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Division II  
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No. 50827-3

(Pierce County No. 13-2-13511-6)

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

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HARORLD KALLES,  
Plaintiff-Appellant,

v.

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

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RESPONDENT'S OPPOSITION BRIEF

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## I. INTRODUCTION

Appellant seeks to recover for “loss of use” damages under his Underinsured Motorist Property Damage (“UIM PD”) coverage with State Farm Mutual Automobile Insurance Company (“State Farm”) in relation to an accident involving his 2013 Land Rover. Appellant asks this Court to interpret the State Farm auto policy in a manner that would impose coverage for this discreet category of damages, despite the fact that under Washington law and the plain terms of the State Farm UIM PD coverage part, loss of use is not a covered damage.

In effort to persuade the Court, Appellant complicates an issue which in reality presents two straightforward questions. Does the UIM PD coverage part of the State Farm policy cover loss of use damages? And if not, does State Farm’s policy comply with the UIM statute?

The answer to the first question is no. The UIM PD language extends coverage only to “property damage,” defined as “physical damage to or destruction of” the insured vehicle; neither of which invoke general damages for loss of use. The language is clear and without ambiguity.

The answer to the second question is yes. State Farm’s UIM PD language tracks almost exactly with Washington’s UIM statutory

framework, which requires carriers to cover “property damage,” defined as “physical damage to the insured motor vehicle...” RCW 48.22.030(3).

Without basis in law, policy, or an accurate presentation of the State Farm policy language, Appellant invites the Court to adopt a gymnastics-like approach to reach his desired conclusion favoring coverage for his loss of use claim. It does not stand up to scrutiny. Judge Serko properly denied Appellant’s Motion for Summary Judgement and Motion for Reconsideration on this issue and her rulings should be affirmed.

#### I. ASSIGNMENTS OF ERROR

- A. Appellant misconstrues the Insuring Agreement for UIM PD coverage; compensatory damages are limited to “property damage,” defined by the policy and Washington statute as “physical damage” to the insured vehicle only.
- B. Appellant misconstrues the statutory framework for UIM PD coverage, which includes an unambiguous definition for covered “property damage” that is limited to “physical damage” unless the policy specifically provides for other forms of coverage.

#### II. STATEMENT OF THE CASE

##### A. Facts of Loss

On June 20, 2014, Appellant’s Land Rover LR4 sustained damaged when the semi-truck hauling the vehicle from Connecticut to Washington crashed into a building. CP 98. The Land Rover was delivered to Washington for repairs, which were completed on or about

November 11, 2014. *Id.* State Farm insured the Land Rover under an auto policy and paid \$39,313.14 for the full cost of repairs. CP 11, 39. The cost of repair fell well below the vehicle's purchase price of \$66,803.75. CP 11.

Appellant claims to have been without the use of the car for 143 days. CP 11. He further asserts that it would have cost \$11,121.26 to rent a similar vehicle during this period. *Id.* Appellant fails to volunteer that the applicable State Farm policy included Car Rental coverage under a different coverage part – PHYSICAL DAMAGE COVERAGES. CP 122-123. State Farm offered to pay for a rental car but Appellant declined. CP 98.

#### B. Procedural History

Appellant sued State Farm to recover damages for the diminished value of his Land Rover and for loss of use. CP 2. He subsequently moved for summary judgment, asking the Court below to find that loss of use damages were covered under the UIM PD coverage part of his State Farm policy. CP 10-21. Pierce County Superior Court Judge Susan Serko denied Appellant's motion, CP 129-130, and Motion for Reconsideration. CP 131-136, 144. Appellant now asks this Court to overturn Judge Serko's rulings.

#### C. Operative Policy and Statutory Language

Appellant's State Farm policy included UIM PD coverage. The Insuring Agreement for UIM PD states in pertinent part:

*We will pay compensatory damages for **property damage** an **insured** is legally entitled to recover from the owner or driver of an **underinsured motor vehicle**. The **property damage** must be caused by an accident that involves the operation, maintenance, or use of an **underinsured motor vehicle** as a motor vehicle.*

CP 119 (emphasis original). Terms in italicized bold are specifically defined within the policy. Included among these is the UIM PD definition for covered *property damage*:

*Property Damage* means physical damage to or destruction of:

1. *your car* or a *newly acquired car*; or
2. property owned by an *insured* while that property is in the passenger compartment of your *car* or a *newly acquired car*.

CP 118 (emphasis original).

The language of the State Farm UIM PD coverage tracks Washington's statutory framework for underinsured motorist coverage.

