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Division III
State of Washington

No. 347231

COURT OF APPEALS, DIVISION III,
FOR THE STATE OF WASHINGTON

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

Respondents,

v.

SVETLANA KOREN as parent and
Guardian of ERIC KOREN,

Appellants.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The theme of Ms. Koren's argument to the trial court and throughout Appellant's Opening Brief is to convince the courts to invoke emotion over the plain and unambiguous terms of the personal injury protection ("PIP") insuring agreement. Her argument is contrary to law.

First, Ms. Koren attempts to create ambiguity in the definition of "automobile" even though that the definition is nearly verbatim of the authorizing statute. Ms. Koren makes the bizarre argument that State Farm's definition is a "technical approach, at the expense of common sense." App. Opening Brief at 5. There is nothing technical in the definition of an automobile being "every motor vehicle registered or designed for carrying ten passengers or less..." This is the Legislatively adopted definition of "automobile" and more importantly, it is the Legislatively adopted definition to be used in the Casualty Insurance Title.

Ms. Koren next attempts to argue that using "automobile accident" as the trigger for PIP coverage somehow creates ambiguity. Ironically, this very argument relies upon a method of analysis that was rejected by the two cases primarily relied upon by Ms. Koren: *Tyrrell* v. *Farmers Ins. Co.*, 140 Wn.2d 129, 994 P.2d 833 (2000) and *Farmers Ins. Co. v. Grelis*, 43 Wn. App. 475, 718 P.2d 812 (1986).

Finally, the bizarre becomes illogical when Ms. Koren suggests that utilization of the Legislatively approved definition somehow violates public policy because the definition is not contained in the statutory provision that allows exclusions for PIP coverage. The fatal flaw in this argument is that State Farm did not use this definition as part of an exclusion. The definition was used to determine whether coverage exists under the plain and unambiguous language of the PIP insuring agreement.

In other words, Ms. Koren is asking the Court to take a definition as being applied to the insuring agreement and find that the definition contravenes public policy if you apply that definition to the exclusionary provisions related to the PIP coverage. That is not State Farm's position and that is not the analysis the trial court undertook in granting State Farm's motion for summary judgment.

Ms. Koren's insurance policy with State Farm provides PIP benefits only if an insured is involved in an "automobile" accident. Ms. Koren's son Eric ("E.K.) is not entitled to PIP benefits under Ms. Koren's insurance policy as a matter of law because the required triggering event did not occur. E.K. was injured during a collision between two school buses. He was not, however, injured in an automobile accident as that term is defined in the insuring policy.

The trial court enforced the plain and unambiguous language of the

policy as written and declined to create an ambiguity where none exists. The court did not err in granting summary judgment to State Farm and in denying summary judgment to Ms. Koren. Ms. Koren's arguments, to the extent they carry any weight, are more appropriately directed to Washington's Legislature, who approved and adopted, not only this definition of automobile but also authorized use of the definition for the Casualty Insurance Title. Accordingly, this Court should affirm the trial court.

After the trial court determined that there was no triggering event for the PIP benefits, it declined to make a determination on the regular use exclusion contained in Ms. Koren's insurance policy with State Farm. Despite the fact that the trial court did not consider the exclusion, Ms. Koren argues that it would be error to enforce the exclusion as to passengers on a school bus.

In the event this Court reverses the trial court's order determining that no PIP coverage exists under the circumstances of this case, State Farm is entitled to an order that the PIP coverage is excluded pursuant to the regular use exclusion in the PIP insurance policy. The clear and unambiguous regular use provision of the State Farm policy, which is authorized and patterned after RCW 48.22.090, would operate to exclude PIP coverage for this loss. At the time of the accident, E.K. was riding in

a school bus that was furnished for his frequent and predictable use.

The undisputed facts are that E.K. rode the same or similar school bus, several days a week, to the same elementary school for at least five years. It is also undisputed that E.K. did not have control over the use, the bus or the route, but none of these three factors are controlling. When the underlying facts are undisputed the question of whether the use constitutes regular use is a question of law.

Ms. Koren argues that the regular use exclusion should not be applied because passengers are not "using" a vehicle, only occupying a vehicle, and this exclusion should not be applied to passengers. This argument, or similar arguments, have been rejected repeatedly by Washington Courts. It is the frequency of use, not the purpose of use, that controls the question of whether use is regular. When use is both frequent and predictable, it is considered regular use. Importantly, the regular use exclusion has been applied to both passengers and in instances where the subject vehicle was part of a fleet of vehicles.

The Court should resist, as the trial court did, Ms. Koren's attempt to invoke emotion as the determinative factor over the plain and unambiguous policy provisions. There is no ambiguity in the definition of automobile for purposes of the PIP insuring agreement and there is no

ambiguity in the regular use exclusion. Both are patterned precisely after the authorizing statutes in the Casualty Insurance Title.

Absent emotion, application of the circumstances of this case to the relevant policy provisions leads to the trial court's correct conclusion that the PIP coverage is not triggered under these circumstances. If this Court disagrees with that outcome, despite the fact that the trial court declined to address the issue, the regular use exclusion operates to exclude PIP coverage under these circumstances. The trial court's order granting summary judgment in favor of State Farm and denying it as to Ms. Koren should be affirmed. In the event it is reversed, the matter should be remanded to the trial court with instructions to enter summary judgment in State Farm's favor on the regular use exclusion.

II. COUNTERSTATEMENT OF THE ISSUES

State Farm acknowledges Ms. Koren's assignments of error, but believes the issues associated with those errors are more appropriately formulated as follows:

> 1. Did the trial court appropriately grant summary judgment to State Farm and deny Ms. Koren's summary judgment by enforcing the plain and unambiguous language of the policy as written and declining to create an ambiguity where none exists?
>
> 2. Did the trial court appropriately reject Ms. Koren's public policy argument where the definition of "automobile" for the purpose of the PIP insuring agreement

is nearly verbatim of the definition of "automobile" under the authorizing Insurance Title?

3. In the event the Court reverses the trial court decision on whether PIP coverage exists for this claim under the insuring agreement, should the Court remand with instruction to the trial court to enter summary judgment in favor of State Farm that PIP coverage for this claim is excluded under the regular use exclusion?

