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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 34542-4-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

KELLY RAMM and LISA RAMM, husband and wife,

Appellants;

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT FARMERS INSURANCE COMPANY OF
WASHINGTON

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I. INTRODUCTION

Appellant Kelly Ramm appeals from an Order granting Summary Judgment in favor of Farmers Insurance Company of Washington (Farmers) in which the Superior Court, applying long-standing Washington law, ruled that Ramm was not entitled to Personal Injury Protection (PIP) insurance benefits for injuries sustained during a medical incident that happened to take place while Ramm was sitting in his parked vehicle.

The policy of insurance issued by Farmers to Ramm provided PIP coverage for injuries sustained as a result of a “motor vehicle accident”. Ramm asked the Superior Court, and now asks this Court, to ignore clear Washington law establishing that there is no coverage where a vehicle is the mere situs of an injury.

In fact, the Washington State Supreme Court has directly addressed the language in Farmers’ PIP coverage and has found that a “motor vehicle accident” occurs only when the motor vehicle is being operated as a motor vehicle.

We find Farmers' position compelling: that the sensible and popular understanding of what a "motor vehicle accident" entails necessarily involves the motor vehicle *being operated as a motor vehicle*. See Pet. for Review at 9. A motor vehicle is being operated as a motor vehicle when it is being driven or when it is stopped while being driven.... On the other hand, a motor vehicle ***is not being***

operated as a motor vehicle when parked. Tyrrell was not operating his motor vehicle when his injuries occurred. They were not caused by a "motor vehicle accident" and are not covered under the personal injury protection provisions of his Farmers Policy... We hold that a "motor vehicle accident" occurs only when the covered motor vehicle is being operated as a motor vehicle. Tyrrell's injuries were not caused by a "motor vehicle accident."

Tyrrell v. Farmers Ins. Co., 140 Wn.2d 129, 137, 994 P.2d 833 (2000) (emphasis added).

Based on the undisputed facts and the admissions in the record, the Superior Court correctly determined that Ramm's injuries, sustained while his vehicle was parked on the side of the road and caused by a medical incident, were not the result of a "motor vehicle accident" under Washington law.

As a result, the Superior Court should be affirmed.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

Farmers assigns no error to the rulings of the trial court.

B. Issues Related to Appellants' Assignments of Error

1. The Superior Court correctly applied long-standing Washington law to the facts of this case, as well as the specific terms and conditions of the Ramm Policy, to conclude that Ramm was not entitled to PIP coverage for the injuries allegedly sustained as a result of his medical

incident. As a result, the Superior Court correctly denied Ramm's Motion for Summary Judgment seeking PIP coverage as a matter of law.

2. The Superior Court correctly determined that under clear Washington law, Ramm was not entitled to PIP benefits and correctly granted Summary Judgment in favor of Farmers.

III. STATEMENT OF THE CASE

A. Undisputed Factual Background

The following facts forming the basis of Ramm's claim for PIP insurance benefits are undisputed for purposes of this appeal:

- On July 25, 2015, Ramm claims that he began to feel ill while driving his 2006 Kia Sedona on westbound Trent Avenue in Spokane, Washington. CP 18.
- Because he felt as though he was going to be ill, Mr. Ramm turned off of Trent Avenue and onto a side street, where he pulled to the shoulder. CP 18.
- Ramm placed the vehicle in "Park". CP 18.
- Ramm removed his seatbelt. CP 18.
- Ramm opened the driver's side door of the vehicle. CP 18.

- Ramm turned in the driver's seat toward the open driver's side door. CP 18-19.
- Ramm leaned out of the open door to be sick. CP 18-19.

At that point, Ramm allegedly passed out, falling to the roadway and suffering injuries. CP 19.

Following this medical incident, Ramm made a claim for Personal Injury Protection (PIP) benefits under the automobile policy of insurance issued by Farmers. CP 55.

B. The Farmers Policy

Farmers issued Auto Insurance Policy No. 0186443385 to Ramm with a policy period of July 7, 2015 to October 18, 2015. CP 78-122. The Policy provides PIP coverage pursuant to the following insuring agreement:

PART III – NO-FAULT

Coverage D – Personal Injury Protection

We will provide the benefits described below for **bodily injury** to each **insured person** caused by a **motor vehicle accident**.