RCW Ch. 48.22. Among other things, the statute provides that:

No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage, suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto 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 bodily injury, death, or property damage, resulting therefrom ...

RCW 48.22.030(2).

In clear and express terms, the statute goes on to define what is meant by the required property damage coverage:

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.

RCW 48.22.030(3) (bold added).

Notably, the State Farm policy extends coverage to include not only physical damage, but damage to contents as well, as conceived of by RCW 48.22.030(3). CP 118. It does not, however, extend coverage for loss of use, similarly in line with the statute.

### III. ARGUMENT

#### A. Standard of Review

State Farm agrees that Standard of Review for this Court is *de novo*.

#### B. The UIM PD Coverage Part of the State Farm Auto Policy Only Applies to Physical Damage to or Destruction of the Insured Vehicle, and Contents; Not Loss of Use

Insurance policies are construed as contracts. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 110 P.3d 733, 737 (2005). A court must consider an insurance policy as a whole and give it a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." *Id.* at 172 (quoting *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 15 P.3d 115, 122 (2000)). If the language of an insurance policy is clear and unambiguous, the court must enforce the policy as written; a court may not modify the policy or create ambiguity where none exists. *Id.*

State Farm's grant of coverage is set forth in the Insuring Agreement clearly and without ambiguity:

*We will pay compensatory damages for **property damage** an **insured** is legally entitled to recover from the owner or driver of an **underinsured motor vehicle**. The **property damage** must be caused by an accident that involves the operation, maintenance, or use of an **underinsured motor vehicle** as a motor vehicle.*

*Supra* § III.B. CP 119. As noted, *supra* § III.B., **property damage** is defined as physical damage to or destruction of the insured vehicle plus damaged contents. CP 118.

Appellant does not appear to contest the obvious; loss of use damages are not physical damages. As the Washington Supreme Court explained, "[t]he rule with respect to loss of use of an automobile is that the owner may recover, **as general damages**, the use value of which he is

deprived because of the defendant's wrongful act.” *Holmes v. Raffo*, 60 Wash. 2d 421, 429, 374 P.2d 536 (1962) (emphasis added) (involving an injured party’s claim against the tortfeasor). Loss of use damages may be measured by, “(1) lost profit, (2) cost of renting a substitute chattel, (3) rental value of the plaintiff's own chattel, or (4) interest.” *Straka Trucking v. Estate of Peterson*, 98 Wn.App. 209, 211, 989 P.2d 1181 (1999). This discrete category of general damages is not measured by the cost of repair for a physically damaged vehicle or the total loss value for a destroyed vehicle.

Because the State Farm UIM PD coverage part applies only to physical damage to or destruction of the insured vehicle and damaged contents, not to general damages such as loss of use, Judge Serko properly denied Appellant’s motions below. There is no coverage for loss of use in this instance and the lower court ruling should be affirmed.

C. The UIM PD Coverage Part of the State Farm Auto Policy is in Accord with Washington’s Underinsured Motorist Statutory Framework

As quoted above, *supra* § III.B., RCW 48.22.030(2) requires auto insurers to offer UIM coverage which includes coverage for bodily injury, death, or property damage. As part of the UIM statutory framework, RCW 48.22.030(3) then defines the “property damage” that must be covered under subsection (2) as “physical damage to the insured motor vehicle

unless the policy specifically provides coverage for the contents thereof or other forms of property damage.” *Supra* § III.B. State Farm’s policy is consistent with the plain language of the statute, extending coverage to compensate the insured for physical damage to the insured vehicle and contents.

D. The UIM PD Coverage Part of the State Farm Auto Policy is Clear and Unambiguous

In an effort to persuade the Court to extend UIM PD coverage to a claim for general damages related to the intangible loss of use of a car, Appellant suggests, though in a tortured manner, that the State Farm policy language is vague and should be read in such a way as to cover losses other than physical damage consequent to an accident. No Court has endorsed this approach, including those cited by the Appellant.

A clause in an insurance policy is ambiguous "when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable." *Am. Nat. Fire Ins. Co. v. B & L Trucking & Const. Co., Inc.*, 134 Wn.2d 413, 951 P.2d 250, 256 (Wash. 1998). To resolve ambiguity, courts look to extrinsic evidence regarding the intent of the parties. *Quadrant*, 110 P.3d at 737. "Any ambiguity remaining after examination of the applicable extrinsic evidence is resolved against the insurer and in favor of the insured." *Id.* The expectations of the insured, however,

cannot override the plain language of the insurance policy. *Id.* Further, when interpreting a policy's terms, words and phrases are not analyzed in isolation. Rather, courts read the policy in its entirety, giving effect to each provision. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997).

