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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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 OPENING BRIEF

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I. Introduction

Jesus was asked by a lawyer, “Who is my neighbor?” In response, Jesus told the story of the Good Samaritan, who found an injured man along side the road, carried the injured man to the doctor, and paid for his medical treatment. This case will decide whether or not State Farm is required to be a “good neighbor” and pay for the medical treatment of a child injured on a school bus.

Ultimately, this case will determine whether or not insurance companies that provide PIP will cover Washington’s children on school busses. It will determine whether or not parents will be allowed to purchase PIP insurance that covers their children while riding on school busses.

State Farm sold Mrs. Koren personal injury protection insurance (hereafter “PIP”). The purpose of PIP was to provide Mrs. Koren and her resident family members adequate and prompt reparation for certain losses when they were victims of motor vehicle accidents. E.K., a minor and Mrs. Koren’s son, was among Mrs. Koren paid State Farm to cover.

E.K. was a passenger on a school bus, when that school bus forcibly collided with another school bus. E.K. was injured in this accident. This claim was submitted to State Farm, who denied payment of E.K.’s medical treatment that arose from the collision.

State Farm refused to pay the benefits they promised to Mrs. Koren and E.K. based on State Farm's assertions that a school bus colliding with another a school bus is not an "automobile accident," and even if this was a covered accident, E.K. was excluded under the "reasonable use" exclusion because he regularly rode a school bus to and from school.

No one disputes that E.K.'s injuries arose out of the collision between the school busses. Rather the dispute is whether or not the insuring agreement's statement that it covers injuries arising out of "automobile accidents" excludes the collision between two school busses. State Farm's denial violates both the reasonable expectations of an insured when they purchase PIP insurance, and Washington's public policy on the mandatory offering of PIP. Washington's public policy only allows for seven exceptions to the offering of PIP, and riding a school bus that collides with another school bus is not among those seven exceptions.

The other dispute is whether a passenger occupying a school bus constitutes the "regular use of a motor vehicle" that would exclude coverage. There are three reasons this "regular use exclusion" does not apply to E.K. riding a school bus. First, when Washington courts have applied the "regular use" exclusion they have looked how often a person drives the motor vehicle. Washington courts have not applied the regular use exclusion to how often a person rides in a motor vehicle. Second, the

exclusionary clause distinguishes between “occupying” (defined as entering, exiting, or being in or on) a motor vehicle and “regular use,” which makes this provision at best ambiguous in applying to a passenger. Third, even if riding in a school bus could be “regular use,” State Farm has never proved that E.K. ever rode the same motor vehicle more than once when he rode a school bus. This would be similar to trying to exclude a person who takes a taxi to work every day under the “regular use” exclusion based on simply the class of motor vehicle being a taxi.

Extending the “regular use” exclusion to passengers, and to a type of motor vehicle rather than a particular motor vehicle, are dangerous and slippery roads that State Farm will be asking this court to go down. Mrs. Koren asks this court to decline liberal construction of exclusionary language in the insurance contract, that are merely put forward because State Farm wants to deny coverage to children on school busses.

II. Assignment of Error

A. It was error to find that the term “automobile accident” did not include the collision of two school busses.

1. It was error to not interpret “automobile accident” as an undefined term, and then giving the term its sensible and popular meaning, since this construction violates *Tyrrell v. Farmers Ins. Co. of Washington*, 140 Wn.2d 129, 134, 994 P.2d 833, 836 (2000)’s logic in defining the

similar term “motor vehicle accident”: “while ‘motor vehicle’ and ‘accident’ are defined, the term ‘motor vehicle accident’ is not.” *Id.*

2. It was error for the trial court to use the defined term “automobile” to later define the term “automobile accident” because insurance contracts should not be interpreted with a technical approach, at the expense of common sense and a reasonable reading of the policy by an average purchaser. *Kent Farms, Inc. v. Zurich Ins. Co.*, 93 Wn. App. 414, 419, 969 P.2d 109, 112 (1998), *aff’d*, 140 Wn.2d 396, 998 P.2d 292 (2000).

B. It was error to determine public policy on the mandatory PIP offering allowed State Farm’s exception to coverage for an accident because that accident did not involve a defined “automobile”.

1. It was error because RCW 48.22.090 only allows seven exceptions to the mandatory personal injury protection insurance (“PIP”) offer, and not having a defined “automobile” involved in the collision is not among those exceptions.

2. This was also error because public policy allows parents buying automobile liability insurance to also purchase PIP insurance that covers their children even when the child is in third party motor vehicle. RCW 48.22.085; RCW 48.22.005(5)(a).

C. While the trial court did not decide on the “regular use exception,”

because it declined coverage under State Farm's interpretation of "automobile accident," it would be error to determine that a child who rides the school bus to and from school is excluded from coverage whenever they are on any school bus.

D. It was error to deny attorney fees and costs under the *Olympic Steamship* doctrine, since E.K. should have been covered and was forced to bring suit to get the coverage Ms. Koren purchased for him.

III. Statement of the Case

A. Substantive Facts of this matter

State Farm sold Mrs. Koren a PIP insurance contract that promised:

“We will provide personal injury protection benefits to an insured for bodily injury sustained by that insured and caused by an automobile accident.” CP 53

On January 21, 2011 E.K., a minor and Mrs. Koren's son, was riding a school bus. That school bus collided with another school bus, causing injury to E.K. (hereafter “Collision”). CP 40; 9, 14.