III. COUNTERSTATEMENT OF THE CASE

The facts of this case are undisputed. Minor Eric Koren ("E.K.") rode the bus to and from school several days per week for approximately five years. CP 9, 46. He rode in the same bus or in one of a fleet of buses provided by the school district. *Id.* E.K. was injured in January 2011 when the school bus in which he was riding collided with another school bus in front of his elementary school. CP 9. Both buses were standard size and designed to carry more than 10 passengers.

At the time of the bus collision, Svetlana Koren ("Ms. Koren") had an automobile insurance policy with State Farm. CP 49-91. Her policy provided both UIM and PIP coverage. CP 58-63, 68-72. As relevant here, the policy provided PIP coverage "for bodily injury sustained by [the] insured and *caused by an automobile accident*."[1] CP 58 (*emphasis added*).

The policy defined an "automobile" as:

[1] Eric qualified for coverage under the policy as a resident relative. CP 58.

> every motor vehicle registered or designed for carrying ***ten passengers or less*** and used for the transportation of persons other than:
>
> 1. a motorcycle or a motor-driven cycle;
> 2. a farm-type tractor or other self-propelled equipment designed for use principally off public roads;
> 3. a vehicle operated on rails or crawler treads;
> 4. a vehicle located for use as a residence; or
> 5. a moped.

CP 58 (*emphasis added*).

The policy did not afford PIP coverage if the loss fell within a "regular use" exclusion:

> THERE IS NO COVERGE 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.

Ms. Koren tendered E.K.'s claim for PIP benefits to State Farm in May 2011. State Farm investigated the claim and denied it shortly thereafter. CP 40-47. State Farm explained the reasons for its denial. CP

46-47. State Farm concluded the collision in which E.K. had been involved did not qualify as an automobile accident under the plain language of the policy:

> 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 designed to carry more than ten passengers at a time. The policy defines an 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 the PIP Coverage. In addition, it is our understanding that the school bus Eric Koren was riding in struck another school bus in front of Eric's elementary school. For this reason, we are unable to qualify this loss as an automobile accident as required by the PIP insuring agreement.

CP 46.

State Farm also concluded that even if PIP coverage was available, it would otherwise be denied under the policy's "regular use" exclusion because the bus in which E.K. was riding when he was injured was furnished for his regular use and was not the regular vehicle listed on the policy:

> In order for Personal Injury Protection Coverage to extend for this loss, Eric Koren cannot be occupying a motor vehicle that is furnished for his regular use unless the vehicle qualifies as your car. The school bus involved in the accident does not qualify as your car because it is not the vehicle listed on the declarations page of the policy. For

> this reason, the regular use exclusion under PIP may apply to this loss.
>
> Svetlana Koren, the mother of Eric Koren, indicated that Eric rode the school bus about five days a week for at least five years. Based on relevant Washington case law, *Nelson v. Mutual of Enumclaw* (2005), Eric's use of the school bus would constitute regular use for the purposes of the PIP exclusion[.]

CP 46.

Ms. Koren filed suit on behalf of her son, including an Amended Complaint on November 25, 2015. CP 8-12. Both parties moved the trial court for an order summarily determining the contractual claims. CP 19-33, 92-103. The court issued a memorandum decision in August 2016 granting State Farm's motion and denying Koren's motion after laying out a cohesive view of the facts and explaining its reasoning. CP 145-150. Looking at the language of the policy, the court concluded the definition of "automobile" was plain and unambiguous and did not encompass the two school buses involved in the collision that injured E.K. *Id.* As a result, Eric was not injured in an automobile accident and PIP benefits were not available. *Id.* The trial court did not reach the issue of whether the regular use exception applied because it concluded the school bus collision in which E.K. was involved was not a insurable event. CP 150.

Although the court did not like the outcome, it emphasized that it

was duty bound to enforce the clear and unambiguous language of the policy unless doing so would violate public policy. CP 148. The court then concluded the language in the policy did not contravene public policy because it replicated RCW 48.22.005 nearly verbatim. CP 149.

The court reduced its memorandum decision to an order on August 12, 2016. CP 151-152. The court entered an order certifying its earlier order for immediate review in September 2016. CP 215-216.

IV. ARGUMENT

A. Standard of Review

The appropriate review by this Court is de novo. "When reviewing a grant of summary judgment, we [the appellate court] engage in the same inquiry as the trial court. *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 60-61, 322 P.3d 6 (2014).

B. The Court Should Affirm Because Ms. Koren Asks the Court to Use an Erroneous Method To Interpret the Insurance Policy

Ms. Koren seeks to turn the law governing the interpretation of insurance contracts in Washington on its head by asking the Court to consider public policy first, before interpreting the clear and unambiguous language of the policy. The Court must first look to the policy language, and enforce its clear and plain meaning where no ambiguity exists.

The policy is to be considered as a whole and given its "fair,

reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005) (*citations omitted*). When the policy language is clear and unambiguous, the policy must be enforced as written and Courts are not permitted to modify or create ambiguity where none exists. *Id.*; *see also Anderson v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 1557870 *8, 2007 U.S. Dist. LEXIS 39769 (W.D. Wash.) ("[I]f the plain language of the policy does not provide coverage, courts will not rewrite the policy to do so." *citing Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 100, 776 P.2d 123 (1989)).

Most importantly, contrary to Ms. Koren's argument "the expectations of the insured cannot override the plain language of the contract." *Id.*; *see also Nevers v. Aetna, Ins. Co.*, 14 Wn. App. 906, 908, 546 P.2d 1240 (1976) (when ambiguity does not exist the "...policy should be enforced according to its clear meaning and purpose, regardless of the coverage insured thought he had."). The Court should not be tempted to adopt Ms. Koren's suggested reinvention of the well-established rules for resolving the straightforward coverage questions presented by this matter.

