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COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION THREE

No. 35864-0-III

JOSEPH M. THOMPSON, an individual,
Respondent,

vs.

PROGRESSIVE DIRECT INSURANCE COMPANY,
Appellant.

REPLY BRIEF OF APPELLANT

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I. REPLY TO RESTATEMENT OF THE CASE

Thompson's restatement of the case does not add new facts or facts not discussed in appellant's statement of the case. Therefore, no response is necessary.

II. REPLY ARGUMENT

1. Coverage

Thompson's response conflates interpretation of the words of the statute with application of those words. Progressive does not dispute that the definition of the word insured in RCW 48.22.005 is clear and unambiguous. But Thompson asks the court to apply the definition to the UIM statute, and then apply it as the sole requirement for UIM coverage. Because RCW 48.22.005 does not say that is how the definition should be applied, the "clear wording" of the definition does not answer the question this case raises.

With regard to whether RCW 48.22.005 applies to the UIM statute, Thompson argues that "the legislature is able to use language effectively and clearly in definitions sections, and to denote the scope of their usage." Response Brief at 14. He then cites examples of that. His point, however, is precisely the point Progressive has made. Here the act that created RCW 48.22.005 did not say it applied to RCW Chapter 48.22. The legislature said the act applied to "this chapter." 1993 Wash. Laws ch. 242. "This chapter" is Chapter 242, the chapter in which the act appeared.

Even if that was not the case, Thompson acknowledges the definition at least does not apply to other statutes where “the context indicates otherwise.” Yet, he fails to explain why the “context” of the UIM statute requires application of the statutory definition. The UIM statute does not even use the term “insured” when identifying who is covered by it or by the insurance it requires. And, applying the definition in RCW 48.22.005 to the UIM statute creates an obvious conflict between the two statutes. Both before and after enactment of RCW 48.22.005, the UIM statute only required carriers to offer UIM coverage for the same persons insured under the liability coverage of the policy. RCW 48.22.030(2). This imposes a minimum standard which Washington courts have repeatedly said “does not mandate any particular scope for the definition of who is an insured in a particular automobile insurance policy.” *Smith v. Continental Cas. Co.*, 128 Wn.2d 73, 83, 904 P.2d 749 (1995), quoting *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 75, 549 P.2d 9 (1976). Liability insurers are not required to insure anyone other than the named insured. Therefore, according to the UIM statute, neither are UIM carriers. See *Wheeler v. Rocky Mountain Fire & Cas. Co.*, 124 Wn. App. 868, 103 P.3d 240 (2004). Importantly, the Legislature did not change the language of the UIM statute when it enacted RCW 48.22.005. Nevertheless, Thompson wants to apply RCW 48.22.005, a more general statute, to impose a new, higher minimum standard. Ordinarily, the more

specific statute controls over the more general statute. *Waste Management of Seattle, Inc. v. Utilities & Transp Comm'n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994). Thompson fails to explain why that should not be the case here.

Thompson also still fails to give any reason why the court should apply the definition of insured as the sole requirement for UIM coverage. The UIM statute on its face imposes at least two requirements for coverage, not one: The person claiming coverage must be covered under the policy, and the person must have been injured by an underinsured motorist. RCW 48.22.030(2) Neither the legislation enacting the definition of insured or the legislative history of that act indicate that a goal or an intended consequence of adding the definition was to eliminate one of those requirements. Thompson offers no explanation why the second requirement can now be ignored.

Moreover, even case law issued after the enactment of RCW 48.22.005, shows that being an insured is not the only requirement a person claiming UIM coverage must establish. In *Bohme v. PEMCO Mut. Ins. Co.*, 127 Wn.2d 409, 899 P.2d 787 (1995), the court approved denial of coverage to an insured based on a policy provision excluding government-owned vehicles from the definition of “underinsured motor vehicle.” In *Barth v. Allstate Ins. Co.*, 95 Wn. App. 552, 977 P.2d 6 (1999), the court approved denial of coverage to an insured based on an

exclusion barring UIM coverage for a vehicle that is owned by a resident relative and not insured under the policy. In *State Farm Mut. Auto. Ins. Co. v. Gates*, 83 Wn. App. 471, 921 P.2d 1096 (1996), the court agreed that an insured injured by an uninsured ATV was not entitled to UIM coverage. In none of these cases did the court conclude that simply being an insured entitled the claimant to UIM coverage. According to Thompson, those decisions are all wrong.

Thompson tries to cast Progressive's actions as limiting who is an insured. Thompson characterizes Progressive's efforts as "contracting around" the definition of insured. Response Brief at 5. They do not.

Who is insured is a question distinct from what is insured.

In determining whether an insurance policy provides coverage for a particular injury, one must ask: (1) Is the person claiming damages protected under the policy? and (2) does the situation in which the injury occurred fall within the class of risks insured against under the policy?

Kowal v. Grange Ins. Ass'n, 110 Wn.2d 239, 244, 751 P.2d 306 (1988).

While the answer to either question may affect coverage, they are, nonetheless, distinct questions. As the *Kowal* court went on to say: "The definition of 'an insured' answers the first question, while the narrow definition of 'accident' which includes only 'covered autos' is an answer to the second." *Id.*

Here, the definition of insured answers the first question, who is insured. The definition of underinsured motor vehicle is one of the

answers to the second question, the situation that is insured. Progressive has never denied that Thompson is an insured. Its position has been that being an insured is not the only requirement Thompson must satisfy; he also must establish he was injured by an underinsured motor vehicle. Therefore, this case involves the definition of underinsured motor vehicle – the situation in which the injury occurred – not the “who” protected under policy through the definition of insured.