E. Appellant's Attempts to Create Ambiguity Where None Exists Should be Rejected

1. Appellant's argument that the State Farm policy is ambiguous based on references to isolated policy terms out of context fails to stand up to scrutiny

Appellant attempts to create an ambiguity in the State Farm policy by citing to limited, inapplicable provisions in the State Farm policy and inviting this Court to read those provisions in isolation and out of context. But as the Supreme Court made clear in *Quadrant*, 154 Wn.2d at 172, a court must consider an insurance policy as a whole and give it a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." (quoting *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654). When the policy is read as a whole, Appellant's argument fails to hold up.

As part of this approach, Appellant cites the definition of an Insured under the UIM PD portion of the policy, specifically no. 4 below, and posits that this language represents a grant of coverage. *Appellant's*

*Brief pp. 9-10.* He misrepresents the policy language and fails to cite the clause in its entirety, likely because when read in its entirety it does not support his position. The policy states:

**Additional Definitions**

*Insured* means:

1. *you*;
2. *resident relatives*;
3. any other *person* while *occupying*;
  - a. *your car*;
  - b. a *newly acquired car*.

Such vehicle must be used within the scope of *your* consent. Such *person occupying* a vehicle used to carry persons for a charge is not an *insured*, and

4. any *person* entitled to recover compensatory damages as a result of *property damage* of an insured as defined in items 1., 2., 3. above.

CP 118 (emphasis original).

This provision simply identifies who qualifies as an insured for purposes of UIM PD coverage. Pursuant to subsection 4, this group of covered insureds includes, for example, a rental car company. The definition of Insured does not constitute a grant of coverage nor is the language meaningless if not interpreted as a grant of coverage. When read

in the context of the policy as a whole, this section is easily understood to be what it is; definitions of an insured for purposes of UIM PD coverage.

Appellant also cites the Deciding Fault and Amount provision, which states in full:

**Deciding Fault and Amount**

1. a. 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 1.a(1) above is yes, then what is the amount of compensatory damage that the *insured* is legally entitled to recover from the owner or driver of the *underinsured motor vehicle*?
- b. If there is no agreement on the answer to either question in 1.a. above, then the *insured* shall:
  - (1) file a lawsuit, in a state or federal court that has jurisdiction, against:
    - (a) *us*; and
    - (b) any other *person* or organization, including the owner or driver of the *underinsured motor vehicle* who may still be legally liable to the *insured* for the *insured's* damages;
  - (2) consent to a jury trial if requested by *us*;
  - (3) agree that *we* may contest the issues of liability and the amount of damages; and

(4) secure a judgment in that action. The judgment must be the final result of an actual trial and an appeal, if an appeal is taken.

2. *We* are not bound by any default judgment against any *person* or organization other than *us*.
3. Regardless of the amount of any award, including any judgment or default judgment, *we* are not obligated to pay any amount in excess of the available limits under this coverage of this policy.

CP 118-119 (emphasis original). *Appellant brief at p. 12.*

Appellant suggests that because subsection 1.a.(2) does not include the phrase *property damage* as the limitation of what could be recovered, that the clause acts as a grant of coverage for any amount of compensatory damages without limitation. But again, this argument is based on reading a phrase of the policy in isolation rather than in conjunction with the policy as a whole. As is evident from the clear language of the policy, this section sets forth the process for determining if a policyholder is entitled to recover UIM PD damages, the amount of damages that may be recovered, and what remedy is available to a policyholder who disputes State Farm's determination of entitlement to coverage and/or the amount of benefits due. It is not a grant of coverage nor does it define what damages are covered under the UIM PD coverage part, which is found in the policy Definitions for Property Damage. Notably, subsection (3) limits any payment to the "available limits under **this coverage** of this policy."

*Supra.* (emphasis added). The grant of coverage is set forth in a policy's Insuring Agreement – not in a section concerning how to decide fault, amount, and the mechanism for resolving disagreements. *See generally, Fluke Corp. v. Hartford Accident & Indem. Co.*, 145 Wn.2d137, 143, 34 P.3d 809 (2001).

