuasively address the issues before this Court, and appears to have been driven by the unusual facts and party before the Court.

144 Wn.2d 130, 141, 26 P.3d 910 (2001) that courts cannot rewrite the policy to benefit the insurer and “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.” *Ibrahim* simply shows what the language State Farm asks this Court to add to its policy would have looked like, completely undercutting its argument.

In any event, the insured in *Ibrahim*, under this very different language, did not claim that any trigger for coverage existed after repair, and repeatedly stated, as the *Ibrahim* Court noted multiple times, that repairs had fully restored the vehicle and there was “no remaining physical damage after these repairs.” *Id.* at 509; 512. Because there was no remaining physical damage after repair, the court found the insured sought the recovery of stigma, which as the *Ibrahim* court found was not “diminished value” under *Moeller*, 173 Wn.2d at 271. Given the claims at issue, and *Moeller*, the *Ibrahim* panel without discussing the language of RCW 48.22.030 found that the exclusion for stigma, not triggered by property damage to the vehicle “did not contravene the letter or the spirit of the underinsured motorist statute” *Id.* at 514. *Ibrahim* involved very different facts, and no discussion of the statutory language, and it did not, nor could it have, established the broad rule State Farm posits allowing

limitations of damages directly triggered by property damage to the insured vehicle.

Plaintiff's construction of the statutory language is reasonable, comports with the purpose of the statute, and with how State Farm has itself applied the statute in the triggering events it occurs, and should be adopted by this Court were the issue to be reached.

### III. 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 April 30, 2018.

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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 30<sup>th</sup> day of April, 2018, 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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