CP 87.

The Farmers Policy defines “accident” as follows:

Accident or **occurrence** means a sudden event, including continuous or repeated exposure to the same condition, resulting in **bodily injury** or **property damage** neither expected nor intended by the **insured person**.

CP 83.

C. Ramm's Claim and Farmers' Response Thereto

Ramm submitted a claim for PIP benefits to Farmers on August 7, 2015. CP 54. Farmers promptly acknowledged receipt of the claim and undertook a coverage investigation. CP 60-70. On August 11, 2015, Farmers sent a letter to Ramm denying coverage for PIP benefits, including the policy provision upon which the coverage decision was based and an explanation of Farmers' position. CP 72-73. Specifically, the letter provided as follows:

The policy does not provide Personal Injury Protection coverage when the incident is not considered a "motor vehicle accident". Since you were injured while falling out of the insured vehicle which was parked, we will be unable to provide Personal Injury Protection coverage for this loss.

CP 72.

Farmers' August 11, 2015 correspondence also advised Ramm of the legal authority supporting its coverage position. CP 72. Specifically, the letter provides as follows:

The Washington Supreme Court, in the case of Tyrell vs. Farmers Insurance Company Of Washington held that a "motor vehicle accident" occurs only when the covered motor vehicle is being operated as a motor vehicle. A motor vehicle is not being operated as a motor vehicle when parked.

CP 72.

Nearly four (4) months later, on December 1, 2015, Ramm responded to Farmers' coverage position and objected asking for reconsideration of the same. CP 55.

As a matter of good faith, and in response to Ramm's letter, Farmers reopened the claim for further investigation. CP 55. By letter of December 8, 2015, Farmers upheld its coverage determination. CP 75-76. Specifically, Farmers' letter provided as follows:

We have reviewed the additional information, and we are upholding our denial as sent to your client on August 11, 2015. It is our position that your client's Personal Injury Protection benefits do not cover this incident because it was not considered a motor vehicle accident based on the Washington Supreme Court case of Tyrell vs. Farmers Insurance Company Of Washington.

CP 75.

Farmers' December 8, 2015 correspondence provided further explanation of and support for Farmers' coverage decision. CP 75.

Furthermore, based on *PEMCO Ins. Co. v. Schlea*, criteria is used to determine if injuries arose out of the use of the motor vehicle. Your client was not engaged in a transaction essential to the use of the vehicle at the time of the loss nor was there a causal connection between the injury and the use of the insured vehicle. Therefore, we are unable to consider your client's claim for Personal Injury Protection benefits.

CP 75.

Thereafter, on December 28, 2015, Ramm initiated the present lawsuit. CP 3-9.

D. Procedural History

On December 28, 2015, Ramm filed the Complaint in the instant matter claiming that he is entitled to the policy limits of \$10,000 in PIP benefits, and asserting several other extra-contractual causes of action, including insurance bad faith, violation of the Washington Insurance Fair Conduct Act, and violation of the Washington Consumer Protection Act. CP 3-9.

Farmers answered Ramm's Complaint denying that he is entitled to PIP benefits for this incident. CP 10-16. Further, Farmers denied that it was liable under any of Ramm's extra-contractual causes of action. CP 14.

On March 31, 2016, Farmers filed a Motion for Summary Judgment seeking the dismissal of all of Ramm's contractual and extra-contractual causes of action. CP 167-181. The parties later stipulated that the scope of Farmers' Motion would be limited to Ramm's contractual claim, leaving the extra-contractual claims for further proceedings. CP 123-124. In light of that stipulation, on March 11, 2016, Ramm filed a Cross-Motion for Summary Judgment seeking a ruling that he was entitled to PIP coverage as a matter of law. CP 52-53.

On April 29, 2016, the Superior Court for Spokane County heard argument on the cross-motions for summary judgment relating to Ramm's

claim for PIP coverage. RP 1-19. The Superior Court found as a matter of law that Ramm was not entitled to PIP coverage for the subject event and granted Farmers' Motion for Summary Judgment. CP 153-154.