State Farm has admitted that E.K. does not select the bus that is provided to him and does not establish the routes, times and stops the bus makes. CP 9, 14

This incident was submitted to State Farm to provide coverage for E.K. under PIP. CP 40. State Farm admitted that E.K. was covered under the policy, but denied coverage claiming that E.K.'s injuries did not come from an "automobile accident." CP 46. State Farm stated:

"In order for Personal Injury Protection Coverage to extend to this loss, the bodily injury must be caused by an automobile accident. It is our understanding that the school bus Eric Koren was occupying is designated to carry more than ten passengers at a time. The policy defines automobile as a motor vehicle designed for carrying ten passengers or less. For this reason, we are unable to qualify the school bus Eric Koren was riding in as an automobile under PIP Coverage. In addition, it is our understanding that the school bus [E.K.] was riding in struck another school bus in front of [E.K.]'s elementary school. For this reason, we are unable to qualify this as an automobile accident as required by the PIP insuring agreement."

Id.

State Farm also found that since E.K. took a school bus to school five days a week, this qualified as regular use, and was excluded since Mrs. Koren's policy did not have the school bus E.K. was on listed as Mrs. Koren's car. This was based on the "regular use" exception to the policy. State Farm did not use this exception for denial, but instead said this "may" apply to the loss. CP 46-47.

Neither party has any knowledge of whether or not E.K. has ever occupied the same bus more than once. CP 9, 14.

B. Procedural Facts

On May 16, 2011 State Farm communicated its denial of the claim to E.K.'s prior attorney, Mr. Barbe. CP 40-47.

E.K.'s current counsel sent an insurance fair conduct act ("IFCA") notice to State Farm about the denial of coverage, and State Farm did not respond. CP 10, 14.

On November 24, 2015 Mrs. Koren, as the parent and guardian of E.K. filed an amended complaint for damages, alleging breach of contract, bad faith, consumer protection act, and IFCA.¹ CP 8-12. Along with this Mrs. Koren requested declaratory relief that the Collision was a covered event, and E.K. was covered by PIP.

State Farm answered the amended complaint on January 21, 2016. CP 13-18.

On February 24, 2016 Mrs. Koren moved for summary judgment that the Collision was an "automobile accident" under the policy, and should be declared as such, or in the alternative the exclusion of the Collision violated Washington's public policy on PIP. CP 19-34. State Farm moved for cross summary judgment on April 1, 2016 that the Collision was not an "automobile accident" under the policy, and that even if it were, coverage was excluded under the "regular use exclusion." CP

¹ The original complaint named State Farm as "State Farm Casualty and Fire Company" and the amended complaint corrected that to State Farm Fire and Casualty Company"

92-104.

After oral arguments of the parties the trial court took the matter under advisement. On August 11, 2016 the trial court issued a decision that the Collision was not an “automobile accident” and was therefore not covered under the contract. CP 145-150.

The trial court certified this matter to the appellate court on September 15, 2016. CP 215-216. This court accepted review of the contract claims.

This matter was decided on summary judgment, and as such is reviewed by this court de novo.

IV. Argument

Personal injury protection (“PIP”) is intended to provide benefits to the victims of motor vehicle accidents. *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 62, 322 P.3d 6, 12 (2014). It is designed to give adequate and prompt payments for certain economic losses at the lowest cost to both the individual and the no-fault insurance system. *Id.* The individual victim is benefited through quick compensation for economic losses incurred as a result of the accident, regardless of fault, and without having to bring a lawsuit. *Id.* PIP insurance is meant to cover the named insured and their household family members, even when they

are not in the insured automobile. RCW 48.22.005(5)(a).

Our legislature has declared that all automobile insurers must offer PIP coverage when they sell or renew automobile liability insurance in Washington. RCW 44.22.085. The public policy for coverage states that PIP can only be denied, and only does not have to be re-offered if the insured denies it in writing. *Id.*

E.K. was covered under the insurance contract because (A) the reasonable interpretation of the contract provides coverage for this accident, (B) State Farm's attempt to exclude this accident violates Washington's public policy on PIP, (C) State Farm's "regular use" exception does not apply to children riding a school bus. Upon success (D) the appellant is entitled to *Olympic Steamship* fees.

"When reviewing a grant of summary judgment, [the appellate court] engage[s] in the same inquiry as the trial court." *Ainsworth*, 180 Wn. App. at 60. Since this is the review of a summary judgment motion, it is reviewed de novo under the CR 56 standard.

A. The reasonable interpretation of the contract provides coverage for this collision

The key term in this matter is "automobile accident." The insuring agreement states "[State Farm] will provide personal injury protection

benefits to an insured for bodily injury sustained by that insured and caused by an automobile accident.” State Farm denied coverage here because they determined that that two school busses colliding with each other was not an “automobile accident,” and therefore E.K.’s physical injuries were not “caused by an automobile accident.”