Here, the trial court correctly determined State Farm was entitled to judgment as a matter of law because the language of the policy clearly

and unambiguously precluded coverage for E.K.'s loss. The collision was not an insurable event because E.K. was riding in a school bus when that bus collided with another bus. The buses were indisputably designed for carrying more than ten people; accordingly, neither bus satisfied the definition of "automobile" provided in the policy. Consequently, E.K. was not involved in an automobile accident as defined in the insuring policy and State Farm appropriately denied coverage for his loss.

The plain meaning of "automobile" as defined in the State Farm policy is not difficult to discern because it is premised on the statutory definition established by the legislature in RCW 48.22.005. That statute defines an "automobile" as:

> (1) a passenger car as defined in RCW 46.04.382 registered or principally garaged in this state other than:
>
> (a) A farm-type tractor or other self-propelled equipment designed for use principally off public roads;
>
> (b) A vehicle operated on rails or crawler-treads;
>
> (c) A vehicle located for use as a residence;
>
> (d) A motor home as defined in RCW 46.04.305; or
>
> (e) A moped as defined in RCW 46.04.304.

RCW 46.04.382 defines passenger car as "every motor vehicle

except motorcycles and motor-driven cycles, *designed for carrying ten passengers or less* and used for the transportation of persons." (*emphasis added*). The definition of "automobile" provided in State Farm's policy is thus clear and unambiguous, encompassing only a motor vehicle designed to carry less than ten passengers. As the trial court correctly recognized, it could not eviscerate that plain language in favor of creating an ambiguity that did not exist. CP 148-150. It was required to enforce the policy definition in the absence of an ambiguity unless doing so would violate public policy. *Brown v. United Pac. Ins. Co.*, 42 Wn. App. 503, 506, 711 P.2d 1105 (1986).

State Farm's definition of "automobile" unequivocally tracks the statutory definitions provided by the legislature; accordingly, the definition cannot contravene public policy. *See id.; See also Barth v. Allstate Ins. Co.*, 95 Wn. App. 552, 560, 977 P.2d 6 (1999) (holding that when the language of an insurance provision closely tracks the authorizing statute it does not contravene public policy). Ms. Koren's disappointment that her loss was not a covered loss does not implicate public policy notwithstanding her complaints to the contrary.

C. The Court Should Affirm Because Ms. Koren's Suggestion That The Court Should Interpret "Automobile Accident" Rather Than "Accident" Is Misplaced And Contrary To Authority, Even That She Relies Upon

Ms. Koren asks the Court to turn a blind eye to the language in her insurance policy, instead attempting to rely on inapposite cases involving criminal conduct in and around automobiles to establish that E.K. was involved in an "automobile accident." Her reliance on *Farmers Ins. Co. v. Grelis* is misplaced.

In *Grelis*, the Court of Appeals, Division II was tasked with deciding whether a stabbing incident that occurred in a parked automobile qualified as an "automobile accident." *Grelis,* 43 Wn. App. at 477-78. Neither party disputed the fact that the insured's injuries were the result of an accident from the standpoint of the insured. The court affirmed Farmers' denial of coverage because the stabbing incident only incidentally occurred in a parked automobile, and did not result from an "automobile accident." *Id.*

The issue was rather whether the word "accident" was ambiguous when modified by the word "automobile." Division II found that the words "automobile accident" were not ambiguous and that it would have required a strained interpretation of the words to find an ambiguity because the insured's injuries were caused by a robbery rather than a collision. Although the policy defined an "injured person" as an insured person who was injured by accident while occupying or being struck by an automobile, that language did not broaden the scope of coverage.

Division II affirmed the declaratory judgment finding no coverage existed.

Grelis is of no use to Ms. Koren. The *Grelis* court was not led astray by the insured's attempt there to conjure up ambiguity where none existed. Likewise there is no ambiguity in this case and E.K. was not involved in an automobile accident because neither one of the buses involved in the collision that caused his injuries fits the policy definition or the Legislative definition of an automobile.

Ms. Koren also relies upon *Tyrrell v. Farmers Ins. Co.* ignoring the fact that the *Tyrrell* court did not analyze the definition of the term "automobile" as authorized by the Insurance Title. *Tyrrell* was determined on the question of whether the insured was operating his motor vehicle as a motor vehicle at the time of the accident such to qualify as a motor vehicle accident. *Tyrrell, supra*, 140 Wn.2 *Id.* at 131, 134-35.

The court found that PIP coverage did not extend to the loss at issue because the injuries were not caused by a motor vehicle accident. *Id.* at 136-37. The court did not question the policy definition of automobile, it questioned whether the use of the vehicle in question involved a motor vehicle accident, and found that it did not. *Id.*

There is no ambiguity in the definition of "automobile" or "automobile accident" in the PIP insurance agreement. When two full-size school buses collide, there is no automobile accident under the State

Farm policy or under Washington statute. Therefore no PIP coverage is available for such an event.

D. The Court Should Affirm Because There Is No Legitimate Public Policy Argument

Ms. Koren's argument on public policy is an attempt to confuse proper interpretation of insurance policies. It appears that her argument seeks to render the definition of "automobile" for the purposes of the insuring agreement unenforceable if it is applied to an exclusion contained in the insurance policy. The problem with her argument is that State Farm did not seek, and the trial court did not rely upon, an application of that definition to an exclusion under the PIP coverage.

The definition of automobile utilized in the insuring agreement is copied nearly verbatim from the authorizing statute. Under any analysis, that Legislatively mandated definition cannot be said to be against public policy unless the statute is in and of itself against public policy.

What Ms. Koren is asking the Court to do is pretend that the definition is being used to define an exclusion under the policy. That is not the case. The definition is being used to define the meaning of the insuring agreement. It is not an exclusion at all. It is a statutorily authorized definition under the insuring agreement that limits contractual liability. As the trial court recognized, we need not even reach the exclusionary provisions of the PIP coverage, because under the clear and

unambiguous terms of the PIP insuring agreement coverage does not exist under these circumstances.

Because those provisions are explicitly authorized by the authorizing statute they cannot be said to be against public policy. If appellant wants to challenge the public policy behind the definition of automobile for the purposes of casualty insurance, the fight is with the Legislature, not a challenge to clear and unambiguous policy language.