On April 29, 2016, Farmers filed a Motion for Summary Judgment seeking to dismiss Ramm's extra-contractual causes of action. CP 183-196. On June 6, 2016, rather than respond to Farmers' Motion, Ramm voluntarily dismissed the extra-contractual claims pursuant to CR 41(a).¹ CP 155-158.

Following the voluntary dismissal of his extra-contractual causes of action, on June 9, 2016, Ramm filed his Notice of Appeal seeking review of the Superior Court's rulings on his contractual claim. CP 159-166.

IV. LEGAL ARGUMENT

A. Standard of Review.

An appellate court reviewing a summary judgment order must engage in the same inquiry as the trial court. *See Sedwick v. Gwinn*, 73 Wn. App. 879, 884, 873 P.2d 528, 531 (1994), *referencing Marincovich v.*

¹ Because the dismissal of the extra-contractual claims was a voluntary, without prejudice, dismissal, those extra-contractual claims are not before this Court on appeal. Ramm apparently contemplates re-filing those causes of action in the event that the Superior Court is reversed on its contractual ruling. Farmers reserves all of its rights and defenses relating to the extra-contractual claims, including its right to seek costs and terms under CR 41(d). Nothing contained in this brief should be construed as a waiver of any right or defense relating to those extra-contractual causes of action.

Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). The appellate court reviews the facts and law with respect to summary judgment *de novo*. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

Summary judgment is appropriate when the pleadings, affidavits, depositions, and admissions indicate that no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. *See LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). The trial court should grant the motion for summary judgment if a party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Young*, 112 Wn.2d at 225, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

B. Principles of Policy Construction Under Washington Law

The interpretation of insurance policy language is a question of law. *State Farm General Insurance Company v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984). A reviewing court examines the policy terms to determine whether or not under the plain meaning of the contract, there is

coverage. *Kitsap County v. Allstate Insurance Company*, 136 Wn.2d 567, 575, 964 P.2d 1173 (1998).

If the language is clear and unambiguous, the court must enforce the policy as written and may not modify it or create ambiguity where none exists. *American National Fire Insurance Company v. B & L Trucking and Construction Company*, 134 Wn.2d 413, 428, 951 P.2d 250 (1998). A clause or phrase is only ambiguous when, on its face, it is fairly susceptible of two *different interpretations*, both of which are reasonable. *Weyerhaeuser Company v. Commercial Union Insurance Company*, 142 Wn.2d 654,666, 15 P.3d 115 (2000); *Kitsap County v. Allstate Insurance Company*, 136 Wn.2d 567, 575, 963 P.2d 1171 (1998). Courts may not strain to find an ambiguity in an insurance contract where none exists, *Farmers Home Mutual Insurance Company v. Insurance Company of North America*, 20 Wn. App. 815, 820, 583 P.2d 664 (1978), nor can courts create ambiguity or doubt where language of an insurance policy is not susceptible of more than one reasonable interpretation, *Truck Insurance Exchange v. Aetna Casualty Insurance*, 13 Wn. App. 775, 778, 538 P.2d 529 (1975) (emphasis added); *Britton v. SAFECO*, 104 Wn.2d 518, 528, 707 P.2d 125 (1985). The rule that contracts of insurance are construed in favor of an insured and most strongly against an insurer should not be permitted to have the effect of making the plain agreement

ambiguous, and then construing it in favor of the insured. *West American Insurance Company v. State Farm Mutual Auto Insurance Company*, 80 Wn.2d 38, 44, 491 P.2d 641 (1971).

C. The Superior Court's Ruling Correctly Applied the Language in the Ramm Policy and Concluded That No Coverage Existed.

1. Under Clear Washington Law, Ramm's Injuries were not the Result of a Motor Vehicle Accident

The Farmers Policy provides PIP coverage for injuries sustained in a "motor vehicle accident". Under clear Washington law and the facts of this case, Ramm's injuries were not caused by a "motor vehicle accident".