The two competing interpretations of the term “automobile accident” are as follows:

1. **Ms. Koren’s interpretation:** “Automobile accident” means “one or more vehicles in a forceful contact with another vehicle or a person causing physical injury.” This is the interpretation given to this term by the appellate court in *Farmers Ins. Co. of Washington v. Grellis*, 43 Wn. App. 475, 478, 718 P.2d 812, 813 (1986). Mrs. Koren’s definition would cover a two school busses colliding.

2. **State Farm’s interpretation:** “Automobile accident” means an accident that involves a defined “automobile.” Read with the definition of “automobile” next to “accident” this would be, “every motor vehicle registered or designed to carry ten passengers or less and used for the transportation of people accident.” State Farm’s definition therefore fails to not cover a school bus when it collides with another school bus.

Mrs. Koren’s interpretation is correct because it follows the contract interpretation process used by our Supreme Court in *Tyrrell v.*

Farmers Ins. Co. of Washington, 140 Wn.2d 129, 134, 994 P.2d 833, 836 (2000), where the court reviewed the term “motor vehicle accident” as a whole and undefined term, despite the terms “motor vehicle” and “accident” being separately defined. Mrs. Koren’s definition is also approved by the *Grelis* court, *supra*. This interpretation also follows the rules of contract interpretation, and Washington’s policy on insurance contracts.

State Farms interpretation is wrong because it follows a contract interpretation process that was rejected in *Tyrrell*, violates the rules of insurance contract interpretation, and leads to absurd results. In general though, State Farm’s interpretation is not what the average purchaser of insurance would expect when buying a PIP policy to cover them in an “automobile accident.”

1. The correct interpretation of “automobile accident” is “one or more vehicles in a forceful contact with another vehicle or a person causing physical injury.”

The courts liberally construe insurance policies to provide coverage wherever possible. *Ainsworth*, 180 Wn. App. at 61–62. The insurance contract should be examined to determine whether under the plain meaning of the contract there is coverage. *Tyrrell*, 140 Wn.2d at 133

(2000). Terms undefined by the insurance contract should be given their ordinary and common meaning, not their technical, legal meaning. *Id.* Terms in an insurance policy must be given a fair, reasonable, and sensible construction, as would be given by an average insurance purchaser. *Ainsworth*, 180 Wn. App. at 61–62. The insurance contract should be interpreted from the point of view of the average person purchasing insurance. *Id.*

“Automobile accident” is an undefined term in the insurance contract. While the term “automobile” may be defined, that definition cannot be used to make “automobile accident” a defined term. This is clear in *Tyrrell*, where both the terms “motor vehicle” and “accident” were defined in the contract. The *Tyrrell* court’s response was “while ‘motor vehicle’ and ‘accident’ are defined, the term ‘motor vehicle accident’ is not.” *Tyrrell*, 140 Wn.2d at 134. *Tyrrell* ignored the separate definitions of other terms “accident” and “motor vehicle”, and ruled solely on the “sensible and popular understanding of what a ‘motor vehicle accident’ entails.” *Id.* at 136-137.

This court has already ruled in *Grelis* that the average person would understand the term “automobile accident” to “evoke an image of one or more vehicles in a forceful contact with another vehicle or a person causing physical injury.” *Grelis*, 43 Wn. App. at 478. This may have

been modified by *Tyrrell's* interpretation of a “motor vehicle accident” to require the vehicle be operated as a motor vehicle. *Tyrrell*, 140 Wn.2d at 137. However, both of these sensible and popular interpretations cover a collision between two school busses.

Interpreting “automobile accident” and “motor vehicle accident” as whole terms, and based on common understanding, has been used in other jurisdictions to refute State Farm’s attempt to deny PIP coverage to children on school busses. Unlike Washington, Delaware requires school busses to have PIP insurance, and covers accidents connected with the school bus. *State Farm Mut. Auto. Ins. Co. v. Buckley*, 140 A.3d 431, 433 (Del. 2016). In *Buckley* State Farm tried to argue a child, waived over to board the bus and hit by another car was not covered. The Delaware court noted “what happened to Buckley is something that is within the commonly understood meaning of a motor vehicle accident, as Buckley was struck by a vehicle while in the process of boarding the bus. Any reasonable person would refer to that as a car accident.” *Buckley*, 140 A.3d at 433.

Because “automobile accident” is an undefined term, and two school busses colliding is within the sensible and popular understanding of this term, E.K.’s injuries were caused by an “automobile accident.” Our court has already interpreted “automobile accident” in the exactly the way

Mrs. Koren requests this court to interpret it today. This accords with Washington's standards for interpreting insurance contracts, and is the most sensible construction.

2. "Automobile accident" cannot be interpreted as "every motor vehicle registered or designed to carry ten passengers or less and used for the transportation of people accident."

Insurance contracts should not be interpreted with a technical approach, at the expense of a common sense and a reasonable reading of the policy by an average purchaser. *Kent Farms, Inc. v. Zurich Ins. Co.*, 93 Wn. App. 414, 419, 969 P.2d 109, 112 (1998), *aff'd*, 140 Wn.2d 396, 998 P.2d 292 (2000). "The contract should be given a practical and reasonable rather than a literal interpretation; it should not be given a strained or forced construction which would lead to an extension or restriction of the policy beyond what is fairly within its terms, or which would lead to an absurd conclusion, or render the [contract] nonsensical or ineffective." *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 907, 726 P.2d 439, 443 (1986).

