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COURT OF APPEALS
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STATE OF WASHINGTON
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No. 347231

(Spokane County Superior Court No. 15-204751-0)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

SVETLANA KOREN as parent and Guardian of ERIC KOREN

Appellants,

vs.

STATE FARM FIRE AND CASUALTY COMPANY, a foreign entity
authorized to perform the business of insurance in Washington,

Respondents.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
I. Introduction	1
A. <u>Interpretation of insurance contracts</u>	1
B. <u>Public Policy requires an exclusion to be authorized and track an entire statute not just a random definition</u>	2
C. <u>State Farm is wrong that Washington law has established a passenger to be “use” under the “regular use exclusion.”</u> .	2
D. <u>State Farm is wrong that the <i>Buztberger</i> test applies to regular use since the test was developed to support the inclusive underinsured motorist (“UIM”) policy of RCW 48.22.030, and cannot be applied to the exclusion of coverage for PIP under RCW 48.22.090.</u>	3
E. <u>Without evidence or a full investigation, State Farm asks this court to apply the exclusion of “regular use” to a “similar vehicle” and not a particular vehicle.</u>	4
II. Argument	4
A. <u>Interpretation of insurance contracts</u>	4
B. <u>State Farm’s limitation of “automobile accident” is an impermissible reduction of coverage that violates public policy</u>	8
C. <u>Being a passenger in a vehicle is not “use” for the purpose of “regular use.”</u>	13
D. <u><i>Buztbergers’</i> test to further coverage under UIM should not be applied to an exclusion under PIP</u>	17
E. <u>State Farm improperly asks this court to change the exclusion to a “type” of motor vehicle available for regular use</u>	19
III. Conclusion	21

Table of Cases

<i>Ainsworth v. Progressive Cas. Ins. Co.</i> , 180 Wn. App. 52, 62, 322 P.3d 6, 12 (2014).....	8, 18
<i>Barth v. Allstate Ins. Co.</i> , 95 Wn. App. 552, 560, 977 P.2d 6, 11 (1999).....	2, 11
<i>Britton v. Safeco Ins. Co. of Am.</i> , 104 Wn.2d 518, 526–27, 707 P.2d 125, 131 (1985).....	2, 8
<i>Brown v. United Pac. Ins. Co.</i> , 42 Wn. App. 503, 711 P.2d 1105, 1107 (1986).....	2, 11, 18
<i>Butzberger v. Foster</i> , 151 Wn.2d 396, 89 P.3d 689 (2004).....	3,16 17, 18, 19,
<i>Diamaco, Inc. v. Aetna Cas. & Sur. Co.</i> , 97 Wn. App. 335, 342, 983 P.2d 707, 711 (1999).....	18
<i>Drollinger v. Safeco Ins. Co. of Am.</i> , 59 Wn. App. 383, 797 P.2d 540 (1990).....	4, 20, 21
<i>Farmers Ins. Co. of Washington v. Grelis</i> , 43 Wn.App. 475, 478, 718 P. 2d 812, 813 (1986).....	1, 4, 5
<i>Hall v. State Farm Mut. Auto. Ins. Co.</i> , 133 Wn. App. 394, 135 P.3d 941, (2006).....	13, 14
<i>Indus. Indem. Co. of the Nw., Inc. v. Kallevig</i> , 114 Wn.2d 907, 917, 792 P.2d 520, 526 (1990).....	4, 19
<i>Kyrkos v. State Farm Mut. Auto. Ins. Co.</i> , 121 Wn.2d 669, 672, 852 P.2d 1078, 1080 (1993).....	8, 21
<i>Nelson v. Mut. of Enumclaw</i> , 128 Wn. App. 72, 115 P.3d 332 (2005)....	13, 14
<i>Ross v. State Farm Mut. Auto. Ins. Co.</i> , 132 Wn.2d 507, 520, 940 P.2d 252, 258 (1997).....	3,15
<i>State Farm Ins. Co. v. Rollins</i> , 182 Wn. App. 1032 (2014).....	14, 15

State Farm Mut. Auto. Ins. Co. v. Ruiz, 134 Wn.2d 713, 718, 952 P.2d 157, 159 (1998).....**7, 18**