Specifically, the Washington State Supreme Court has held the follows regarding this exact same policy language:

We find Farmers' position compelling: that the sensible and popular understanding of what a "motor vehicle accident" entails necessarily involves the motor vehicle *being operated as a motor vehicle*. See Pet. for Review at 9. A motor vehicle is being operated as a motor vehicle when it is being driven or when it is stopped while being driven.... On the other hand, a motor vehicle is not being operated as a motor vehicle when parked. Tyrrell was not operating his motor vehicle when his injuries occurred. They were not caused by a "motor vehicle accident" and are not covered under the personal injury protection provisions of his Farmers Policy...We hold that a "motor vehicle accident" occurs only when the covered motor vehicle is being operated as a motor vehicle. Tyrrell's injuries were not caused by a "motor vehicle accident."

Tyrrell v. Farmers Ins. Co., 140 Wn.2d 129, 994 P.2d 833 (2000).

The *Tyrrell* decision is directly on point. In *Tyrrell*, the insured was injured while exiting a parked vehicle. *Tyrrell*, 140 Wn.2d at 131. Mr. Tyrrell sought PIP benefits under the exact same policy language at issue in this matter, arguing that his injuries were caused by a motor vehicle accident. *Tyrrell*, at 131-132. The Supreme Court held in *Tyrrell* that a “motor vehicle accident” necessarily entails the operation of a motor vehicle as a motor vehicle at the time of the incident causing the injury. *Tyrrell*, 140 Wn.2d at 137.

In holding that the insured in *Tyrrell* was not entitled to PIP benefits, the Supreme Court specifically held that a more expansive definition would not fit within the fair, reasonable, and sensible construction of the policy.

The definition of "motor vehicle accident" that Tyrrell arrives at is more expansive: "[A]ny unforeseen or unexpected bodily injury resulting from the use of a self-propelled device capable of moving upon a public highway." Resp't's Br. at 13 (emphasis added). An image that easily comes to mind is an insured tripping while making the oft difficult step down from the high doorway of a pickup truck or sports utility vehicle. Another is tripping--over, say, the threshold or a seat belt--while *entering* a vehicle. Making all such accidents "motor vehicle accidents" for insurance purposes is a logical extension of the Court of Appeals holding that "the use of a vehicle depends on an insured's ability to safely enter and exit it." *Tyrrell*, 94 Wn. App. at 325. However, this definition does not fit with "a *fair, reasonable, and sensible* construction as would be given to the contract by the *average* person purchasing insurance." *Roller*, 115 Wn.2d

at 682 (emphasis added). Nor would this construction of the term "motor vehicle accident" comport with the plain, ordinary, and popular meaning of that term. See *Kitsap Co.*, 136 Wn.2d at 576. Even had the facts here been less attenuated, and *all* of Tyrrell's injuries caused by contact with his parked vehicle after tripping over the detached wooden step, they still could not properly be conceived of as the result of a "motor vehicle accident."

Tyrrell, 140 Wn.2d at 136.

Ramm argues that the *Tyrrell* case actually supports coverage for his injuries because "an average purchaser of insurance," would believe that Ramm was operating his vehicle at the time of his medical incident. Ramm's argument, however, is legally and factually without merit.

To the extent that Ramm is attempting to argue that the language of the Farmers PIP coverage is somehow ambiguous, that argument is directly inapposite of Washington law. *Farmers Ins. Co. v. Grellis*, 43 Wn. App. 475, 718 P.2d 812 (1986). In discussing the finding in *Grellis*, the Washington Supreme Court stated the following:

On appeal, Grellis argued that the term "automobile accident" was ambiguous and should be construed against Farmers. Grellis's policy defined "accident" in a manner identical to the definition of "accident" in Tyrrell's Farmers policy. *Id.* The court wrote that "[t]he issue . . . is whether the word 'accident' is ambiguous when modified by the word 'automobile.'" *Id.* at 478. Applying the rules of insurance contract interpretation, the court found that "the words 'automobile accident' are not ambiguous. It would require a strained interpretation of the words to find an ambiguity." *Id.* It noted that the average person would not consider the stabbing incident to be an "automobile

accident," even though it involved an automobile. *Id.* Significantly, Division Two found support in another court's construction of "the similar term 'motor vehicle accident'":

"The term motor vehicle accident is not an enigmatic one. The words evoke an image of one or more vehicles in a forceful contact with another vehicle or person, causing physical injury."