State Farm's use of its defined term "automobile" to then define the entire term "automobile accident" is not only a violation of *Tyrrell's* process for defining the term "motor vehicle accident" as noted above, but

it also is (a) overly technical and pedantic rather than based on what an average purchaser would understand, (b) it leads to absurd conclusions that would render the contract nonsensical or ineffective. These violate Washington's standards of insurance contract interpretation.

a. **State Farm's interpretation is overly technical and pedantic, rather than what the average purchaser of insurance would understand**

State Farm's attempt to modify the term "automobile accident" with their separate definition of an "automobile" is a very technical, legalistic and pedantic approach. This approach has been rejected time and again by our courts.

The *Ames* court noted it best when it said: "It is well established that the language of an insurance policy should be interpreted in accordance with the way it would be understood by the average man purchasing insurance.' Nice distinctions and refinements are not favored. Rather than interpreting the policy in a technical sense, the court should interpret the policy in accordance with its ordinary meaning." *Ames v. Baker*, 68 Wn.2d 713, 716, 415 P.2d 74, 76 (1966), citations omitted.

Most importantly though, State Farm's technical, legalistic and pedantic approach would violate the purpose of PIP insurance: providing

benefits to the victims of motor vehicle accidents. See *Ainsworth, supra*. In an even better written insurance contract, the *Morgan* court refused to require a strictly literal interpretation of an insurance contract that would have defeated that contract's purpose to provide disability insurance for losing your hands. *Morgan v. Prudential Ins. Co. of Am.*, 86 Wn.2d 432, 435, 545 P.2d 1193, 1195 (1976). The *Morgan* insured had lost two fingers and portions of his thumbs, but the insurance contract only paid out for "hands severed at or above the wrists." The *Morgan* court refused to apply this overly literal construction that defeated the basic purpose of the insurance contract. *Id.*

Ultimately though, State Farm's very technical, legalistic and pedantic approach of using its definition of "automobile" to modify the term "automobile accident" was rejected in *Tyrrell* as shown above. *Tyrrell*, 140 Wn.2d at 134. *Tyrrell* refused to combine two separately defined terms of "motor vehicle" and "accident" even though this would be the most technical and pedantic way of interpreting "motor vehicle accident." The *Tyrrell* court instead looked at what the most popular and sensible meaning was for "motor vehicle accident" to come to its ruling.

This follows the warning of the *Berg* court:

"In approaching contract interpretation every court should heed the strong words of Corbin:

[I]t can hardly be insisted on too often or too vigorously that language at its best is always a defective and uncertain instrument, that words do not define themselves, that terms and sentences in a contract, a deed, or a will do not apply themselves to external objects and performances, that the meaning of such terms and sentences consists of the ideas that they induce in the mind of some individual person who uses or hears or reads them, and that seldom in a litigated case do the words of a contract convey one identical meaning to the two contracting parties or to third persons.

Berg v. Hudesman, 115 Wn.2d 657, 664, 801 P.2d 222, 227 (1990); citing 3 A. Corbin, *Contracts* § 536, at 27–28 (1960), emphasis added.”

State Farm’s interpretation does not comply what an average purchaser would understand of the term “automobile accident.” Instead State Farm applies an overly technical formula, requiring the purchaser to review the term “automobile” in a separate part of the policy and then insert that definition in front of an undefined term “accident.” This makes “automobile accident” really mean “every motor vehicle registered or designed to carry ten passengers or less and used for the transportation of people accident.” That is not even close to what the average purchaser of insurance would assume they are purchasing, when they buying insurance to cover their family for injuries arising from an “automobile accident.”

b. State Farm’s interpretation leads to absurd results

Insurance contracts should not be given an interpretation that leads

to absurd results. *E-Z Loader Boat Trailers, Inc.*, 106 Wn.2d at 907. State Farm's interpretation would cover an "accident" only if it involved one or more defined "automobile[s]." While the examples here are endless, the following incident's of covered versus non-covered under this interpretation shows the absurdity:

- Pedestrian + Ford Pinto = Covered
- Pedestrian + City bus = Not Covered
- Bus + Ford Pinto = Covered
- Bus + Bus = Not Covered
- 12 passenger van + Cow = Not Covered
- 12 passenger van + moped = Covered
- Bicycle + Ford Pinto = Covered
- Bicycle + limousine = Not sure since it depends on how long the limousine is

PIP insurance was intended to provide benefits to the named insured and their family members when they are victims of a motor vehicle accident. *Ainsworth, supra.*; RCW 48.22.005(5)(a). Importantly to RCW 48.22.005(5)(a), the named insured and their resident family members are insured under PIP regardless of the any relationship with a certain vehicle.

The only insured that is required to have a relationship to a certain

vehicle is the next type of insured in RCW 48.22.005(5)(b). That type of insured, who is a passenger or pedestrian must be in relationship with the “insured automobile” in order to be covered.

This shows that the legislature wanted to make sure that a person could buy coverage that would cover them or their resident family members regardless of what vehicle was in the accident. State Farm’s interpretation makes this impossible.