2. Appellant's "for" and "because of" argument fails scrutiny because Washington's UIM statute defines the loss to be compensated under property damage coverage as physical damage to the insured vehicle

Appellant argues that the State Farm policy is ambiguous because the UIM PD Insuring Agreement states that the company will pay "for *property damage*," while RCW 48.22.030(2) requires UIM carriers to cover damages "because of" property damage. To the extent there is a difference between "for" and "because of," that difference does not give rise to an ambiguity in the policy because the UIM statute unequivocally defines the scope of property damage coverage as "physical damage to the insured motor vehicle unless the policy specifically provides coverage for the contents thereof or other forms of property damage." RCW 48.22.030(3).

Appellant also suggests that State Farm embraced all damages sustained "because of" property damage because it covered his diminished value claim. But this argument is misguided. Under Washington law,

“physical damage” includes diminished value, which stems directly from or actually is physical damage to a vehicle. *See Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 267 P.3d 998 (2011); *Ibrahim v. AIU Ins. Co.*, 177 Wn.App. 504, 312 P.3d 998 (2013). Thus, State Farm correctly extended coverage for *property damage* under the UIM PD coverage part and paid for diminished value. No Washington court has held that physical damage includes loss of use.

3. Appellant’s argument that the occurrence of property damage constitutes a triggering event which entitles a policyholder to recover loss of use damages not covered by the clear language of the policy is not supported by the UIM statute or case law

Appellant invites the Court to read “because of” language into the Insuring Agreement with the result that “property damage” becomes a triggering event which entitles a policyholder to compensation for all damages flowing from that event, citing *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 38 P.3d 322 (2002). But *Overton* is inapplicable. There, the Washington Supreme Court addressed coverage under a commercial general liability (“CGL”) policy with entirely different policy language, a different insuring agreement, a different category of coverage, and different policy definitions. *Id.* at 424-425. Further, the *Overton* Court was not guided by RCW Ch. 48.22, which governs UIM PD coverage as discussed in detail herein. Appellant similarly relies on *American National*

*Fire Ins. Co. v. B&L Trucking & Constr. Co., Inc.*, 134 Wn.2d 413, 951 P.2d 250 (1998), which involved coverage for pollution clean up costs under a CGL policy. Neither case informs the Court’s analysis here, not only because of the policy language and statutory differences, but because no Washington Court has applied a “trigger theory” of damages to a UIM PD policy. And because the State Farm UIM PD policy is clear, unambiguous, and in accord with the statute for the reasons discussed above, *supra* § IV.B., C., and D., there is no need to perform the gymnastics-style moves required to conflate CGL and UIM PD policies.

Even so, Appellant also cites to two opinions from the United States District Court for the Western District of Washington as support for the premise that RCW 48.22.030 necessarily includes all consequential damages as a result of physical damage to the vehicle; however, both cases limit their analysis to physical damage in the context of diminished value claims and fail to support Appellant’s more expansive argument.

In *Su Shin v. Esurance Ins. Co.*, C8-5626 RBL, 2009 WL 688586, (W.D. Wash. Mar. 13, 2009), Esurance filed a CR 12(b)(6) motion to dismiss the policyholders claim to recover diminished value under the UIM PD coverage part of the policy. The policyholder argued that the accident triggered physical damage, which entitled her to recover all damages flowing therefrom; specifically, diminished value. She did not,

however, suggest that such damages might include a category separate from physical damage. Judge Leighton did not adopt the “trigger” argument. Instead, he denied the CR 12(b)(6) motion on the basis that the precise meaning of the policy terms was in question and thus survived the motion to dismiss. Importantly, the court did not hold (and never held) that the policyholder’s legal theories were correct, only that they were sufficiently plausible to survive a motion to dismiss. The Court stated, “[t]o be sure, the Court has reservations about this lawsuit’s long-term viability. At this juncture, however, Ms. Shin has sufficiently alleged facts that support a plausible legal theory.” *Id.* at \*20.

*Degenhart v. AIU Holdings, Inc., Degenhart v. AIU Holdings, Inc.*, No. C10-5172RBL, 2010 WL 4852200 (W.D. Wash. Nov. 26, 2010), also involved a policyholder’s claim for diminished value under a UIM PD policy. Like *Su Shin*, the insurer brought a CR 12(b)(6) motion to dismiss. Judge Leighton denied the motion, relying on the *Moeller* opinion to conclude that post-repair residual damage is actual physical damage and therefore must be covered in accordance with the UIM statute, RCW 48.22.030. *Id.* at \*14. Judge Leighton rejected a trigger theory that all potential damages flowing from act of physical damage were compensable under the statute and policy, drawing a distinction between the

metaphysical loss of stigma damage and actual residual damage reflected by diminished value. *Id.* at \*14-15.

