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COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION THREE

No. 358640

JOSEPH M. THOMPSON, an individual,
Respondent,

vs.

PROGRESSIVE DIRECT INSURANCE COMPANY,
Appellant.

AMENDED BRIEF OF APPELLANT

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NATURE OF THE CASE

This is a declaratory judgment action to determine whether plaintiff Joseph Thompson (Thompson), a passenger in a one-car accident, can collect underinsured motorist (UIM) benefits from the driver's (Haney's) insurance policy after he collected the limits of the liability insurance from the same policy. On motion for summary judgment, the trial court found in favor of Thompson. The insurer, Defendant Progressive Direct Insurance Company (Progressive), appeals.

INTRODUCTION

To abandon established precedent, there must be “a clear showing that an established rule is incorrect and harmful.” *Fergen v. Sestero*, 182 Wn.2d 794, 809, 346 P.3d 708 (2015) (quoting *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006) (quoting *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004))).

In *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 794 P.2d 1259 (1990), the Supreme Court held that Washington's UIM statute did not prohibit insurers from excluding the insured vehicle from the definition of underinsured motor vehicle for purposes of underinsured motorist coverage. The court interpreted and applied the definition of underinsured motor vehicle contained in the UIM statute, and reasoned that it, and the UIM statute as a whole, contemplated two distinct vehicles, the insured vehicle and a separate underinsured vehicle. The decision had the effect of

preventing the passenger injured in a single car accident from collecting from both the liability and UIM coverages in the driver's insurance policy.

The legislature never changed the definition of underinsured motor vehicle after *Blackburn*. Nevertheless, twenty eight years after *Blackburn*, the trial court in this case decided that a 1993 act that requires auto insurers to offer personal injury protection insurance overruled *Blackburn*. The act does not mention *Blackburn*. It does not mention UIM insurance. It does not mention or change the definition of underinsured motor vehicle. Yet, without analysis, the trial court agreed with plaintiff that a definition of the word "insured" included in the 1993 act nullified the policy definition of underinsured motor vehicle and effectively overruled *Blackburn*, so that UIM insurers are now required to pay UIM benefits to passengers in single vehicle accidents. With that, the court allowed Thompson to collect from both Haney's liability insurance and her UIM coverage from the same insurance policy. Similarly, without analysis and without findings of fact or conclusions of law, the trial court awarded attorney fees to Thompson that included a multiplier.

The trial court erred in granting summary judgment. Nothing in the 1993 act indicates or even suggests the legislature intended to alter the UIM statute or overrule *Blackburn*. Nor does the act require that result. In the absence of insurance coverage, the trial court erred in awarding attorney fees

to plaintiff. And, even if fees were properly awarded, the trial court erred in making its award summarily, without findings of fact or conclusions of law. It also erred in the amount of fees it awarded, and in applying a multiplier. Progressive asks that judgment be granted in its favor. However, if summary judgment is affirmed, Progressive asks that the court recalculate attorney fees without a multiplier.

ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment in favor of Thompson, and deciding that Progressive was obligated to provide UIM coverage to Thompson as a result of the underlying accident.
2. The trial court erred in awarding Mr. Thompson attorney fees.
3. The trial court erred in awarding attorney fees summarily, without making findings of fact or conclusions of law.
4. The trial court erred in the amount of attorney fees it awarded.

ISSUES

1. Did Progressive properly apply Ms. Haney's insurance policy when it denied Mr. Thompson's request for UIM benefits?
2. In *Blackburn v. Safeco Ins. Co.*, the Washington Supreme Court held that neither Washington's underinsured motorist statute nor public policy requires insurers that insure vehicles involved in single car accidents to provide underinsured motorist coverage to non-family member passengers in the vehicle. Did 1993 Wash. Laws ch. 242 overrule *Blackburn*?