Along with this, if the insured is a pedestrian, bicyclist or riding in vehicle designed to carry more than 10 people, the insured’s coverage depends on the other vehicle involved in the collision. It is an absurd result that the “no fault” and immediate protection of PIP requires the insured to first ask, “what size of vehicle hit me?” when they are a the victim of motor vehicle accident.

B. State Farm’s interpretation of “automobile accident” violates public policy

Where provisions in insurance contracts are inconsistent with public policy, Washington courts have not hesitated to strike them. *Mut. of Enumclaw Ins. Co. v. Wiscomb*, 95 Wn.2d 373, 381, 622 P.2d 1234, 1238 (1980), on reconsideration, 97 Wn.2d 203, 643 P.2d 441 (1982). If a contract excludes coverage where a statute requires coverage, the

exclusion is void as against public policy. *Kyrkos v. State Farm Mut. Auto. Ins. Co.*, 121 Wn.2d 669, 672, 852 P.2d 1078, 1080 (1993).

In looking at public policy of a similar mandatory offer of under/un-insured motorist (“UIM”) coverage, the court found that public policy is analyzed by a two part inquiry, (1) does the exclusion conflict with the express language of the statute, and if not (2) is the exclusion contrary to the statute’s declared public policy. *Id.* at 674. State Farm’s attempt to exclude children on school busses violates both these items, especially in the face of PIP being a “mandatory offering” like UIM.

1. State Farm’s exclusion of children on school busses conflicts with the express language of RCW 48.22.090

RCW 4.22.085 requires PIP insurance to be offered with every sale or renewal of automobile liability insurance. RCW 48.22.090 then gives seven (7) types of people PIP is not required to cover. These are:

- a. A person who intentionally injures him/herself
- b. A person who is injured while participating in races/ speed contests;
- c. A person whose bodily injury is due to war;
- d. A person whose bodily injury results from nuclear material;
- e. A named insured while occupying a vehicle owned by the

named insured or furnished for the regular use of the named insured;

f. “A relative while occupying a motor vehicle owned by the relative or furnished for the relative’s regular use, if such motor vehicle is not described on the declaration page of the policy under which a claim is made”;²

g. An insured whose bodily injury results or arises from the insured’s use of an automobile in the commission of a felony.

State Farm’s exclusion of people who are injured in an accident that does not include a defined “automobile” is not on this list. State Farm’s attempt to exclude coverage from people who are injured when hit by a bus, or riding a bus that collides with another bus, conflicts with RCW 48.22.085, and the limited exclusions of RCW 48.22.090. This makes it directly against public policy.

State Farm argued to the trial court that because their definition of “automobile” tracked with the definition of “automobile” in RCW 48.22.005(1), it did not violate public policy. In doing this State Farm misused two cases, *Brown v. United Pac. Ins. Co.*, 42 Wn. App. 503, 711 P.2d 1105, 1107 (1986), and *Barth v. Allstate Ins. Co.*, 95 Wn. App. 552, 560, 977 P.2d 6, 11 (1999), to argue defining “automobile” to exclude coverage can only violate public policy if the statute also violates public

² This exception is a direct quote because it will be addressed more later.

policy. State Farm is wrong because *Barth* and *Brown* were looking at specific exclusions authorized by the statute to find public policy supported those exclusions, versus trying to use a definitional statute (RCW 48.22.005(1)) to create an exclusion that is not allowed under RCW 48.22.090.

Brown analyzed the regular use exclusion specifically authorized under RCW 48.22.030 and held that because the statute specifically authorized the exclusion it did not violate public policy. *Brown*, 42 Wn. App. at 506-507. RCW 48.22.030(2) specifically allowed the exclusion, and the question was whether or not the insurance contract followed the statutorily authorized exclusion.

Barth analyzed the “ownership” exclusion written into the contract and specifically authorized under RCW 48.22.030. In particular the *Barth* looked to see if the language in the policy tracked with the exclusion specifically authorized by the legislature, and only upheld it because it was similar enough to an exclusion specifically authorized by the statute. *Barth*, 95 Wn. App. at 560 (1999). In regards to PIP insurance, *Barth* found the exclusion generally too broad, but because an exclusion based on ownership was authorized RCW 48.22.090 it did not violate public policy. *Id.* at 562.

In contrast to *Brown* and *Barth*, State Farm is arguing for an

exclusion that is outside the specific exclusions authorized by statute. RCW 48.22.090. If this kind of hijacking of definition statutes is allowed to justify exclusions, there will be no end to the creative statutory twisting to create exclusions. The statute is clear that only the seven items of RCW 48.22.090 are allowed exceptions. Being injured in an accident that does not include a RCW 48.22.005(1) defined automobile is not among those seven exclusions. Even if State Farm's interpretation is correct it clearly violates RCW 48.22.090.

2. State Farm's exclusion violates the statute's stated public purpose.

Every time a parent buys automobile liability insurance, they must be offered the right to buy PIP coverage for their resident children. RCW 48.22.085; RCW 48.22.005(5)(a). The public policy behind this insurance is to cover the child with prompt and adequate medical payments when he/she is a victim of a motor vehicle accident. *Ainsworth*, 180 Wn. App. at 62; RCW 48.22.095. By making a resident member of the family covered, without referencing any relationship to an automobile, the statute shows children are to be covered even when in a third party's vehicle. This was recognized in *Barth* when the court stated an exclusion of a resident family member from PIP is too broad if it were to exclude coverage for the

family member in a third party's vehicle. *Barth*, 95 Wn. App. at 562.