State Farm used a statutorily authorized definition to limit contractual liability under the insuring agreement. That definition cannot be held against public policy when it is authorized by the Legislature. Ms. Koren's confused argument regarding public policy should be rejected.

Washington Courts "rarely" invoke public policy to override express insurance contract provisions, even in instances where those express terms may "seem unnecessary or harsh in their effect." *See Allstate Ins. Co. v. Raynor*, 93 Wn. App. 484, 499, 969 P.2d 510 (1999) quoting *Cary v. Allstate Ins. Co.*, 130 Wn.2d 335, 340, 922 P.2d 1335 (1996). The Washington Supreme Court has made very clear that insurers are permitted to limit their contractual liability so long as those limitations are not contrary to public policy and statute:

> We have said that limitations in insurance contracts which are contrary to public policy and statute will not be enforced, but otherwise insurers are

> permitted to limit their contractual liability. **While questioning the wisdom of certain exclusion clauses, we have been hesitant to invoke public policy or limit or avoid express contract terms absent legislative action**. 'In general, a contract which is not prohibited by statute, condemned by judicial decision, or contrary to public morals contravenes no principle of public policy.'

State Farm General Ins. Co. v. Emerson, 102 Wn.2d 477, 481, 687 P.2d 1139 (1984) (*citations omitted*) (*emphasis added*).

The definition of "automobile" under the PIP coverage could not be more clear or less technical. It is a motor vehicle designed for carrying less than ten passengers. This unambiguous provision "must be enforced unless against public policy." *Brown, supra*, 42 Wn. App. at 506.

The definition of automobile in the State Farm policy is patterned, nearly verbatim, on the Insurance Title, and is not against public policy. A similar question was addressed in *Brown*, and the Court noted "[a]s the clause tracks the language of RCW 48.22.030, it can only be against public policy if the statute is as well." *Id.* at 506; see *also Barth, supra*, 95 Wn. App. at 560 (when the language of an insurance provision closely tracks the authorizing statute it does not contravene public policy).

Mere dissatisfaction and disappointment that a loss falls outside the scope of coverage offered by a policy does not constitute a public policy violation. Mere listing of hypothetical fact patterns where some

trigger coverage and some do not does not illustrate a public policy. Ms. Koren fails to articulate a specific legitimate public policy of the State of Washington which she contends is violated by a provision expressly limiting PIP benefits to an automobile accident, defined in a way that does not include a school bus versus school bus collision.

E. Even if PIP Coverage is Triggered By This Loss, it is Otherwise Excluded Pursuant to the Regular Use Exclusion

1. The Regular Use Exclusion is Specifically Authorized By RCW 48.22.090(6) and Must Be Enforced.

Even if PIP coverage is triggered under the policy for this loss, the regular use exclusion applies and precludes coverage. The regular use exclusion in the PIP portion of Ms. Koren's policy tracks the language of RCW 48.22.090(6), which defines exceptions to personal injury protection and states in relevant part:

> An insurer is not required to provide personal injury protection coverage to or on behalf of: (6) 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; ...

This is a clear and unambiguous exclusion, requiring no analysis as to whether it is valid and enforceable given that it has been specifically sanctioned by the Washington legislature.

> Washington courts have routinely held that regular use clauses such as the one in Hall's policy are clear and unambiguous. The language excluding coverage for regular use **has been found "'plain and popular' as insurance language can be, and there is no need to construe it.'"** We agree and find no ambiguity in Hall's policy excluding coverage for regular use of a vehicle not covered by the policy.

Hall v. State Farm Mut. Auto. Ins. Co., 133 Wn. App. 394, 399-400, 135 P.3d 941 (2006) (*emphasis added*).

The question then becomes whether the loss claimed by E.K. occurred in a vehicle that was furnished for his regular use. The undisputed facts are that E.K. rode the same or similar school bus, several days a week, to the same elementary school for at least five years. It is also undisputed that E.K. did not have control over the use, the bus or the route, but none of these three factors are controlling. When the underlying facts are undisputed the question of whether the use constitutes regular use is a question of law. *See Hall, supra* 133 Wn. App. at 400; *see also Nelson v. Mut. of Enumclaw*, 128 Wn.App. 72, 76, 115 P.3d 332 (2005).

The purpose of a regular use provision is clearly defined in Washington:

> Overall, the purpose of regular use provisions 'is to provide coverage for isolated use without the payment of an additional premium, but to disallow the interchangeable use of other cars which are not covered by the policy.' Specifically, the purpose of regular use provisions is to (1) prevent an insured

> from receiving the benefits of coverage by purchasing only one policy and (2) provide coverage to an insured when the insured is engaged in the casual or infrequent use of a nonowned vehicle.

Id. (*citations omitted*).

To put it another way:

> Insurance companies have a legitimate interest in preventing an increase in coverage risks without a corresponding increase in premiums. Frequency of the use rather than the purpose of the use is the critical factor in determining regular use.

Hall, supra at 400 (*citations omitted*).

2. Ms. Koren Misconstrues Washington's Treatment Of The Definition Of "Use" In An Improper Attempt To Limit The Definition

Ms. Koren relies primarily on three flawed arguments regarding regular use. First, that a passenger is occupying, not using a vehicle. Second, that the regular use exclusion has been found to be ambiguous as to passengers. Third, that the use was not regular in this case because it is potentially being applied to a fleet of vehicles that were provided for E.K.'s regular use.

a. It Is The Frequency Of Use That Controls, Not the Type Of Use

Mr. Koren urges the Court to believe that E.K. was not "using" the school bus but only occupying it as a passenger because he was not driving or operating the school bus. The argument borders on the absurd.

Such a limiting definition would not only defy the plain and ordinary meaning of the word "use," and would therefore require the Court to ignore Washington law governing policy interpretation, but would be directly contrary to the well-established authority in Washington that the term "use" includes passengers, in addition to operators.

The real question in determining whether the school bus was furnished for E.K.'s regular use is the frequency of use. The undisputed facts are that E.K. rode the same or similar school bus, several days a week, to the same elementary school for at least five years. It is also undisputed that E.K. did not have control over the use, the bus or the route, but none of these three factors are controlling.