Tyrrell v. Farmers Ins. Co. of Washington, 140 Wn.2d 129, 134, 994 P.2d 833, 836 (2000).....**1, 4, 5, 6, 7, 21, 22**

Federal Court

Anderson v. State Farm Mut. Auto. Ins. Co., C06-1112RSM, 2007 WL 1577870, at *4 (W.D. Wash. May 30, 2007).....**3, 15,16**

Statutes, Administrative Rules and Constitution

RCW 48.22.030.....12, 17

RCW 48.22.005.....2, 9, 10, 11, 12, 18

RCW 4.22.085.....2, 9, 10

RCW 48.22.090.....2, 9, 12, 17, 18, 22

RCW 48.22.095.....9, 10, 18

I. Introduction

State Farm's response, while having a lot of "shock and surprise," State Farm fails to deliver on its statements and arguments. This brief will address the following failures:

A. Interpretation of insurance contracts: *Tyrrell's* process of interpretation shows a term is only defined if the insurance contract defines the entire term as a whole; otherwise it is an undefined term interpreted by applying the 'plain, ordinary, and popular' meaning of the term. *Tyrrell v. Farmers Ins. Co. of Washington*, 140 Wn.2d 129, 134, 994 P.2d 833, 836 (2000). While State Farm shows great bluster about this being the "reasonable expectations of the insured" over the "plain meaning" of the contract, this is the exact process laid out by our Supreme Court in *Tyrrell*. State Farm fails to show case law that supports its unique approach of splicing "automobile" into "automobile accident" to create a defined term. State Farm also fails to show why they never defined the entire term "automobile accident" when State Farm was clearly aware of over 11 years of precedent in *Tyrrell* and *Grelis* requiring the entire term to be defined in the contract. See also *Farmers Ins. Co. of Washington v. Grelis*, 43 Wn. App. 475, 718 P.2d 812 (1986). Only Ms. Koren has offered a plain, ordinary, and popular meaning to "automobile accident;" State Farm does not even try.

B. Public Policy requires an exclusion to be authorized and track an entire statute not just a random definition. Washington law is clear an insurer cannot narrow mandatory coverage less than what is required by the legislature. *Britton v. Safeco Ins. Co. of Am.*, 104 Wn.2d 518, 526–27, 707 P.2d 125, 131 (1985)(Voiding a disability setoff in UIM since it was not authorized by the statute.) Regardless of this clear law, State Farm argues that it “used a statutorily authorized definition to limit contractual liability under the insuring agreement” and therefore this limitation tracks with public policy. Respondent brief p. 16. State Farm fails to deliver any case law to support its position. State Farm’ cases of *Brown v. United Pac. Ins. Co.*, 42 Wn. App. 503, 506, 711 P.2d 1105, 1107 (1986) and *Barth v. Allstate Ins. Co.*, 95 Wn. App. 552, 562, 977 P.2d 6, 12 (1999) only support the proposition that “exclusions from coverage” are only allowed when authorized by the statute, and then those exclusions track the statutory language. While “automobile” may be defined in RCW 48.22.005(1), only RCW 48.22.090 authorizes “limitations” on the PIP offering. The statutory scheme of RCW 48.22.085-90, including the definitions in RCW 48.22.005 specifically referenced in this scheme will show State Farm is flat out wrong.

C. State Farm is wrong that Washington law has established a passenger to be “use” under the “regular use exclusion.” State Farm fails

to deliver on its bold claim that the term “use” has “repeatedly been found to include use as a passenger.” Respondent’s brief p. 24. State Farm’s then goes to say three cases support this “repeated” finding, however only one federal court case, and now Washington cases, ever finds a frequent occupancy of the vehicle as a passenger is “regular use.” The two Washington cases cited, one unreported, have parties that stipulate that being a passenger is regular use, but both courts never find on this. Instead both Washington courts rule on different issues (owned by spouse exclusion in *Ross*, and public policy of ride sharing in *Rollins*). As shown by the Appellant’s brief, p. 27-28, Washington courts find frequent driving of a vehicle to be “regular use.”