This is not the case of first impression Thompson says it is. Response Brief at 15. Whether UIM carriers may restrict who is an insured was specifically addressed in *Financial Indem. Co. v. Keomaneethong*, 85 Wn. App. 350, 931 P.2d 168 (1997). In *Keomaneethong*, the court expressly approved a limitation on the definition of insured that excluded from coverage passengers who are unrelated to the insured.

In place of analysis, Thompson has offered broad conclusions. For example, at page 5 he says: “Reading The Definition Statute in conjunction with The UIM Statute, insurers are thus required to provide UIM coverage to permissive automobile passengers who are entitled to recover damages from the owners of ‘underinsured motor vehicles.’” At page 7, he restates this same conclusion: “However, the legislature has now determined that Guest Passengers are ‘covered persons’ and that changes the meaning of The UIM Statute. Progressive is no longer free to

exclude coverage to Guest Passengers because, as persons whom are 'Insured' by statute, they are statutorily 'covered persons.'" But, Thompson fails to support any of the propositions that underlie these conclusions. Nowhere in any statute does it say that guest passengers are "covered persons." Indeed, in presenting this argument, Thompson engages in linguistic slight of hand, casually substituting the undefined term "covered person" for the defined term "insured." Moreover, nowhere in any statute or court decision does it say that RCW 48.22.005 changed the meaning of the UIM statute. Thompson leaves the most obvious question raised by his argument – "Why does defining insured change the ability of insurers to define underinsured motor vehicle to exclude the insured vehicle?" – entirely unanswered.

Thompson spends much of his brief arguing why *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 794 P.2d 1259 (1990), was a bad decision. Response Brief at 8-12. Most of his argument is based on Justice Dore's dissent, joined by one other justice. The crux of Thompson's argument, however, is that RCW 48.22.005 statutorily eliminated the "tiered" classes of insureds. Response Brief at 9. But even that argument lacks merit. The tiers identified in *Blackburn* were based on the individual's relationship to the policy: Named insureds who purchase and pay for the policy and are insured at all times; other insureds who pay nothing and are covered only while occupying the vehicle. *Blackburn*, 115 Wn.2d at 88-89. Even

under the statutory definition, those tiers remain. Indeed, the statutory definition creates an additional class: pedestrians who not only did not purchase or pay for the insurance but are not even oriented to the vehicle when they are injured. RCW 48.22.005(5)(b)(ii).

The Washington Supreme Court has established a two-part test for examining the validity of UIM exclusionary clauses: Does the proposed exclusion conflict with the express language of the UIM statute? If not, is the exclusion contrary to the UIM statute's declared public policy? *National Merit Ins. Co. v. Yost*, 101 Wn. App. 236, 241, 3 P.3d 203 (2000), (citing *Greengo v. Public Employees Mut. Ins. Co.*, 135 Wn.2d 799, 806, 959 P.2d 657 (1998) (citing *Bohme v. PEMCO Mut. Ins. Co.*, 127 Wn.2d 409, 412, 899 P.2d 787 (1995))). The court will approve an exclusionary clause if it can answer both inquiries in the negative. *Id.*

In *Blackburn*, the Supreme Court answered both questions in the negative with regard to the same definition of underinsured motor vehicle at issue here. Thompson has not provided a reasoned basis for concluding that the definition of insured in RCW 48.22.005 undermines either that Court's analysis or its conclusion.

2. Attorney Fees

With regard to attorney fees, Thompson makes several allegations that simply are not supported. At page 17, he states: "Mr. Gosselin again neglects to point out that Mr. Thompson's counsel spoke with Mr.

Gosselin on January 4, 2017, 23 days before he claims to have billed his first hour. CP 143. Prior to that, Plaintiffs counsel spent 13 hours of attorney time on this coverage dispute, primarily with Progressive's in house attorney, Greg Tidwell. *Id.*” The page in the Clerk’s Papers to which Thompson refers is his reply brief in support of his motion for attorney fees. See CP 143. Progressive’s counsel actually testified he began work on the case on January 16, 2016, almost a year before his first contact with Thompson’s counsel. CP 141, ln. 21. Between those times, Progressive’s counsel performed virtually all the work done on the matter other than communicating directly with Thompson’s counsel. Therefore, “time on the file” does not explain the difference in the amount of time billed.

At page 18, Thompson claims Progressive is suggesting his attorneys’ hours “should be cut to some random number and divided by some random percentage” Neither was “random.” The hours Progressive suggested were based on a comparison of the hours and work both sides spent on the case. CP 136-37. The allocation mirrored Thompson’s counsel’s bill. CP 137.

Finally, at page 18, Thompson argues that Progressive artificially discounted the amount of time its counsel spent on the case by travel time, contending that counsel actually worked on the case during travel delays caused by fog. CP 140-41. However, there was no work to be

done on the case during those delays. The travel delays occurred on the two days immediately after the trial court had ruled on Thompson's motion for summary judgment. There was no work to do on the case then. There were no other pending motions, no pleadings, no research to do during those hours. The court's ruling on summary judgment had essentially ended the case for the time being.

III. CONCLUSION

For the foregoing reasons, Progressive renews its request that this court reverse summary judgment in favor of Thompson, reverse the award of fees and costs to Thompson, and remand for entry of judgment in favor of Progressive. If the court denies this request, Progressive asks the court to reverse the trial court's award of the attorney fee multiplier, recalculate the lodestar fee award, and remand for entry of judgment consistent with its award.

Dated this 20th day of July, 2018.

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CERTIFICATE OF SERVICE

I certify that, per agreement, I emailed a copy of the foregoing Reply Brief of Appellant to:

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