Washington has a similar policy of mandatory UIM offering RCW 48.22.030. The fundamental public policy underlying our UIM scheme is full compensation for victims of automobile accidents. *Tissell By & Through Cayce v. Liberty Mut. Ins. Co.*, 115 Wn.2d 107, 111, 795 P.2d 126, 127 (1990). When an exclusion limits the ability to buy the UIM coverage mandated by public policy mandates, then the exclusion violates public policy. This is shown by the following analysis of *Tissell*:

Where the victim is the purchaser of the UIM policy, however, the denial of UIM benefits will thwart the public policy in favor of full compensation. In those situations, the victim does not have any alternative source of UIM coverage. It is not reasonable to expect that any motorist will buy more than one UIM policy. Since such a victim's only source of UIM coverage is cut off by the liability coverage exclusion in his policy, the exclusion frustrates the Legislature's intent to provide UIM coverage to all potential victims.

Id., emphasis added.

In the same way as a UIM purchaser could not get UIM elsewhere under the *Tissell* insurance contract, Mrs. Koren has no other place to buy PIP insurance for E.K. It is only available from her automobile liability carrier as mandated under RCW 48.22.085. State Farm's exception would violate the public policy of PIP by not allowing Ms. Koren to purchase PIP insurance that covers E.K. on a school bus.

C. The “regular use” exception does not apply to a child on a school bus

Exclusionary clauses, that subtract coverage rather than granting it, are to 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). This is because such clauses are contrary to the fundamental protective purpose of insurance. *Id.* The scope of these clauses will not be extended beyond their clear and unequivocal meaning. *Id.* The burden is upon the insurer to prove that the exclusion applies to the facts. *Bosko v. Pitts & Still, Inc.*, 75 Wn.2d 856, 861, 454 P.2d 229, 233 (1969).

The regular use exclusion does not apply to a child riding a school bus, because (1) riding in a vehicle is not “regular use,” but rather is best defined as “occupying” the bus, (2) even if “regular use” could be argued, the term is ambiguous as applied to a passenger and therefore should be interpreted to not include children on school busses, and (3) State Farm’s interpretation would cover any school bus, regardless of the exact vehicle, and this should not be allowed.

1. Riding a school bus is not “regular use” of the motor vehicle as our case law has applied “regular use,” but is rather “occupying”

the school bus

The contract says

There is no coverage for an insured:

(4) Who is a resident relative and while occupying a motor vehicle (a) owned by; or (b) furnished for the regular use of that insured if that motor vehicle is not your car. CP 61 emphasis added.

The “regular use” clause applies to how often the insured is driving the vehicle. *Grange Ins. Ass'n v. MacKenzie*, 103 Wn.2d 708, 712, 694 P.2d 1087, 1089 (1985). When applying the “regular use” exception to UIM or PIP coverage, the published opinions of Washington courts have only found “regular use” based on the driving of a vehicle, and not based on being a passenger in the vehicle. The following cases are examples, of the court looking at the driving of the vehicle for use:

- *Grange Ins. Ass'n v. MacKenzie, supra*: Found regular use based on the insured regularly driving the car of a household member.
- *Hall v. State Farm Mut. Auto. Ins. Co.*, 133 Wn. App. 394, 135 P.3d 941, (2006): Found regular use by driving a specific school bus on a regular basis.
- *Nelson v. Mut. of Enumclaw*, 128 Wn. App. 72, 115 P.3d 332 (2005): Found regular use based on driving a specific loaned automobile on a mail route. *Id.* at 73

- *Eddy v. Fid. & Guar. Ins. Underwriters, Inc.*, 113 Wn.2d 168, 171, 776 P.2d 966, 967 (1989): Regular use exclusion applied to a car given to the insured to drive for business purposes.
- *Drollinger v. Safeco Ins. Co. of Am.*, 59 Wn. App. 383, 797 P.2d 540 (1990). Found regular use based on driving a definable police squad car. *Id.* at 385.

State Farm is expected to argue *Barth*, 95 Wn. App. at 562, applied the “regular use” exclusion to a passenger, since in that case the owner of the vehicle was excluded when he was injured as a passenger in the vehicle. However, the *Barth* court stated exclusion was applied underneath the “ownership” exclusion, and that the entire exclusion was too broad to apply it to anything but the “ownership” exclusion. *Id.* Since there is no argument that E.K. owned the school bus, *Barth*’ application of the “ownership” exclusion should not be applied to E.K.

Driving another vehicle has been the key factor to determine “regular use.” There is only one case interpreting “regular use” in a Washington policy to apply to a passenger.³ The case is *Anderson v. State*

³ We note there is an unpublished case discussing “participation” in a van pool to be stipulated to as “regular use,” but only state this to fully disclose to the court. The case does not discuss whether the participation was as a passenger or as a driver since it was stipulated to. For GR 14.1 and as not binding under that rule, but merely to be thorough this is cited as *State Farm Ins. Co. v. Rollins*, 182 Wn. App. 1032 (2014).