D. State Farm is wrong that the *Buztberger* test applies to regular use since the test was developed to support the inclusive underinsured motorist (“UIM”) policy of RCW 48.22.030, and cannot be applied to the exclusion of coverage for PIP under RCW 48.22.090. State Farm argues that this Court should apply the *Buztberger* test of “use” like the federal court did in *Anderson*. What State Farm fails to recognize is that a test developed to support the public policy of providing UIM coverage, and is an inclusionary clause to be broadly construed, cannot be applied to a PIP exclusion that is to be narrowly construed. State Farm ignored this portion of Ms. Koren’s brief, p. 29-30. Instead State Farm asks to invert

Washington's strict interpretation of exclusions, with Washington's broad interpretation of inclusionary language that is built to further the public policy of UIM.

E. Without evidence or a full investigation, State Farm asks this court to apply the exclusion of "regular use" to a "similar vehicle" and not a particular vehicle. There is no doubt that an insurer must prove the application of an exclusion, and may not rely on "suspicion or conjecture" in this process. *Indus. Indem. Co. of the Nw., Inc. v. Kallevig*, 114 Wn.2d 907, 917, 792 P.2d 520, 526 (1990). However, State Farm never proved a specific fleet of vehicles like the insurer did in the *Drollinger* case State Farm relies on. Instead State Farm asks this court to apply regular use to being a passenger in a similar type of vehicle. This is a wrong application of law, and even worse, a bad precedent if adopted by this Court.

II. Argument

A. Interpretation of insurance contracts

It is a well settled insurance law that if a contract term is undefined then the term is interpreted by giving it the "plain, ordinary, and popular" meaning of that term. *Tyrrell*, 140 Wn.2d 129. It is also apparent in both *Grelis* and *Tyrrell* that defining only portions of a term like "automobile accident" does not make it a defined term, and that you cannot splice a

another defined term into the definition. Instead the entire term is undefined. This can be seen by *Grelis* having the term “accident” defined but the *Grelis* court instead applies the “plain, ordinary and popular meaning of the entire term “automobile accident” in order to interpret the term. *Grelis*, 43 Wn. App. at 478.

Supreme Court in *Tyrrell* cemented this process when they were asked by the insured to combine the two defined terms of “motor vehicle” and “accident” into the term “motor vehicle accident,” thus providing coverage. The *Tyrrell* court found the combination of defined terms was an incorrect way to interpret an undefined term, even if the undefined term was totally made up of the defined terms. According to *Tyrrell*, if the entire term, like “motor vehicle accident,” is not defined, the only proper interpretation is by using the “plain, ordinary, and popular” meaning of that term. *Tyrrell*, 140 Wn.2d 134, 136-137.

State Farm tries to distinguish *Tyrrell* by claiming the Supreme Court did not analyze the term “automobile” as stated in the statute. This is nothing but a distraction. The *Tyrrell* court was clear in the process of interpretation that the court is first to look to see if the entire term is defined. If the entire term, such as “motor vehicle accident” is undefined, it cannot be a defined term by just looking at the definitions of separate words in the term such as “motor vehicle” or “accident.” Instead the entire

term is undefined and must be interpreted as an undefined term. *Tyrrell*, 140 Wn.2d at 134, 136-137. (“Thus, while ‘motor vehicle’ and ‘accident’ are defined, the term “motor vehicle accident” is not.”) Having “automobile” defined, even the same as the statute, does not make the term “automobile accident” defined any more than the term “motor vehicle accident” was defined in *Tyrrell*.

Most interestingly is that *Tyrrell* was ruled on in 2000, but when State Farm issued its policy to Ms. Koren in 2011 State Farm chose only to define “automobile” and not “automobile accident.” CP 44,5 9. While State Farm argues that the term “automobile” should be used to define “automobile accident” and only “accident” is an undefined term, this completely ignores the fact that the Supreme Court in *Tyrrell* refused this same technique when argued by the insured, that did not even write the *Tyrrell* insurance contract. State Farm asks this Court to bail them out of their failure to fully define the term “automobile accident,” and wishes this court not to apply the ““plain, ordinary, and popular” meaning of that term. This would be an error that would require this Court to conflict with the Supreme Court purely to bail out State Farm from poor drafting.