3. If Thompson is not entitled to UIM benefits, should this court reverse the award of Thompson's attorney fees?

4. If the trial court correctly granted summary judgment to Thompson, did the trial court improperly apply a multiplier, improperly calculate the amount of fees, and improperly fail to make findings in support of the award?

STATEMENT OF FACTS

The material facts are not in dispute. (Compare CP 10-12 with CP 81-84) The case arises out of a single vehicle car accident involving Stacie Haney and Joseph "Mike" Thompson. Haney owned and was driving the car. Thompson was her passenger. (CP 95) Thompson was injured in the accident. Haney and Thompson are not married or related. (CP 11) For purposes of these proceedings, the parties agreed Haney was solely at fault for the accident. (CP 82)

Progressive insured Haney and the vehicle she was driving. (CP 95) The policy provided both liability and underinsured motorist (UIM) coverage. The liability limits were \$100,000 per person, and \$300,000 per accident. The limits of the UIM coverage were the same. (CP 24)

After the accident, Progressive offered, and Thompson accepted, the full \$100,000 per person bodily injury liability limits in settlement of his claim against Haney. (CP 95) He then asked Progressive to pay him up to the limits of the UIM coverage as well. (CP 63-64, 95)

Under the UIM coverage, Progressive agreed to pay as follows:

If you pay the premium for this coverage, we will pay for damages that an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury:

1. sustained by that insured person;
2. caused by an accident; and
3. arising out of the ownership, maintenance, or use of an underinsured motor vehicle.

(CP 40) The policy defines “insured person.”

“Insured person” means:

- a. you or a relative;
- b. any person while operating a covered auto with the permission of you or a relative;
- c. any person occupying, but not operating, a covered auto; and
- d. any person who is entitled to recover damages covered by this Part III because of bodily injury sustained by a person described in a, b, or c above.

(CP 40)(Appendix 1) The policy also defines the term “underinsured motor vehicle.”

5. “Underinsured motor vehicle” means a land motor vehicle or trailer of any type:

- a. to which no bodily injury liability bond or policy applies at the time of the accident;
- b. to which a bodily injury liability bond or policy applies at the time of the accident, but the bonding or insuring company:
 - (i) denies coverage; or
 - (ii) is or becomes insolvent;
- c. that is a hit-and-run vehicle whose owner or operator cannot be identified and which strikes:
 - (i) you or a relative;
 - (ii) a vehicle that you or a

- relative are occupying; or
- (iii) a covered auto;
- d. that is a phantom vehicle; or
- e. to which a liability bond or policy applies at the time of the accident, but the sum of all applicable limits of liability under all applicable bonds and policies is less than the damages that the insured person is legally entitled to recover.

An “underinsured motor vehicle” does not include any vehicle or equipment:

- a. owned by you or a relative or furnished or available for the regular use of you or a relative. However, this exclusion to the definition of underinsured motor vehicle does not apply to a covered auto with respect to bodily injury to you or a relative;
- b. owned by any governmental unit or agency. However, this exclusion to the definition of underinsured motor vehicle does not apply if the governmental entity is unable to satisfy a claim because of financial inability or its insolvency;
- c. operated on rails or crawler treads;
- d. designed mainly for use off public roads, while not on public roads;
- e. while located for use as a residence or premises; or
- f. that is a covered auto. However, this limitation on the definition of underinsured motor vehicle does not apply to a covered auto with respect to bodily injury to you or a relative.

(CP 41)(Appendix 1)

Progressive did not dispute that Thompson qualified as an insured

person for purposes of the UIM coverage. (CP 65) Progressive did dispute that Thompson's injuries arose out of "the ownership, maintenance, or use of an underinsured motor vehicle." (CP 65) Progressive contended Haney's car was not an underinsured motor vehicle. (CP 65-66, 95) Because Haney is the named-insured, she is "you" for purposes of second subparagraph "a" in the definition of underinsured motor vehicle. Haney owned the car involved in the accident. Therefore, the car is excepted from the definition of underinsured motor vehicle under that subparagraph. Haney's car also was a covered auto. Therefore, it was excepted from the definition of underinsured motor vehicle under subparagraph "f" as well.