Farm Mut. Auto. Ins. Co., C06-1112RSM, 2007 WL 1577870, at *4 (W.D. Wash. May 30, 2007), aff'd sub nom. *Anderson v. State Farm Ins. Co.*, 300 Fed. Appx. 470 (9th Cir. 2008), a federal court case interpreting Washington law and statutes, and thus not binding. *In re Elliott*, 74 Wn.2d 600, 602, 446 P.2d 347, 350 (1968); *State v. Copeland*, 130 Wn.2d 244, 258–59, 922 P.2d 1304, 1314 (1996).

Not only is *Anderson* not binding, it confuses Washington's policy of liberally interpreting inclusionary clauses (clauses that extend coverage) with Washington's policy of strictly construing exclusionary clauses (clauses that reduce coverage). *State Farm Mut. Auto. Ins. Co. v. Ruiz*, 134 Wn.2d 713, 718, 952 P.2d 157, 159 (1998), as amended (Mar. 16, 1998)("[A]s 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."); See *Diamaco, Inc., supra*. for the interpretation of exclusionary clauses.

The federal court in *Anderson* used *Sears v. Grange Ins. Ass'n*, 111 Wn.2d 636, 639, 762 P.2d 1141, 1142 (1988) to find "use" included being a passenger. The problem is that "use" in *Sears* was an inclusionary clause meant to extend coverage and thus getting a "liberal" interpretation. This liberal interpretation of "use" in inclusionary clauses went even further in *Butzberger v. Foster*, 151 Wn.2d 396, 89 P.3d 689 (2004). In

The *Butzberger* court which modified *Sears* to go beyond passengers and include a “Good Samaritan” trying to help a person injured in an accident as “use” under UIM. *Id.* at 410-411.

In contrast to the inclusionary “use” of *Sears* and *Butzberger*, the term “regular use” is exclusionary and must be strictly, and not liberally construed under Washington law. *Diamaco, Inc., supra*. A federal court’s misunderstanding of cases on the inclusionary clause’s liberal construction of “use” should not give this same liberal construction to the exclusionary clause of “regular use.” Washington has a policy a policy of strictly interpreting exclusions, and this should not be inverted.

Because Washington cases show our courts looking at how often a person drives a vehicle to find “regular use,” this exclusion should not be applied to a passenger who is merely “occupying” (“Occupying means in, on, entering or exiting,” CP 52) a motor vehicle. “Regular use” requires something more than “occupying” and has only been applied to how often the insured drove the motor vehicle. Ms. Koren urges this court to deny an extension of the “regular use” beyond its current application of how often a person drives a vehicle. State Farm’s desire to deny PIP coverage to children on school busses is not a good enough reason to begin applying “regular use” to passengers.

2. “Regular use” is ambiguous when it is applied to a passenger, since a passenger does no more than “occupy” a motor vehicle.

The phrase “regular use” can be ambiguous if it is applied to facts outside of how often a person drives a vehicle. *Grange Ins. Ass’n v. MacKenzie*, 103 Wn.2d 708, 712, 694 P.2d 1087, 1089 (1985). When reviewing the application of the “regular use” exception, the *MacKenzie* court stated, “[w]hile it is possible that the phrase “regular use” might be ambiguous under some factual situations such as in *Ward*, it is not at all ambiguous here.” *Id.*, emphasis added. It is anticipated that State Farm will quote the *Hall* court to say the term “regular use” is not ambiguous, but this would be out of context. *Hall* based its decision upon *MacKenzie*, and purely analyzing “regular use” under the same question of how often the insured drove the vehicle. See *Hall*, 133 Wn. App. at 399-400 (citing courts that quote *MacKenzie*). *Hall*’s statement on the “regular use” not being ambiguous should be read in the context in which it was made; how often an insured drove the motor vehicle.

If an insurance provision is ambiguous then the meaning and construction most favorable to the insured is to be applied. *Dairyland Ins. Co. v. Ward*, 83 Wn.2d 353, 358, 517 P.2d 966, 969 (1974). An insurance contract provision is ambiguous if it is susceptible to different, but

reasonable meanings. *McDonald Indus., Inc. v. Rollins Leasing Corp.*, 95 Wn.2d 909, 913, 631 P.2d 947, 949 (1981).

The exact clause applies the “regular use” exclusion to a family member “occupying” a vehicle that is either “owned” by the family member, or available to the family member for “regular use.” The contract defines “occupying” as being “in, on, entering, or exiting” a motor vehicle. CP 52 The contract does not define “regular use.” In doing this, the contract comports with the statute of RCW 48.22.090(f), and RCW 48.22.005(10).

By using different words of “occupying” from “regular use” it shows a person could be “occupying” a vehicle but not “using” the vehicle. Otherwise, the exclusion would have excluded a person who is “occupying” a motor vehicle that also “regularly occupies” the motor vehicle. “Regular use” and “ownership” convey a higher level of interaction with the motor vehicle than simply “occupying” it.

Being a passenger in a vehicle simply meets the definition of “occupying” since a passenger does all of the items required for “occupying.” A passenger enters, and exits a motor vehicle, and is either in or on the vehicle depending on how it is phrased. However, it is unlikely that a passenger does any more to the vehicle than these things.