State Farm offers no possible definition for an undefined term of “automobile accident.” Ms. Koren presumes this choice to not offer a potential “plain, ordinary, and popular” meaning is because most people

would feel comfortable calling two busses colliding an “automobile accident.” Ms. Koren’s brief laid out all the possible weird outcomes of State Farm’s interpretation; including a pedestrian hit by a city bus, or a bicyclist hit by a limousine. Appellant’s brief p. 19. While each of these would be confusing under State Farm’s twisted analysis of “automobile” “accident,” every person on this list would feel comfortable saying they were in an “automobile accident” in these scenarios.

At one point State Farm argues that this “automobile accident” is the insuring agreement and not an exclusion. If this is true then it is an “inclusionary clause” since it grants coverage. “As a general principle, courts must liberally construe inclusionary clauses in insurance policies in favor of coverage for those who can reasonably be embraced within the terms of the clause.” *State Farm Mut. Auto. Ins. Co. v. Ruiz*, 134 Wn.2d 713, 718, 952 P.2d 157, 159 (1998), as amended (Mar. 16, 1998). If this clause is meant to provide coverage as the insuring agreement, and not limit it like an exclusion, then it should get liberal construction that would include E.K. rather than narrow construction that would exclude E.K.

Ms. Koren’s process of interpretation of “automobile accident” as an undefined term fits *Tyrrell*, where State Farm’s is not even close. Ms. Koren’s interpretation also fits the inclusionary principle of Washington’s interpretation of insurance contracts, where State Farm’s does not. State

Farm presents no case law that supports the interpretation of the term “automobile” as a defined term and “accident” as an undefined term, when the entire term is “automobile accident.” Because of this State Farm’s twisted interpretation should be rejected.

B. State Farm’s limitation of “automobile accident” is an impermissible reduction of coverage that violates public policy

There is no question that offering less insurance coverage than is required by the statute is against public policy. *Britton v. Safeco Ins. Co. of Am.*, 104 Wn.2d 518, 526–27, 707 P.2d 125, 131 (1985)(Voiding a disability setoff in UIM since it was not authorized by the statute.) PIP is a mandatory offering of insurance that is the public policy “to provide victims of motor vehicle accidents adequate and prompt reparation for certain economic losses.” *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 62, 322 P.3d 6, 12 (2014). The other major mandatory offering of insurance per public policy is UIM. *Kyrkos v. State Farm Mut. Auto. Ins. Co.*, 121 Wn.2d 669, 673, 852 P.2d 1078, 1080 (1993).

In evaluating the public policy of the mandatory UIM offering our courts have come up with two categories of analysis to see if a reduction in coverage violates public policy. The first category of analysis is to look at whether or not the reduction in coverage is directly contrary to

specific language in the statute. *Id.* The second category of analysis is where the reduction in coverage is neither permitted nor foreclosed in the statute; at which point the reduction of coverage is only allowed if it comports with the declared public policies of the statutory scheme. *Id.*

The statutory scheme of PIP starts out in RCW 48.22.085 that whenever an insurance company offers or renews an “automobile liability insurance policy” the insurance company must also offer PIP coverage. This mandatory offering requires that the insurer offer minimum benefits to each “insured.” RCW 48.22.095.

There are only seven types people to whom an insurer is not required to offer PIP. RCW 48.22.090. In this list of seven types of people, the term “automobile” is only excepted from the public policy for people whose “bodily injury arises from the insured’s use of an automobile in the commission of a felony.” RCW 48.22.090(7).

The above underlines are actual terms defined in RCW 48.22.005. Since State Farm argues that copying one term, “automobile” somehow makes it magically follow public policy, this term should be looked at in regards to the statutory scheme of RCW 48.22.085-095.

Under RCW 48.22.005 the term “automobile,” as a standalone term, is only used to further define the term “insured automobile.” RCW 48.22.005(4). The term “insured automobile” is then used to define two

important terms in the statutory scheme laid out in RCW 48.22.085-095. These are “automobile liability insurance policy” referenced in RCW 48.22.085 of when PIP must be sold, and as defining one of the two possible insured’s that must be provided benefits under RCW 48.22.095. It is the second use of “insured automobile” and thus “automobile” to define an insured that is important to this term in the statutory scheme.