Tyrrell v. Farmers Ins. Co., 140 Wn.2d 129, 134-135 (Wash. 2000); citing *Grelis, supra*; quoting, *Manhattan & Bronx Surface Transit Operating Auth. v. Gholson*, 98 Misc. 2d 657, 658-59, 414 N.Y.S.2d 489, 490, *aff'd*, 71 A.D.2d 1004, 420 N.Y.S.2d 298 (1979).

Ramm argues that the Court should construe the policy language in his favor. That argument is directly contrary to the Washington cases finding the language unambiguous and enforceable. The Courts cannot modify clear and unambiguous language in a policy or revise the insurance contract under the guise of "construing" the language. *Britton v. SAFECO*, 104 Wn.2d 518, 528, 707 P.2d 125 (1985).

Ramm's argument also ignores clear Washington caselaw indicating that the term "motor vehicle accident" involves "forceful impact" between vehicles or persons, occurring while actually operating the motor vehicle as a motor vehicle. Ramm further ignores the causation element, in which the Courts have stated that the injuries must have been caused by the "motor vehicle accident."

Here, Ramm has not argued or presented any evidence supporting any claim that his injuries were caused by any “motor vehicle accident”. Ramm has not claimed that some noxious gas emanating from the vehicle caused him to become ill and pass out. Ramm has not claimed that his vehicle forcefully struck any other vehicle, structure, or person causing him to become ill.

Rather, it is undisputed that Ramm suffered injuries because he became ill.

Ramm’s speculation as to how an “average” person might interpret the policy is immaterial. Essentially, Ramm’s argument is that the car was “in park” but not “parked” and that an “average person” would conclude that this distinction alone is enough to create coverage. Ramm makes this argument and then accuses Farmers of an overly narrow interpretation of the *Tyrrell* decision.

Ramm’s speculation of an “average” person’s interpretation is not evidence sufficient to overcome a motion for summary judgment. *See LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975)(“the adverse party may not rest on mere allegations in the pleadings but must set forth specific facts showing that there is a genuine issue for trial”).

Even with this argument, Ramm fails to explain how the injuries were caused by the alleged motor vehicle accident. As a result, the

Superior Court was correct in its determination that no PIP coverage is available in this matter.

In fact, Ramm's admits that the vehicle was placed into park. CP 18. Accordingly, Ramm was not operating the car as a motor vehicle to cause a motor vehicle accident. The only relevance the vehicle has to Mr. Ramm's injuries is that the vehicle was the site of the loss. Moreover, Mr. Ramm does not even allege that the vehicle caused the injuries. See, CP 18-19. Mr. Ramm's alleged injuries occurred as a result of his fall.

Ramm also argues that his claim is more akin to the hypothetical addressed in *Tyrrell* in which the Supreme Court posited that its holding may not apply to a situation in which a tree branch fell onto a vehicle while driving or stopped while being driven. However, Ramm's argument ignores the actual facts of this case. Ramm was not stopped while driving. He had pulled off of his main road onto a side street, pulled the vehicle to the side of the road, and placed it in park because he had become too ill to continue operating the vehicle. Again, Ramm is advancing an unreasonably expansive definition of the term "motor vehicle accident". This type of expansive definition was rejected by the Supreme Court:

This conception of an accident involving a person and a parked vehicle is quite a stretch as the word "forceful," as used in Gholson's definition, very obviously necessitates movement on the part of "one or more vehicles in a forceful

contact with another vehicle or a person, causing physical injury." *Gholson*, 98 Misc. 2d at 659.

Tyrrell, 140 Wn.2d at 136; citing *Manhattan & Bronx Surface Transit Operating Auth. v. Gholson*, 98 Misc. 2d 657, 658-59, 414 N.Y.S.2d 489, 490, *aff'd*, 71 A.D.2d 1004, 420 N.Y.S.2d 298 (1979)

Ramm's arguments of what an average person would consider to be covered under an Auto Policy are merely unsupported conjecture. Ramm's alleged injuries are not of the type of motoring risk intended to be covered by an automobile policy as the injuries were not caused by a motor vehicle accident. In fact, there was no motor vehicle accident. As a result, the Superior Court properly followed established Washington law and held that no coverage is available for Ramm in this matter. The Superior Court should therefore be affirmed.