In *Nelson*, this Court considered a similar argument to the one being made by Ms. Koren and rejected the notion that the type of use controls. *Nelson* involved the regular use of a mail carrier's vehicle by a substitute driver. *Nelson, supra*, 128 Wn.App. at 74. In that case, Deanna Nelson substituted as a mail carrier for Ronald Franklin every other Saturday and during his vacations. *Id.* When she substituted for him, she drove his vehicle. *Id.* Ms. Nelson argued that the regular use exclusion did not apply in that case because she did not have exclusive control over the vehicle, rather the use of the loaned vehicle was at the discretion of Mr. Frederick. *Id.* at 77-78.

This Court noted that use in this context is not defined by control or type, but only by the frequency of the use. When use is both "frequent and predictable," it is considered regular use:

> Here, Ms. Nelson used Mr. Frederick's Saturn 16 times in a four-month period. While she was not the exclusive driver of the vehicle, her use of the vehicle was frequent, consisting of every other Saturday and those days Mr. Frederick took a vacation. More importantly, Ms. Nelson's use of the Saturn increased Enumclaw's risk without payment of additional premiums.

Id. at 77 (This Court reversed the denial of Mutual of Enumclaw's motion for summary judgment and ordered the case be remanded and dismissed because coverage was excluded based on the UIM regular use exclusion[2]).

In specifically rejecting the limited permissive use argument, this Court noted that several Washington cases "require an inquiry into the frequency of the use, not questions as to the permission." *Id.* at 78. This Court relied again on the purpose behind the regular use exclusion as further rationale to deny the limited permissive use argument:

> Finally, even though Ms. Nelson required Mr. Frederick's permission to use the Saturn, her use of the vehicle was regular and frequent, and for a specific ongoing purpose, not an isolated endeavor. In short, Ms. Nelson's use of the Saturn altered Enumclaw's risk on her policy by factors not

[2] Where UIM and PIP regular use exclusions have similar wording, Washington Courts regularly apply the same analysis to both without distinguishing them. *Anderson, supra* at *14.

> contemplated when the premiums on her policy were calculated.

Id.

The Court of Appeals, Division Two, faced a similar argument in *Hall* as to whether restricted use of an employer-provided vehicle barred application of the regular use exclusion. Relying on several cases, including *Nelson*, the Court in *Hall* rejected that argument, again noting that it is the frequency of the use, not the purpose of the use that controls.

> Although District policies restricted Hall's use, she points to no case law stating that restricted use does not constitute regular use. And it is the frequency of the use rather than the purpose of the use that is the critical factor in determining regular use. Nelson, 128 Wn.App. at 76.

Hall, supra, 133 Wn. App. at 402.

b. Ms. Koren's Position Is Based On The Mistaken Notion That The Regular Use Exclusion Is Ambiguous As To Passengers

Washington does not limit the definition of "use" of a vehicle to use as a driver. Instead, "use" of a vehicle has repeatedly been found to include use as a passenger. In 2014, the Court of Appeals, Division Two, considered facts similar to those at issue here, and in an unreported decision affirmed a trial court's grant of summary judgment in favor of State Farm on application of a regular use exclusion to a passenger riding

in a Metro Vanpool van. *See State Farm Ins. Co. v. Rollins*, 2014 Wash. App. LEXIS 1803 (2014).

As an unpublished decision[3], *Rollins* is non-binding authority, but raised here for its' substantial persuasive authority. In that case, Vera Rollins commuted to work as a passenger in a Metro Vanpool van. *Id.* at *2. Ms. Rollins, as a passenger, used one of four particular Metro Vanpool vans, five days each week for three years prior to the accident that was the subject of her claim. *Id.* The trial court in that case granted State Farm's motion for summary judgment that she was not entitled to PIP benefits under her insurance policy with State Farm because the regular use exclusion applied to her use, as a passenger, of the Metro Vanpool van. *Id.* at 2-3.

Ross v. State Farm, 132 Wn.2d 507, 940 P.2d 252 (1997) also supports the proposition that the "regular use" exclusion can apply to use as a passenger. In *Ross*, the Washington Supreme Court held that a "regular use" exclusion precluded UIM coverage in a situation where the parties stipulated that a vehicle was available for the wife's regular use "either as driver or passenger." *Id.* at 520.

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[3] Pursuant to GR 14.1, "...unpublished decisions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

The question of whether a passenger is using a vehicle for purposes of the regular use exclusion was also specifically addressed in unpublished opinions of the United States District Court for Western Washington and of the 9th Circuit of the Federal Court of Appeals in *Anderson v. State Farm Ins. Co.*' 2007 WL 1577870 ("District Court Decision"); 300 Fed.Appx. 470 (2008) (9th Circuit Decision affirming District Court). Both of those unpublished decisions may be cited and followed as persuasive authority because GR 14.1 (a) allows citation to unpublished decisions "if citation to that opinion is permitted under the law of the jurisdiction of the issuing court," and the federal courts permit citation to unpublished federal judicial decisions issued on or after January 1, 2007. *See* FRAP 32.1 (a)

In *Anderson*, an 8-year-old child was injured in an auto accident with an underinsured driver while the child was riding in the back of her mother's car. The child sought UIM benefits, but State Farm denied her claim because it was excluded under the policy's "regular use" exclusion. *See Anderson*, District Court Decision at *3-4. In determining that the regular use exclusion precluded UIM coverage[4] for the child, the District

[4] As noted in *Anderson*, "Washington courts regularly apply the same analysis to both types of coverage [UIM & PIP] without distinguishing them." *Anderson*, District Court Decision at *14. The District Court cited to *Hall*, 133 Wn.App. at 396 and *Eddy v. Fidelity*, 113 Wn.2d 168, 776 P.2d 966 (1989) in applying the "regular use" exclusion to preclude both UIM and PIP coverage under the *Anderson* State Farm policy.