The statute allows for two types of insureds, and this is disjunctive test allowing a person to fit in either or both categories to be an insured. RCW 48.22.005(5). The first type of insured is defined by their relationship to the named insured (relative and household resident), but has absolutely no requirement of any relationship to an “automobile.” RCW 48.22.005(5)(a). The second option for an insured is defined by their relationship to the “insured automobile” (passenger or run down pedestrian). RCW 48.22.005(5)(b). Under this statutory scheme the term “automobile” is relevant to the second type of insured, but by the very legislative scheme “automobile” was specifically removed from the first type of insured under RCW 48.22.005(a).

Regardless of this clear legislative scheme and public policy to insure resident family members without any relationship to an “automobile” State Farm argues that copying RCW 48.22.005(1) somehow makes this follow public policy. RCW 48.22.095 requires that

PIP benefits be offered to an insured as defined under RCW 48.22.005(5)(a), but State Farm adds an extra requirement to this insured before it offers benefits that the insured also be injured in an accident involving a defined “automobile.” This clearly violates the legislative scheme, and public policy.

State Farm’s excuse here is that this is not an “exclusion” but rather part of the insuring agreement. State Farm euphemistically calls this an “authorized definition under the insuring agreement that limits contractual liability.” Respondent’s brief, p. 16. Interestingly then State Farm tries to use *Brown v. United Pac. Ins. Co.*, 42 Wn. App. 503, 506, 711 P.2d 1105, 1107 (1986) and *Barth v. Allstate Ins. Co.*, 95 Wn. App. 552, 562, 977 P.2d 6, 12 (1999) to support its use of the term “automobile” to limit contractual liability.

The problem for State Farm is that both *Brown* and *Barth* only support UIM “exclusions” that are specifically authorized by statute and substantially track with the statute and public policy. *Brown*, 42 Wn. App. at 506; *Barth*, 95 Wn. App. at 560. The very passage of *Brown* cited by State Farm would show it is talking about a specifically authorized “exclusion” had State Farm just cited the sentence before the one it cites. See Respondent’s brief p.18, *Brown*, 42 Wn. App. at 506, emphasis added, (“Since the exclusion is not ambiguous, it must be enforced unless against

public policy. As the clause tracks the language of RCW 48.22.030, it can only be against public policy if the statute is as well.”)

The reason State Farm protests against this being an “exclusion” is because this broad “automobile” exclusion is not an authorized as an exclusion by the statute. The statute only allows for one exclusion, or person that PIP is not required to cover, based on the term “automobile,” but that is when the “automobile” is used in the commission of a felony. RCW 48.22.090(7). State Farm is aware that this is not an authorized exclusion, and therefore wants to call it something else, but then tries to co-op cases on authorized exclusions to somehow boot strap this in to public policy.

Whether State Farm euphemistically calls it a “limit” to its contractual liability, or admits that it is an exclusion State Farm’s interpretation of automobile accident limits coverage to less than the statutory scheme requires. As the trial court recognized, despite its ruling, the legislature never intended to not cover children on school busses by defining “automobile.” CP 149. State Farm is trying to misuse the term to limit coverage for an insured under RCW 48.22.005(5)(a), when the statutory scheme clearly shows this is not allowed. This violates the public policy of PIP.

C. Being a passenger in a vehicle is not “use” for the purpose of “regular use.”

The real issue on the “regular use” exception is what is “use?” State Farm tries to ignore this by arguing that the frequency of “use” is the actual question, and the purpose of “use” is irrelevant. Ms. Koren agrees that the purpose of “use” is irrelevant, but there must be a finding that being a passenger is “use” before looking at the frequency of that “use.” This would be like arguing the frequency of how often a person is up to bat is the most critical factor to a batting average, without first deciding whether or not the bat boy carrying the bats back to the dugout was up to bat. Frequency of being a passenger is irrelevant if being a passenger is not “use.”

State Farm spends a lot of brief real estate arguing the two cases of *Nelson* and *Hall*. Respondent’s brief p. 21-24. Interestingly both *Hall* and *Nelson* solely rely on how often the plaintiff drove the vehicle in order to determine regular use. The plaintiff in *Nelson* was driving the vehicle at the time of injury, and the court looked at how often she drove the vehicle in order to find regular use. *Nelson v. Mut. of Enumclaw*, 128 Wn. App. 72, 74, 115 P.3d 332, 333 (2005). *Nelson* never presents facts of the plaintiff as a passenger, and constantly interchanges the term “use” for the plaintiffs driving of the vehicle.