As shown above, our courts have only found driving a vehicle to

be “regular use.” While there may be a “regular use” other than driving, simply “occupying” a vehicle on regular basis cannot be it. Because of being a passenger can be reasonably interpreted as “occupying” and not going as far as “regularly use” of the motor vehicle, then the provision is at least ambiguous and should not be construed to exclude coverage of E.K. as a passenger.

Ms. Koren notes that her interpretation of a passenger not being “regular use” furthers Washington’s policy in RCW 48.22.085 and RCW 48.22.005(5)(a) of making sure parents can purchase PIP to cover their children in other vehicles. As shown previously, the *Barth* court stated the “regular use” exclusion would be too broad if it denied coverage to insureds and resident family members in third party vehicles. The legislature chose not to exclude the children for “regularly occupying” a motor vehicle. Instead the authorizing statute on “regular use” chose to only exclude something more than “occupying” with either “ownership” or “regular use” of the motor vehicle. RCW 48.22.090(f).

3. Even if “regular use” could apply to a child occupying a school bus, State Farm fails to prove “regular use”

The “regular use” applies to “a” motor vehicle and not to a similar class of motor vehicle. CP 61. It is State Farm’s burden to prove the

exclusion applies to E.K., and State Farm is not allowed to use suspicion or conjecture to meet its burden. *Bosko.*, 75 Wn.2d at 861; *Indus. Indem. Co. of the Nw., Inc. v. Kallevig*, 114 Wn.2d 907, 917, 792 P.2d 520, 526 (1990). The facts are clear here that although E.K. road a school bus everyday, several years after the denial State Farm stated in its answer that it did not have enough information to prove E.K. had ever ridden that exact school bus (“motor vehicle”) before the Collision. CP 9, 14.

State Farm’s assumption is because E.K. road a school bus, it must be the same “motor vehicle” as this one. However, this is about the same as assuming because a person who takes a taxi to work every day is excluded from coverage under the “regular use” exception simply because they were in a taxi. The exclusion, approved by RCW 48.22.090(f) refers to “a motor vehicle” and not “a class of motor vehicle.” This would be a dangerous extension of Washington law, and violate our policy of interpreting insurance contracts to provide coverage. See *Ainsworth*, *supra*.

State Farm will undoubtedly try to say that their assumption is allowed under *Drollinger v. Safeco Ins. Co. of Am.*, 59 Wn. App. 383, 797 P.2d 540 (1990), which allowed for regular use based on a police officer driving a car from a definable pool of vehicles. However, unlike Safeco in *Drollinger*, State Farm has never proved that the school bus was the one

that was regularly used, or that the available vehicles were limited in number. In *Drollinger*, the insured admitted that he drove one of the patrol cars on almost a daily basis, and that the fleet was limited to 22 vehicles. *Id.* at 385. Unlike *Drollinger*, State Farm after their investigation has produced no evidence that E.K. was a passenger in one of a defined number of “motor vehicles.”

It would be a dangerous precedent to allow State Farm to exclude coverage based on E.K. simply riding in the same class of motor vehicle every day. This also violates Washington policy that it is the burden of the insurer, after a reasonable investigation, to prove the exclusion applies.

D. Mrs. Koren is entitled to her attorney fees for this appeal, and for pursuing coverage.

When an insured is compelled to assume the burden of legal action in order to obtain the benefit of its contract, the insured is entitled to attorney fees. *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 658, 272 P.3d 802, 809 (2012). “Generally, when an insured must bring suit against its own insurer to obtain a legal determination interpreting the meaning or application of an insurance policy, it is a coverage dispute.” *Id.* at 660. These fees are allowed for the trial level, as well as under RAP 18.1.

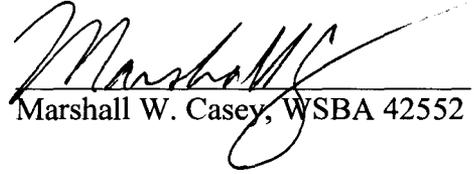
State Farm denied coverage based, and this is an insurance contract interpretation and application dispute. Mrs. Koren is entitled to her fees under this dispute, and requests them accordingly.

V. Conclusion

Mrs. Koren bought PIP insurance to cover E.K. when he was in a third party vehicle. This is exactly what our legislature intended to make available to Mrs. Koren, and she availed herself of that. State Farm now wants this court to interpret “automobile accident” using logic rejected by our Supreme Court in *Tyrrell*, and in contradiction to the ruling in *Grelis*. State Farm also wants this court to extend the “regular use” definition for the first time to passengers. Denying PIP coverage to children on school busses is not a good reason to create new law that violates logic and Washington policy. As noted by the trial court, denial of coverage to children on school busses was not the intention of the legislature. CP 149. State Farm should be required to be a “good neighbor” to E.K., and pay the benefits Mrs. Koren bought from them.

Respectfully submitted this 24th day of April, 2017

M Casey Law, PLLC

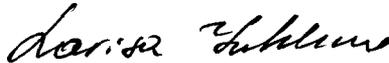

Marshall W. Casey, WSBA 42552

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 24th day of April, 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 24th of April, 2017.



Larisa Yukhno-Legal Assistant
M CASEY LAW, PLLC