2. *Ramm Further Ignores Washington Case Law Establishing that PIP Coverage Is Not Available Where the Vehicle is the Mere Situs of an Injury*

In addition, even in situations not involving the exact policy language at issue in this case, the Washington Courts have held that there is no PIP coverage available when a motor vehicle is the mere situs of an injury. In this case, Ramm's vehicle was merely the situs of the incident. Additionally, Ramm's injuries were not caused by a motor vehicle accident nor were Ramm's injuries related to the use of a motor vehicle.

In *Pemco Ins. Co. v. Schlea*, 63 Wn. App 107, 817 P.2d 878 (1991), the Court also discussed the criteria for determining a causal connection between the vehicle and the injury:

Regarding criterion 1, the "connection" between the use and the injury requires that the vehicle or its permanent attachments causally contribute in some way toward the production of the injury. *Transamerica Ins. Group v. United Pac. Ins. Co.*, 92 Wn.2d 21, 26, 593 P.2d 156 (1979). **The fact that the vehicle is the "mere 'situs'" of an accident does not bring the occurrence within the coverage of the policy.** *Transamerica Ins. Group*, 92 Wn.2d at 26. The injury must result from the type of motoring risk that the parties intended to cover by the automobile policy. *State Farm Mut. Auto. Ins. Co. v. Centennial Ins. Co.*, 14 Wn. App. 541, 543, 543 P.2d 645 (1975), *review denied*, 87 Wn.2d 1003 (1976).

Pemco, at 110-111 (emphasis added).

In *Pemco*, the claimant was abducted and raped in the vehicle. *Pemco*, at 108-109. Although *Pemco* is factually dissimilar to this claim, the criteria for determining whether the injuries arise from the use of a motor vehicle are applicable for this matter.

In this case, there is no evidence that the insured vehicle causally contributed to Ramm's injuries whatsoever. In fact, Ramm's son, Connor Ramm, testified that the injuries were sustained when Ramm hit the pavement. CP 21-22. As a result, Ramm's injuries could have occurred whether he was in a parked car or if he was walking down the street. The

vehicle was merely the situs of the injury. There is no evidence, however, that the vehicle caused or contributed to the production of the injury.

Secondly, Ramm was not engaged in a transaction essential to the use of the vehicle at the time of the injuries. In *Pemco*, the Court held:

Criterion 4 was not satisfied because Evans could have accomplished the deeds without an automobile. Thus, the injuries in this case did not arise out of the "use" of the vehicle as contemplated by the parties.

Pemco, at 111.

It is undisputed that Ramm had been driving but pulled-over placed the vehicle into park. At that point, Ramm had discontinued his driving. Similar to the ruling in *Pemco*, Ramm's injuries could have occurred anywhere. Ramm could have passed out and injured himself at any location. As a result, his injuries could have occurred without an automobile. In this case, the vehicle happened to be the mere situs. Becoming ill and falling onto the pavement while in a parked vehicle is not the use of the vehicle as contemplated by the parties. As a result, Farmers' correctly denied Ramm's PIP benefits.

More recently, in *Kroeber v. GEICO Inc. Co.*, 184 Wn.2d 925, 2016 Wash. LEXIS 114 (2016), the Washington Supreme Court addressed this issue in the context of UIM benefits. Although the *Kroeber*

case is not a PIP case, the Court's analysis is consistent with its prior analysis. Specifically, the Court held:

the rule in our cases have established that some causal connection exists when the events leading up to an injury involve vehicle use, unless the vehicle is merely the coincidental location of the accident.

Kroeber, at 934.

Even in the UIM analysis above, the Court once again determines coverage by requiring a causal connection between the injuries and motor vehicle. In this case, Ramm's injuries coincidentally occurred near his vehicle. The alleged injuries were not caused by a motor vehicle accident, caused by operation of the motor vehicle, or even related to the motor vehicle, other than the fact that it was the mere situs. The circumstances surrounding Ramm's alleged injuries are not of the sort intended to be covered by the Automobile Policy. Further, Washington law has previously determined on numerous occasions that these injuries are not covered by an Automobile Policy. Ramm's vehicle was the mere situs of his injuries and as a result Farmers reasonably denied PIP coverage. Therefore, the Superior Court's decision should be affirmed.