Court first considered the question of whether riding as a passenger constitutes use and found that it did because Washington courts broadly define the term "use:"

> The Court next turns to the question of whether riding as a passenger in a car constitutes "use." While the Court agrees that the fact pattern here is novel, and can find no authority analyzing the precise issue presented, this Court answers that question in the affirmative. The word "use" is not defined in the policy. Thus, the Court gives the word its ordinary meaning. However, this Court does not do so blindly. Indeed, Washington courts have defined the word "use" broadly in the context of UIM policies and claims. For example, in *Sears v. Grange Ins. Ass'n*, 111 Wn.2d 636 (1988), overruled on other grounds, *Butzberger v. Foster*, 151 Wn.2d 396 (2004), the Supreme Court of Washington addressed the question of whether a passenger "uses" a vehicle for purposes of UIM coverage. The court found that a passenger was "using" the vehicle based on the four-factor test for usage set forth in *Rau v. Liberty Mut. Ins. Co.,* 21 Wn.App. 326, 324 (1978).[FN3] *Sears,* 111 Wash.2d at 639. The court further noted that the weight of authority from other jurisdictions supports the proposition that passengers are users of a motor vehicle. *Id.*

Anderson, District Court Decision at *11-12.

The District Court then rejected the insured's contention that "use" should be defined differently when contained in an exclusion as opposed to an inclusionary clause, and held that "use" has been established under Washington law "to include passengers:"

> Plaintiff urges this Court not to rely on *Sears* or *Butzberger* because both of those cases analyzed the term "uses" in construing an inclusionary clause rather than an exclusionary clause. The

> Court is not persuaded. Here, as noted above, there is no need to construe the language at issue. It is clear and unambiguous, and therefore, must be applied as drafted. Accordingly, the Court agrees with defendant that the term "use" has been established under Washington law to include passengers, minor or otherwise. [FN4]
>
> FN4. This interpretation is consistent with the exclusion's general purpose and the legislative intent behind UIM. Washington statute expressly permits the use of these exclusions, RCW 48.22.030(2), and Washington courts regularly enforce the exclusion in other contexts. *See, e.g., Hall v. State Farm Mut. Auto. Ins. Co.*, 133 Wn.App. 394 (2006); *Nelson v. Mutual of Enumclaw Ins. Co.*, 128 Wn.App. 72 (2005).

Anderson, District Court Decision at *12-13.

Finally, the District Court held that the child's use of the car was regular when she rode as a passenger to school and activities, and correspondingly found that the exclusion precluded coverage:

> Finally, the parties do not appear to dispute that M.A.'s use of the car was regular. Indeed, the parties have stipulated that M.A. regularly rode as a passenger to and from school, extracurricular activities, and errands in her mother's car. Plaintiff provides no other facts or argument to the contrary. For all of these reasons, the Court finds that defendant's "regular use" exclusion precludes UIM coverage for M.A.

Anderson, District Court Decision at *13.

Not only is the District Court's opinion in *Anderson* persuasive, but there is further support from the 9th Circuit that affirmed the District Court and held that "regular use" exclusions apply to passengers. Again citing to specific Washington decisions applying the term "use" to

passengers, the 9th Circuit rejected the argument being made by Ms. Koren herein, that "use" requires control over the vehicle:

> Linda Anderson appeals the summary judgment entered in favor of State Farm Insurance Co. We affirm.
>
> The "regular use" exclusions at issue apply to passengers. *See, e.g., Sears v. Grange Ins. Ass'n*, 111 Wash.2d 636, 762 P.2d 1141, 1142-43 (1988), overruled on other grounds, *Butzberger v. Foster*, 151 Wash.2d 396, 89 P.3d 689 (2004). We think the state supreme court would not require control of the vehicle, as Anderson contends; rather, it would apply the *Butzberger* factors. 89 P.3d at 697. Under them, MA was "using" her mother's car. This being so, there is no dispute that MA's use was regular.

Anderson, 300 Fed.Appx. 470.

Like *Anderson*, the facts here when analyzed under the *Butzberger* factors support the conclusion that use as a passenger constitutes use for the purpose of the "regular use" exclusion. Under *Butzberger* to determine whether a person is using a vehicle three factors must be met at the time of injury- 1) there must be a causal relation or connection between the injury and the use of the insured vehicle; 2) the person asserting coverage must be in reasonably close geographic proximity to the insured vehicle, and 3) the person must also be engaged in a transaction essential to use of the vehicle at the time. *See Butzburger, supra*, 151 Wn.2d at 410.

There is no dispute that all three of these factors are met with respect to E.K.'s use of the school bus: 1) he was injured while riding the bus to school; 2) he was physically present on the bus at the time of the injury; and 3) he was riding the bus, as he had almost daily for five years, for the purpose of getting to school.

In making her argument, Ms. Koren misconstrues the *Anderson* case, failing to mention that *Anderson* cited favorably several Washington cases that found that "use" applies not only to a vehicle operator, but also, like E.K., to a passenger riding in such a vehicle.

Based on overwhelming authority, both persuasive and binding, Washington broadly define "use," with respect to application of a regular use exclusion for UIM or PIP benefits. Riding as a passenger plainly qualifies as use. Accordingly, Eric Koren's frequent and predictable use of the same or similar school bus as a regular passenger does qualify as regular use that excludes coverage.

c. Application Of The Regular Use Exclusion Is Appropriate When The Use Involves A Fleet Of Vehicles Furnished For Regular Use

There is no dispute that E.K.'s use of the school bus, either the same or similar vehicle, furnished for his regular use was frequent. E.K. rode the bus to and from school on an almost daily basis for five years.

That type of use certainly qualifies as both frequent and predictable. See e.g. *Grange Ins. Ass'n v. MacKenzie,* 103 Wn.2d 708, 712 694 P.2d 1087 (1985) (regular use found where insured drove his brother's car 4 to 6 times per month); *Nelson, supra* at 77 (regular use found where Ms. Nelson drove Mr. Frederick's vehicle every other Saturday and when he was on vacation).