Likewise, in *Hall* the sole question of “use” was how often the plaintiff drove the school bus. *Hall v. State Farm Mut. Auto. Ins. Co.*, 133 Wn. App. 394, 402, 135 P.3d 941, 946 (2006). It is solely the frequency of how often Hall drove the bus that the court used to deter “regular use.” *Id.*, emphasis added (“Here, Hall drove the same bus every day for at least three months before the accident. The district assigned her the specific bus, and she drove that exact bus everyday. Her use was thus frequent and predictable.)

Hall and *Nelson*, along with the slew of other cases cited in Ms. Koren’s brief (Appellant’s brief p. 28-29) that solely look at driving as “use.” In the face of these cases, State Farm says, “‘use’ has repeatedly been found to include use as a passenger.” Respondent’s brief p. 24. Despite this bold claim State Farm only puts forward two Washington cases and one federal case to support this its statement of “repeatedly been found.” However, neither of the Washington cases, including the unpublished opinion, go as far as finding a passenger to be “use.”

The unpublished case of *State Farm Ins. Co. v. Rollins*, 182 Wn. App. 1032 (2014)¹ specifically states that it did not analyze or find that being a passenger was “regular use.” The *Rollins* court noted the insured

¹ Ms. Koren is not offering this case for any value, either persuasive or other, since it is not relevant here. It is solely mentioned to respond to State Farm’s offer. To the extent GR 14.1 is necessary to mention, Ms. Koren does cite that this matter is not binding precedent.

did not dispute regular use, but only disputed the public policy of the regular use exclusion versus the public policy in favor of ride sharing. *Id.* at p. 2. The *Rollins* court stated the sole issue it must decide was the public policy issue of ride sharing and made no other findings. It is absolutely wrong to state that *Rollins* found a passenger was “use” when the *Rollins* court never even looked at the issue.

State Farm is also wrong that *Ross v. State Farm Mut. Auto. Ins. Co.*, 132 Wn.2d 507, 520, 940 P.2d 252, 258 (1997) found a passenger to be “use” under the “regular use” clause. The plaintiff in *Ross* stipulated that the vehicle was available for her regular use “either as a driver or passenger.” *Id.* at 513. This alone negates this case finding that solely being a passenger is “use” when it involved both a driver or passenger. However, the *Ross* insurance policy provided two types of exclusions, one for vehicle’s available for regular use, and an exclusion for a unlisted vehicle owned by a spouse. *Id.* at 517. The *Ross* court upheld the exclusion of coverage based the parties stipulation to being spouses, rather than the stipulations of regular use, thus deciding it under the owned by spouse exclusion and not regular use exclusion. *Id.* at 522. *Ross* does not make the finding State Farm claims it did.

The sole case that finds being a passenger as “use” under the “regular use” clause is the federal case of *Anderson v. State Farm Mut.*

Auto. Ins. Co., C06-1112RSM, 2007 WL 1577870, at *1 (W.D. Wash. May 30, 2007), *aff'd sub nom. Anderson v. State Farm Ins. Co.*, 300 Fed. Appx. 470 (9th Cir. 2008). As was discussed in Appellant's brief, the federal court misapplied Washington law in deciding *Anderson*. Appellant's brief p. 28-30. As will be discussed in the next section, and as was discussed in Appellant's brief, the *Anderson* court misapplied the *Bertzburg* UIM inclusionary test to impermissibly expand the regular use exclusion to passengers.

Regardless of how one does math, one federal case does not make "repeated findings" that being a passenger is "use" under the "regular use exclusion." The case law simply does not support State Farm's bold statement.

In contrast, the rules of contract interpretation support Ms. Koren's interpretation that being a passenger is not "use" under the "regular use" exclusion. The actual wording in the exclusion allows two possible interactions with the motor vehicle. The first is "occupying" which is to be "in, on, entering or exiting" the vehicle. Presumably this is what a passenger does, occupies the vehicle. A driver also occupies the motor vehicle, but clearly goes beyond that occupation to something more that becomes "use." It makes sense that a passenger is merely "occupying" a vehicle, where something more such as driving or control over the vehicle

creates “use.” This follows the strict construction required for exclusionary clauses.