D. Ramm's Reliance on Extra-Jurisdictional Case Law is Misplaced

Much of the Ramm's briefing on appeal is devoted to a discussion of Texas case law. In particular, Ramm focuses on *Tex. Farm Bureau Mut.*

Ins. Co. v. Sturrock, 146 S.W.3d 123 (Tex. 2004). Ramm's reliance on the *Sturrock* decision is misplaced for multiple reasons.

First, Ramm presents no legal basis for any claim that a decision by an appellate court in Texas is somehow binding on this Court or overcomes the holdings of the Washington State Supreme Court in *Tyrrell*.

Moreover, the *Sturrock* case involved a factual scenario very similar to the *Tyrrell* case. Like in *Tyrrell*, the *Sturrock* case involved an insured sustaining injuries while exiting a vehicle.

Jeff Sturrock drove his truck to work, parked, and turned off the engine. While exiting the truck, he entangled his left foot on the raised portion of the truck's door facing. Sturrock injured his neck and shoulder in his attempt to prevent himself from falling from the vehicle.

Sturrock, 146 S.W.3d at 124.

Ramm is asking this Court to favor the outcome from the Texas decision over the outcome from the legally binding Washington decision on the exact same facts. Ramm presents no legal authority for the proposition that the holding of the Texas Supreme Court should operate to overcome clear Washington law.

Finally, even if this Court were to consider the *Sturrock* analysis, that analysis would not favor coverage in *this* case. The *Sturrock* Court

adopted the following test for determining whether a “motor vehicle accident” has occurred:

We hold that a "motor vehicle accident" occurs when (1) one or more vehicles are involved with another vehicle, an object, or a person, (2) the vehicle is being used, including exit or entry, as a motor vehicle, and (3) a causal connection exists between the vehicle's use and the injury-producing event.

Sturrock, 146 S.W.3d at 134.

Based on the foregoing, the *Sturrock* analysis is essentially the same as the Washington Supreme Court’s formulation of what constitutes a “motor vehicle accident” in *Tyrrell*. Both Courts require that the incident arise from a vehicle together with another vehicle, object or person. Both Courts require that the vehicle involved to have been being used as a motor vehicle.

Thus, whether analyzing Ramm’s claim under Texas law or Washington law, there is no coverage available. Although Ramm became ill in a vehicle, there was never any collision between that vehicle and any other vehicle, object, or person. Ramm does not even claim that he impacted any part of the vehicle either before or after passing out.

Moreover, despite his self-serving arguments, Ramm was not operating his vehicle as a motor vehicle when he leaned out of the vehicle to be sick due to an illness completely unrelated to the vehicle.

Finally, and perhaps most importantly, in both his analysis and argument, Ramm once again fails to address causation. As in *Tyrrell*, the *Sturrock* Court specifically requires a causal connection between the use of the vehicle and the injury-producing event. *Sturrock*, 146 S.W.3d at 134.

Once again, Ramm has presented no evidence that his vehicle caused the his injuries. Ramm happened to become sick while in his parked vehicle. CP 18. In *Sturrock*, on the other hand, the vehicle literally caused the injuries when Sturrock's foot was caught on the truck. *Id.* at 124. In fact, the *Sturrock* Court specifically held that in a situation such as the instant case, there would be no coverage.

[I]f Sturrock had finished exiting the truck and then fell, ***or if he had fallen out of the car without any involvement of the vehicle, there would be no coverage.*** But here, the vehicle's door facing was a causative factor in Sturrock's fall.

Sturrock, at 133. (emphasis added)

Ramm's alleged injuries occurred when he parked his vehicle, removed his seatbelt, turned in his seat, opened the driver door, and leaned out to be ill. CP 18-19. The vehicle did not cause the alleged injuries. Rather, the vehicle was merely the situs. Ramm does not even argue that the vehicle caused the injuries.