Thompson filed suit challenging Progressive's denial of coverage. (CP 4-6) Then he filed a motion for summary judgment. (CP 10-16) In his motion, Thompson argued that Washington's UIM statute, RCW 48.22.030 requires Progressive to provide him with UIM coverage because he met the definition of "insured" in RCW 48.22.005(5). (CP 12-15) The definition was enacted in a 1993 act, 1993 Wash. Laws ch. 242. The act imposed a requirement that auto insurers offer personal injury protection insurance. *Id.* Thompson argued that the definition applied to the UIM statute. Since he fell within the definition, he contended the UIM statute required Progressive to pay him UIM benefits regardless of the terms in the policy. (CP 12-15; RP

2-3)

Without analysis, the trial court granted Thompson's motion and decided that Progressive was obligated to provide Thompson with UIM coverage. (CP 133-34; RP 3) Also without analysis, the trial court awarded Thompson attorney fees. (CP 203-04; RP 5-6) Progressive appeals both decisions.

ARGUMENT

1. Standard of Review

The appellate court reviews summary judgment de novo. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). Interpretation of an insurance contract is a question of law they also review de novo. *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 424, 38 P.3d 322 (2002); *Quellos Grp., LLC v. Federal Ins. Co.*, 177 Wn. App. 620, 634, 312 P.3d 734, (2013)

Whether a party is entitled to attorney fees is an issue of law subject to de novo review. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993). Whether the amount of fees awarded was reasonable is reviewed under an abuse of discretion standard. *American Nat'l Fire Ins. Co. v. B & L Trucking & Const. Co.*, 82 Wn. App. 646, 669, 920 P.2d 192 (1996). A trial judge is given broad discretion in determining the reasonableness of an award. In order to reverse that award, it must be shown

that the trial court manifestly abused its discretion. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993); *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App. 283, 289, 951 P.2d 798 (1998).

2. Progressive is not obligated to pay UIM benefits to Thompson.

A. Haney’s insurance policy clearly and unambiguously precludes UIM coverage for Thompson.

Courts construe insurance policies in the same manner as contracts. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). When interpreting an insurance contract, the court’s primary goal is to determine the intent of the parties. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997). Washington courts construe insurance policies as a whole, giving force and effect to each clause in the policy. *Am. Star Ins. Co. v. Grice*, 121 Wn.2d 869, 874 (1993), *opinion supplemented by* 123 Wn.2d 131 (1994). If the policy language is clear and unambiguous, the Court will not modify the policy or create an ambiguity. *Id.*

Here, the policy clearly and unambiguously requires that Thompson be injured by an underinsured motor vehicle to receive UIM benefits. And, the policy clearly and unambiguously excludes Haney’s vehicle, the vehicle that injured Thompson, from being an underinsured motor vehicle. Second subparagraph “a” in the definition of underinsured motor vehicle removes vehicles “owned by you or a relative or furnished or available for the regular

use of you or a relative” from being classified as underinsured motor vehicles. Subparagraph “f” of the definition also removes “covered autos” from the classification. Because Haney is the named-insured, she is “you” for purposes of second subparagraph “a.” Haney owned the vehicle involved in the accident. Therefore, the vehicle is excluded from being an underinsured motor vehicle under that subparagraph. Haney’s vehicle also was a covered auto. Indeed, it had to be for Thompson to be an insured person in this case. Therefore, it was excluded from being an underinsured motor vehicle under subparagraph “f” as well.

Because the vehicle in which he was riding does not meet the definition of underinsured motor vehicle, Thompson was not injured by an underinsured motor vehicle. Therefore, Thompson does not meet the requirements for UIM coverage under the policy, and he is not entitled to UIM benefits.