The Washington case law applies “regular use” to drivers and not to just being a passenger. This would accord with the language of the insurance contract, as well as the statute authorizing the exclusion, RCW 48.22.090(6). In direct disregard of this, State Farm asks this court to rule for the first time that merely “occupying” a vehicle as a passenger, but nothing more, is “use.” Ms. Koren asks this Court to decline this bold and non-supported stance.

D. *Butzbergers*’ test to further coverage under UIM should not be applied to an exclusion under PIP.

Washington’s public policy on UIM is to protect the public from the ravages of the negligent and reckless driver. *Butzberger v. Foster*, 151 Wn.2d 396, 401, 89 P.3d 689, 692-3 (2004). As part of that public policy the UIM statute extends coverage to any person “using” the vehicle. *Id.*; RCW 48.22.030. This extension of coverage is afforded to the insured based on “use” regardless of the terms of the insurance contract, since this forwards the public policy of UIM. *Id.* at 402.

It was to further the public policy of providing UIM coverage to innocent victims that the *Butzberger* court created a three part test for

“use.” *Id.* at 410. The *Butzberger* court gave an “expansive reading of use” under UIM. *Id.* This coincides with Washington’s longstanding “general principle, [that] courts must liberally construe inclusionary clauses in insurance policies in favor of coverage for those who can reasonably be embraced within the terms of the clause. *State Farm Mut. Auto. Ins. Co. v. Ruiz*, 134 Wn.2d 713, 718, 952 P.2d 157, 159 (1998), as amended (Mar. 16, 1998).

Public policy requires PIP insurance be offered with the sale of automobile liability insurance, much the same way as UIM coverage. RCW 48.22.085. The public policy behind PIP is to provide no fault insurance coverage for basic economic losses after a motor vehicle accident. *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 62, 322 P.3d 6, 12 (2014). However, unlike UIM the statute does not require “use” of the vehicle, but rather bases the right to benefits upon being an “insured” under RCW 48.22.005(5). RCW 48.22.095.

The “regular use” exception is a compromise to the public policy of PIP that is specifically authorized by RCW 48.22.090. See *Brown*, 42 Wn. App. at 507 commenting on this exclusion under UIM. As such, an exclusion of clause is contrary to the fundamental protective purpose of insurance, and must be strictly construed. *Diamaco, Inc. v. Aetna Cas. & Sur. Co.*, 97 Wn. App. 335, 342, 983 P.2d 707, 711 (1999), as amended on

reconsideration (Oct. 12, 1999).

State Farm asks this court to apply the *Buztberger* test to limit PIP coverage, when the test was clearly designed to extend UIM coverage and further the public policy of UIM protection. While the federal court in *Anderson* was persuaded to apply an inclusionary insurance test to an exclusionary clause, this clearly violates Washington's stated public policy of UIM and PIP coverage. Washington courts have applied *Buztberger* to UIM in order to further coverage, and it would be a divergence from the rule and policy for a Washington court to apply *Buztberger* to PIP. It would be a further departure from public policy to apply a test meant to further coverage, to language that is solely built to exclude coverage. Ms. Koren asks this Court not to take such a drastic step just because State Farm does not want to cover children on school busses.

E. State Farm improperly asks this court to change the exclusion to a "type" of motor vehicle available for regular use

Prior to denying coverage State Farm had a duty to fully investigate the facts of this matter. *Indus. Indem. Co. of the Nw., Inc. v. Kallevig*, 114 Wn.2d 907, 917, 792 P.2d 520, 526 (1990). State Farm's sole proof of "regular use" is that E.K. was a passenger in the "same or

similar vehicle.” Respondent’s brief p. 30. However, even if being a passenger in a vehicle can be “use,” which Ms. Koren disputes, the clear language of the exclusion requires occupying “a motor vehicle” available for regular use. State Farm asks this court to add “a similar motor vehicle” to the exclusion, that is neither authorized by statute nor in the actual contract language of the strictly construed exclusion.