In addition, E.K.'s use of the same or similar school bus qualifies as regular use because Washington law provides that regular use is established by the use of a fleet of vehicles. In *Drollinger v. Safeco Ins. Co.*, 59 Wn. App. 383, 388-89, 797 P.2d 540 (1990), this Court affirmed summary judgment that the regular use exclusion applied to a fleet of police vehicles provided to Mr. Drollinger, a deputy sheriff. Mr. Drollinger argued that the regular use exclusion should not apply because he was assigned to one of a fleet of cars and the use was therefore irregular. *Id.* at 388. The Court, in rejecting that argument cited to a Massachusetts case in which the regular use exclusion applied to a collision involving 1 of 12 of a fleet of police vehicles. *Id.* The Court stated:

> Although the Drollingers acknowledge one of the patrol cars was used by him almost daily, they argue since he was assigned to one of a fleet of cars, the use of one particular car was irregular. This argument must be rejected; it is the fact of regular use that is dispositive. (*citation omitted*). We find

> persuasive the rationale in *Galvin v. Amica Mut. Ins. Co.*, 11 Mass. App. 457, 417 N.E.2d 34 (1981). There, the Court rejected a similar argument and held an **exclusion of vehicles "owned or regularly used" applied to an officer who was injured in a collision while driving 1 of 12 police vehicles**.

Id. at 388-89 (*emphasis added*).

It is undisputed that E.K. engaged in frequent and predictable use of the same or similar school bus furnished by the school district for his nearly daily travel to and from school for five years. Even with a conservative estimate that E.K. rode the bus to school only 4 times per week, that would entail approximately 32 times (considering round trips to and from school) that a school bus was furnished for his use per month. That equates to approximately 320 times that the school district furnished a school bus for Eric Koren each year. Over the course of five years the total number of times that a school bus was furnished to Eric Koren is approximately 1600.

Applying the reasoning of *Drollinger*, and the purpose of the regular use exclusion to prevent an increase in coverage risk without a corresponding increase in premium to E.K.'s circumstances, it is irrelevant whether E.K. always rode in the same school bus out of a fleet of school buses that were furnished for his regular use. E.K.'s regular use of the same or similar school bus to get to and from school, almost daily, for five years, triggers the regular use exclusion to exclude coverage for the PIP.

3. The Regular Use Exclusion Is Not Against Public Policy

Ms. Koren invites the Court to ignore the clear and unequivocal policy language of the regular use exclusion to PIP coverage found in her State Farm policy, and to base its result on contrived public policy grounds. The Court should decline this invitation to reach a result in this case based on something other than what the contract itself says because it is well established in Washington that the regular use exclusion is clear and unambiguous, and therefore there is no need to resort to other rules of construction to divine its meaning.

However, even if the Court engages in Ms. Koren's counter-intuitive argument, the regular use exclusion does not violate public policy and must be enforced for a variety of reasons.

First, there is no justification to refuse to enforce the exclusion on public policy grounds because, as discussed above, the Courts rarely invoke public policy to override the express terms of an insurance policy. *Fluke Corp. v. Hartford Accident & Indemn. Co.,* 145 Wn.2d 137, 144, 34 P.2d 809 (2001). This point was reiterated by Court of Appeals in *Certain Underwriters at Lloyd's London v. Valiant Ins. Co,* 155 Wn. App. 469, 229 P.3d 930 (2010), in a case where the Court refused to hold that an anti-stacking provision violated public policy:

> We also reject Underwriters' argument that the anti-stacking provision violates public policy. Limitations in insurance contracts which are contrary to public policy and statute will not be enforced, but otherwise insurers are permitted to limit their contractual liability. *Brown v. Snohomish County Physicians Corp.,* 120 Wash.2d 747, 753, 845 P.2d 334 (1993). Washington courts rarely invoke public policy to override the express terms of an insurance policy. *Fluke Corp. v. Hartford Accident & Indem. Co.,* 145 Wash.2d 137, 144, 34 P.3d 809 (2001). Generally a contract does not violate public policy unless it is prohibited by statute, condemned by judicial decision, or contrary to the public morals. *Brown,* 120 Wash.2d at 753, 845 P.2d 334.

Id. at 477.

Second, there is no justification to refuse to enforce the exclusion because enforcing the exclusion violates no statute. As noted by the *Valiant Ins.* court in the language quoted above, a contract provision that violates a statute can be void as against public policy for that reason. In this case, Ms. Koren has not identified any way in which enforcement of the regular use exclusion would violate any statute. Instead, the exclusion tracks the language of the statute which provides that an insurer does not have to offer Personal Injury Protection (PIP) coverage for vehicles, like the school bus, not listed on the policy's declaration page, but furnished for the insured's regular use. *See* RCW 48.22.090 (5).

In *Brown v. United Pacific Ins. Co.,* the Court of Appeals, Division One held that a regular use exclusion as to Underinsured Motorist (UIM)

coverage did not violate public policy because it tracked the language of the UIM statute, RCW 48.22.030:

> The sole issue here is whether the Browns are entitled to underinsured motorist coverage under David Brown's policy with United Pacific, despite an exclusion for injuries incurred "[w]hile operating, or occupying any motor vehicle owned by or available for the regular use of you or any family member which is not insured for Liability coverage under this policy."
>
> Since the exclusion is not ambiguous, it must be enforced unless against public policy. *Progressive Casualty Ins. Co. v. Jester,* 102 Wash.2d 78, 80, 683 P.2d 180 (1984). As the clause tracks the language of RCW 48.22.030, it can only be against public policy if the statute is as well.

Brown, supra, 42 Wn. App. at 506.

Just as the UIM regular use exclusion in *Brown* could not violate public policy because it tracked the UIM statute, the PIP regular use exclusion here cannot violate public policy because it tracks the PIP statute.

Third, there is no justification to refuse to enforce the exclusion because exclusions which are related to an insurance company's increased risk have been specifically found **not** to be contrary to public policy. For example, in *Mendoza v. Rivera-Chavez*, 140 Wn.2d 659, 999 P.2d 29 (2000), the Washington Supreme Court noted that courts have upheld exclusions when the activity increases the insurer's risk and have found exclusions to violate public policy when no increased risk was manifested:

> Other cases have upheld exclusion clauses in insurance policies on the basis that the activity excluded increased the risk to the insurer. The principle underlying these cases was expressed in *Eurick v. Pemco Ins. Co.,* 108 Wash.2d 338, 343-44, 738 P.2d 251 (1987), where we explained that "exclusions that have been held violative of public policy generally have been those manifesting no relation to any increased risk faced by the insurer, or when innocent victims have been denied coverage for no good reason.