In short, there is no basis to apply a trigger theory to the policy at issue. To do so would deviate from the clear language of both the policy and the governing statute.

F. The UIM PD Coverage Part of the State Farm Auto Policy Does Not Contravene RCW 48.22.030

In his final volley, Appellant premises an argument on the assumption that the State Farm UIM PD policy excludes damages for loss of use. The policy contains no affirmative exclusions for loss of use damages. CP 120-121. If it did, those exclusions would be strictly construed against the drafter, subject to the plain, clear language of the exclusion. *Quadrant* at 154 Wn.2d at 180. Rather, the clear and unambiguous language of the policy affirmatively describes the covered damage in accord with the UIM statute and there is no express exclusion for the Court to analyze. *Supra* § III.A.-D.

But working off the assumption that loss of use is excluded, Appellant argues that exclusion contravenes the UIM statute by failing to cover “the applicable damages which the covered person is legally entitled to recover.” RCW 48.22.030(1). Assuming *arguendo* that loss of use damages fell within the applicable damages a policyholder is legally entitled to recover, State Farm may nonetheless limit its UIM PD liability

and properly did so here by limiting coverage to physical damage to the subject vehicle. Division I addressed a similar issue of policy limitations in *Ibrahim*, 177 Wn.App. 504. There, the policyholder sought to recover for stigma damages. The policyholder conceded that the vehicle had been restored to pre-loss condition by repairs, but argued that he was entitled to diminished value, which he described as a reduction in value to the car due to the stigma associated with the accident. The Court distinguished between diminished value, as the reduction in value to a vehicle only when it cannot be restored to its pre-loss condition, and stigma, which involves the hassle and mental concern of driving a car that had been involved in an accident. *Id.* at 510-12. The Court then recognized that the policyholder could recover stigma damages from the at-fault driver, but not from his UIM PD policy, which limited recovery to the cost necessary to restore the vehicle to its pre-loss condition (not pre-loss value). The Court upheld the limitation, explaining that:

[a]lthough the purpose of the statute is to allow the insured to recover from the UIM insurer as if the insurer were the tortfeasor, this purpose is not vitiated simply because parties contract to limit the insurers liability.

*Id.* at 513-514. The Court also found that the limitation on liability did not violate public policy because it was “not prohibited by statute, condemned by judicial decision, or contrary to the public morals ...” *Id.* at 514.

The same is true of the State Farm policy. It provides coverage for property damage as required and defined by RCW 48.22.030(2) and (3), and Appellant fails to show that this limitation is condemned by judicial decision or contrary to the public morals. The policy covering only physical damage is enforceable.

We note that in his Motion for Summary Judgment brief to Judge Serko, Appellant referenced an unpublished Division One ruling, *Reger v. State Farm Mut. Auto. Ins. Co.*, No. 51002-9-I, 2003 Wash. App. LEXIS 2866 (Ct. App. Dec. 8, 2003). CP 18. In *Reger*, the Court considered the very issue presented for consideration here and held that the policyholder was entitled to coverage only for physical damage to his vehicle under the UIM PD portion of his State Farm policy, that physical damage did not include loss of use, and no language in RCW 48.22.030 required coverage for loss of use. Though that decision remains unpublished, the analysis is sound and State Farm urges the Court to adopt it here.

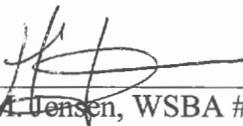
#### IV. CONCLUSION

The fact of the matter is that RCW 48.22.030 requires insurers to offer UIM PD coverage for physical damage to the insured vehicle. The State Farm UIM PD policy does just that; covers physical damage to the insured vehicle. This includes damage that can be repaired and damage that remains after repairs are performed (diminished value). There is no

authority supporting the extension of UIM PD coverage under either the terms of the policy or the language of RCW 48.22.030 to general damages for an intangible loss, such as loss of use (or stigma). Indeed, courts have expressly rejected recovery for stigma under this coverage because it does not involve physical damage. Loss of use is no different.

For these reasons, the Court should reject the Appellant's efforts to create ambiguity in the auto policy where none exists. The Court should Affirm Judge Serko's denial of summary judgment and find that loss of use damages are not covered under the State Farm UIM PD policy.

DATED this 12<sup>th</sup> day of January, 2018 LEWIS BRISBOIS BISGAARD &  
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By:   
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## CERTIFICATE OF SERVICE

The undersigned certified, under penalty of perjury under the laws of the State of Washington, that on the 12<sup>th</sup> day of February, 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 Plaintiff-Appellant via email, as follows:

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**Comments:**

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