State Farm’s basis for this language is *Drollinger v. Safeco Ins. Co. of Am.*, 59 Wn. App. 383, 388, 797 P.2d 540, 543 (1990) where a police officer drove one of a limited number of vehicles on almost a daily basis. In *Drollinger* though the insurer had proved that the vehicle driven was part of a limited fleet of 22 vehicles that could be driven on a regular basis. *Id.* at 385. In looking at another limited fleet case the *Drollinger* court noted that a police car fleet of 12 vehicles had also been found to be regular use. *Id.* at 388-389. *Drollinger* upheld the exclusion based on the evidence that a limited number of vehicles was available for regular driving by the insured, and not based on the insured driving a “similar vehicle.”

While it may have been possible for State Farm to prove the busses came from a limited fleet like *Drollinger*, State Farm’s investigation did not prove this and State Farm has produced no such evidence. State Farm had the duty to find this evidence before it made the denial, or its denial

was in bad faith solely relying on speculation and conjecture that this bus came from a defined fleet like the *Drollinger* case. *Kallevig*, 114 Wn.2d at 917. State Farm now asks this Court to adopt State Farm’s “speculation and conjecture” of a defined fleet, and thus approve State Farm’s bad faith.

If this Court adopts State Farm’s position of “similar vehicle” being enough proof of “a motor vehicle” this will serve as horrible precedent in insurance law. Under State Farm’s newly proposed evidence standard, if they prove a “similar vehicle” then that is enough. What is the outcome of such standard if an insured takes a taxi to work everyday, but has a different car each time? What is the outcome of the standard if a person rides in a Ford F-150 two times a week, but each time it is a different motor vehicle? “Similar vehicle” is a dangerous slope, and does not coincide with Washington’s law that an insured does a reasonable investigation to prove facts that support their exclusion.

III. Conclusion

The Supreme Court precedent of *Tyrrell* makes “automobile accident” and undefined term, and does not allow State Farm to splice a defined term of “automobile” into the undefined term. Despite this State Farm argues its interpretation is the only correct way, but gives this Court

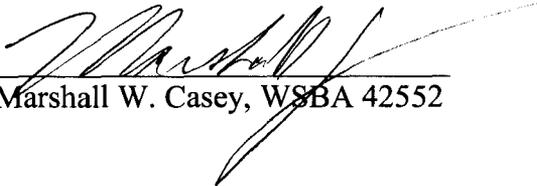
no basis to ignore the binding precedent of *Tyrrell*. As such the proper interpretation of “automobile accident” would include the collision of two school busses. Not only is this the proper interpretation, but it also follows Washington’s public policy that State Farm must sell PIP to Ms. Koren that covers an insured in every instance except the seven outlined in RCW 48.22.090.

Along with this State Farm’s application of the “regular use” clause to children on school busses fails. The case law shows Washington courts applying “regular use” to someone who does more than “occupying” the vehicle as a passenger. It applies the “regular use” to drivers. The statute and contractual language of the “regular use” clause gives a much more reasonable interpretation that being a passenger is mere “occupying” until something more creates use. Otherwise the regular use exception would exclude an insured “occupying” a motor vehicle that is available for them to “regularly occupy.” Ms. Koren’s interpretation is the correct one here since it fits with the language, case law and public policy of insurance.

Ms. Koren asks this Court to overturn the trial court’s summary judgment motion, and grant summary judgment on coverage to her and E.K.

Respectfully submitted this 23 day of June, 2017

M Casey Law, PLLC

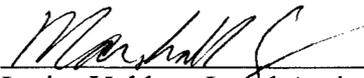

Marshall W. Casey, WSBA 42552

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 23rd day of June, 2017, I caused a true and correct copy of the foregoing document to be delivered in the manner indicated below to the following court reporter and counsel of record:

<u>Counsel for Defendant:</u> LEWIS BRISBOIS BISGAARD & SMITH LLP V. Andrew Cass William W. Simmons Emmelyn Hart 1111 Third Avenue, Suite 2700 Seattle, WA 98101	SENT VIA: <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Eastern WA Attorney Services <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email
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Dated this on 23 of June, 2017.


~~Karisa Yukhno - Legal Assistant~~ *Marshall Case*
M CASEY LAW, PLLC