As a result, even if the Court were to analyze Ramm's coverage claim under *Sturrock*, the result would be the same. Under clear Washington law, there is no coverage available for Ramm's injuries.

Ramm argues that the cases holding that PIP coverage is not available where the vehicle is the mere situs of an injury, "almost universally" involve shootings or assaults. Importantly, though, the *Sturrock* case relies on a New Jersey Supreme Court decision that is not addressed by Ramm. *See, Kordell v. Allstate Ins. Co.*, 230 N.J. Super. 505, 554 A.2d 1 (Super. Ct. App. Div. 1989).

In *Kordell*, the insured died of a heart-attack while at a red light in his pickup truck. *Id.* at 505. It was undisputed that there was no causal relationship between the death and the decedent's presence in the vehicle. *Id.* In *Kordell*, the New Jersey Supreme Court held that a heart-attack unrelated to automobile travel is not covered under PIP coverage. *Id.* at 507-508.

The *Kordell* Court held the following:

[O]nly those injuries having a substantial nexus with the use of an automobile are covered. Where the automobile is merely an attending circumstance unrelated to the injury, PIP benefits are not available.

Kordell, at 509.

The *Kordell* decision is not only similar factually, but also presents similar analysis to the Washington Courts. In order to trigger PIP coverage, the injuries must be caused by the motor vehicle accident which requires more than the vehicle being situs of the injuries.

Ramm also cites to a number of cases in footnote that he claims support the notion that PIP coverage may be available for an insured injured while entering or exiting the vehicle. See Appellant's Brief, p. 20. However, none of the cases cited involve the actual policy language at issue in this matter. In fact, nearly all of the cases are based on a broader coverage for injuries, "arising out of the ownership, maintenance or use" of a motor vehicle or when an insured is "occupying" the motor vehicle.

Moreover, in each of the cases cited by Ramm, there was some causal nexus between the injuries and the insured's operation of the vehicle. *Haagenson v. Nat'l Farmers Union Prop. & Cas. Co.*, 277 N.W.2d 648 (Minn. 1979) (Plaintiff was insured attempting to rescue another person that has crashed their vehicle into a power-line pole); *Walker v. M & G Convoy, Inc.*, Civil Action No. 88C-DE-191, 1989 Del. Super. LEXIS 496 (Super. Ct. Nov. 2, 1989) (Plaintiff was loading vehicles into a trailer when he slipped on ice causing injuries); *Padron v. Long Island Ins. Co.*, 356 So. 2d 1337 (Fla. Dist. Ct. App. 1978) (Plaintiff's injuries were caused by hitting the car door during a fall while

exiting the vehicle); *Putkamer v. Transamerica Ins. Corp. of Am.*, 454 Mich. 626, 563 N.W.2d 683 (1997) (Plaintiff was injured slipping on ice while entering the vehicle and the Court ruled that the slip was caused by her attempt to enter the vehicle); *Berry v. Dairyland Cty. Mut. Ins. Co.*, 534 S.W.2d 428 (Tex. Civ. App. 1976) (Plaintiff's injury was caused by his attempt to exit the vehicle).

As a result, jurisdictions all over the country are in agreement with Washington law. In this case the Superior Court correctly applied Washington law and held that no PIP coverage exists for Ramm's alleged injuries.

E. Ramm Is Not Entitled To *Olympic Steamship* Fees and Costs.

Ramm's brief includes a request for attorneys' fees and costs under *Olympic Steamship v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). Ramm, however, is not entitled to attorneys' fees and costs under *Olympic Steamship* because he is not the prevailing party.

Washington Courts have held that attorneys' fees under *Olympic Steamship* are only available when the insured prevails. *Baldwin v. Silver*, 165 Wn. App. 463, 477, 269 P.3d 284 (2011). In this case, Ramm is not the prevailing party. The Spokane County Superior Court agreed with Farmers that no coverage exists in this matter. As a result, Ramm is not entitled to attorneys' fees and costs under *Olympic Steamship*.

V. CONCLUSION

Based on the foregoing, Farmers asks that the Superior Court be affirmed in its entirety and that a Mandate be issued.

DATED this 12 day of December, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing on the parties mentioned below as indicated:

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