B. Blackburn v. Safeco Ins. Co. affirms that Progressive’s policy is valid and enforceable, and that Thompson is not entitled to UIM benefits.

In *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 794 P.2d 1259 (1990), the Washington Supreme Court held that neither Washington’s underinsured motorist statute nor public policy requires that insurers who insure vehicles involved in single car accidents provide underinsured motorist coverage to

non-family-member passengers in the vehicle. 115 Wn.2d at 83-84, 93-94. In *Blackburn*, a passenger in the insured vehicle was hurt in a single car accident due to the negligence of the named-insured driver. 115 Wn.2d at 84. The driver's insurer paid the passenger the limits of the liability coverage. The passenger then demanded the limits of the UIM coverage as well. *Id.* The policy excepted from the definition of underinsured motor vehicle "any vehicle [w]hich is a covered auto for Liability Insurance." 115 Wn.2d at 85. The passenger argued that this exception was not consistent with the definition of underinsured motor vehicle contained in the UIM statute. 115 Wn.2d at 86. That definition read:

"Underinsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance, or use of which either no bodily injury or property damage liability bond or insurance policy applies at the time of an accident, or with respect to which the sum of the limits of liability under all bodily injury or property damage liability bonds and insurance policies applicable to a covered person after an accident is less than the applicable damages which the covered person is legally entitled to recover.

RCW 48.22.030(1)(Appendix 2); 115 Wn.2d at 86. The passenger contended that the insurer could not provide less coverage than what the statute required. But, since the policy definition excluded the covered vehicle while the statutory definition did not, the policy did just that. 115 Wn.2d at 86.

The Supreme Court rejected the argument. The court reasoned that

the UIM statute contemplated two distinct motor vehicles: the motor vehicle with respect to which uninsured motorist coverage is issued and the “uninsured or underinsured” motor vehicle. In addition, the court noted, the statute distinguishes between the person insured under the liability coverage and the owner or operator of the uninsured or underinsured motor vehicle. 115 Wn.2d at 90, quoting *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 1, 6, 665 P.2d 891 (1983).

. . . [T]he UIM exclusion in Blackburn’s case is fully consistent with the UIM statute and the public policy underlying the statute. A 2-car requirement applies in *Millers* and in this case because the insurance policy exclusion requires two cars.
. . . .

Blackburn did not contract with Safeco for UIM insurance. Blackburn was able to purchase the protection he seeks from his own insurance company. The exclusionary provision of the Safeco policy, as applied to “other insureds,” is consistent with the Washington UIM statute, the public policy of this state, and the expectations of the parties to the insurance contract.

115 Wn.2d at 92-93. Accord, *Millers Cas. Ins. Co. v. Briggs*, supra. The Court affirmed the denial of UIM benefits to the passenger.

Blackburn controls this case. The facts present and the provisions at issue there and here are identical. Therefore, Progressive’s definition of underinsured motor vehicle does not violate the UIM statute, does not violate the public policy reflected in the UIM statute, is not prohibited, and is valid

and enforceable.

C. 1993 Wash. Laws ch. 242 neither overruled *Blackburn* nor justifies a different result.

Thompson argues that *Blackburn* was silently overruled by the legislature in 1993. In 1993, the legislature enacted legislation that required insurers to offer personal injury protection insurance. 1993 Wash. Laws ch. 242 (“An Act relating to mandatory offering of personal injury protection insurance; adding a new section to chapter 48.22 RCW; creating a new section; and providing an effective date.”)(Appendix 3) With it, the Legislature added a definitions statute, codified as RCW 48.22.005. *Id.* §1. In that statute, the Legislature included a definition of the word “insured.”

The definition states:

“Insured” means:

- (a) The named insured or a person who is a resident of the named insured's household and is either related to the named insured by blood, marriage, or adoption, or is the named insured's ward, foster child, or stepchild; or
- (b) A person who sustains bodily injury caused by accident while: (i) Occupying or using the insured automobile with the permission of the named insured; or (ii) a pedestrian accidentally struck by the insured automobile.