Id. at 667.

As discussed above, E.K.'s use of the school bus for his almost daily trip to and from school increased State Farm's risk of having to pay a PIP claim, such as that asserted here by Ms. Koren, without a corresponding premium to make up for that increased risk. An insurer has the right, without violating public policy, to limit its exposure in the manner effected in the policy at issue here based on this uncompensated increased risk.

The 9th Circuit spoke to the public policy argument in *Anderson*:

> The clauses themselves are clear and unambiguous. *Hall v. State Farm Mut. Auto. Ins. Co.*, 133 Wash.App. 394, 135 P.3d 941, 944 (2006) (citing cases). While the facts here are particularly unfortunate, applying the exclusions does not offend public policy. Both exclusions are consistent with Washington statutory law, Wash. Rev. Code § 48.22.030(2), as well as the purpose of "regular use" exclusions. *Hall*, 135 P.3d at 944 (describing the purpose as "to provide coverage for isolated use of a vehicle without requiring the insured to pay an additional premium to insure that vehicle"); *see Barth v. Allstate Ins. Co.,* 95 Wash.App. 552, 977 P.2d 6, 11 (1999).

Anderson, 300 Fed.Appx. 470.

The exclusion is designed to prevent coverage under the precise scenario presented in this case. E.K. was furnished the use of the same or similar school bus approximately 32 times per month (a total of 1600 times over the course of five years), with no corresponding increase in premium. That type of frequent use substantially increases the risk to State Farm as a matter of law. Clear evidence of this is shown through comparison to the frequency of use in *Grange Insurance v. MacKenzie*. The *McKenzie* case involved a circumstance where the Washington Supreme Court found there was regular use and thus no coverage when the Grange insured drove his resident relative brother's car insured by Farmer's Insurance Company 4 to 6 times a month. *MacKenzie, supra*, 103 Wn.2d at 712.

In holding that coverage was barred by the regular use exclusion, the *Mackenzie* court held that use of the car 4 to 6 times a month "significantly increased the risk to the insurer." *Id.* Given that in *McKenzie* the Washington Supreme Court held that 4 to 6 uses of a car per month "significantly" increased the insurer's risk, E.K's use of a school bus about 32 times a month certainly increased State Farm's risk.

Finally, refusing to enforce the exclusion on public policy grounds would be an unwarranted departure from binding Washington authority in

cases like *Hall, Nelson* and *MacKenzie,* which focused on the amount and regularity of use and the commiserate increase in risk to the insurer. In *Hall, Nelson* and *MacKenzie,* the courts enforced regular use exclusions where use was far less frequent than the twice a school day – 8-10 times a week – and 320 uses a year that occurred in this case. It would be contrary to those cases to find the exclusion void for public policy and unenforceable.

In this case, there is no dispute to the fact of E.K.'s regular, nearly daily use of the school bus for at least five years prior to the accident. The regular use exclusion is designed to prevent this very scenario, whereby the insured attempts to seek benefits, without a corresponding premium. Washington specifically authorizes regular use exclusions as to both PIP and UIM coverages in order to promote a balance between insurer and insured. The right to policy benefits without increased premiums for isolated use is protected for the insured. The right to prevent an increase in coverage risk without a corresponding increase in premium is protected for the insurer. Both are valid and important rights, and promoted by the regular use exclusion.

F. Ms. Koren is Not Entitled to Attorney's Fees/Costs Because There is No PIP Coverage For This Loss

Ms. Koren argues that she is entitled to attorney's fees under *Matsyuk v. State Farm Fire & Cas. Co.,* 173 Wn.2d 643, 272 P.3d 802

(2012) and RAP 18.1. Her argument fails in that she must first establish that the PIP coverage applies to this loss, and even if it is, there must be a finding that the regular use exclusion does not apply to preclude the coverage. Ms. Koren cannot meet her burden under the insuring agreement and the request for attorney's fees should be denied. Even if she could meet that burden, the regular use exclusion applies as a matter of law and likewise her request for attorney's fees should be denied.

V. CONCLUSION

State Farm is permitted by well-established Washington law to limit its' contractual liability unless those limitations are contrary to public policy or statute. *See Emerson, supra* at 481. The definition of automobile contained in Ms. Koren's insurance policy with State Farm is not only plain and unambiguous, but copied nearly verbatim from the authorizing Insurance Title. Based on this plain, express policy term PIP coverage under the policy is not triggered for this loss. This plain and unambiguous term cannot be held as contrary to public policy or statute.

Ms. Koren would have the Court decide this matter on emotion, however, like the trial court, this Court must enforce the plain and unambiguous terms of the policy and affirm the trial court's order granting summary judgment to State Farm and denying summary judgment to Ms. Koren.

In the event the trial court's order is reversed, this Court should remand the matter back to the trial court with instructions to enter summary judgment in favor of State Farm based on the regular use exclusion. Based on the undisputed fact of frequent and regular use of the school bus, the regular use exclusion applies to this loss.

Ms. Koren's arguments that the regular use exclusion should be found unenforceable because it is ambiguous as applied to passengers or on some public policy grounds are not supported by any legal authority or by common sense.

DATED this 24th day of May, 2017.

Respectfully submitted,

/s/ Gregory S. Worden

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DECLARATION OF SERVICE

On said day below, I caused to be served on the following a true and accurate copy of **Brief of Respondents** in Court of Appeals Cause No. 347231-III to be served on the parties below via email per agreement of parties.

Marshall Casey M CASEY LAW, PLLC 1106 N. Washington, Ste. B Spokane, WA 99201 marshall@mcaseylawfirm.com matt@mcaseylawfirm.com larisa@mcaseylawfirm.com	☐ ☐ ☐ ☐ ☒	via U.S. Mail via Legal Messenger via Overnight Mail via Facsimile via Electronic Mail

Original e-filed with:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

EXECUTED this 24th day of May, 2017 at Seattle, Washington.

Vicki Milbrad