RCW 48.22.005(5). Thompson contends this definition must be read into

UIM policies,¹ and when that is done, the definition nullifies or overrules *Blackburn*. His theory is that “the definition statute requires all policies issued in Washington to provide underinsured motorist coverage to individuals occupying an insured automobile with the permission of the named insured.” (CP 12) At oral argument, Thompson’s counsel described his position this way:

[A]t the time of *Blackburn*, the policy was what granted the coverage. And so when the policy granted the coverage, it was then free to erode its own definition because it was providing the coverage. But after 1994 [sic], the legislature provided the definition of coverage.

. . . .

And once the legislature provides that definition, you can’t erode it with exclusionary policies. Once the legislature requires the definition of insured, you can’t then go in the policy and erode it. So that’s the only argument.

RP 3.

The most obvious failure in Thompson’s argument is that it proceeds from the faulty premise that being an insured is the only element necessary for UIM coverage. Even if the court accepts Thompson’s contention that

1. In the trial court, Thompson intertwined the argument that the UIM statute is the exclusive source of the terms of UIM coverage with a separate argument that the definitions in the UIM statute must be read into the policy. These are two separate arguments, the second of which has no bearing on this case. Progressive does not dispute that the definitions in the UIM statute must be read into the policy. The *Blackburn* court said just that. 115 Wn.2d at 93-94 (“As noted, [the statutory] definition of an underinsured motor vehicle becomes part of the Safeco insurance policy.”) The rule does not impact this case, however, because (1) the definition of insured is not part of the UIM statute and (2) even if it was, Progressive’s definition of insured complied with the statutory definition, at least with regard to Thompson.

satisfying the statutory definition of insured is an element of UIM coverage, it is not the only element. The UIM statute also requires that a person be injured by an underinsured motor vehicle. RCW 48.22.030(2). For example, if Haney and Thompson had been hit by another car, Thompson would have to show that the vehicle that struck him was an underinsured motor vehicle that did not have insurance sufficient to fully compensate him for his injuries before he could collect UIM benefits from Haney's policy. Merely being an insured under Haney's policy or under RCW 48.22.005 would not be enough. By focusing on the definition of insured, Thompson simply ignores – and invites the court to ignore – the fact that he cannot establish he was struck by an underinsured motor vehicle as that term is defined in the policy.

Even if Thompson could overcome that failure, his argument proceeds from several other incorrect premises regarding the interpretation of the UIM statute and the 1993 act. These require the court to interpret the 1993 Wash. Laws ch. 242 and the UIM statute, RCW 48.22.030. Accepting Thompson's argument also requires overruling *Blackburn*. Both are subject to well-established rules.

The fundamental goal in statutory interpretation is to “discern and implement the legislature's intent.” *O.S.T. v. Regence BlueShield*, 181 Wn.2d 692, 696, 335 P.3d 416 (2014) (quoting *State v. Armendariz*, 160

Wn.2d 106, 110, 156 P.3d 201 (2007)). If a statute's meaning is plain on its face, the court "give[s] effect to that plain meaning as an expression of legislative intent." *Id.* The court derives the plain meaning from the language of the statute and related statutes. *Id.* When the plain language is unambiguous, the legislative intent is apparent, and the court will not construe the statute otherwise. *Id.* If the language is ambiguous the court looks to aids of construction, such as legislative history. *Merriman v. Am. Guar. & Liab. Ins. Co.*, 198 Wn. App. 594, 611, 396 P.3d 351 (2017).

“[O]verruling prior precedent should not be taken lightly.” *Hardee v. Dept. of Social & Health Servs.*, 172 Wn.2d 1, 15, 256 P.3d 339 (2011)(quoting *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009)). To abandon established precedent, there must be “a clear showing that an established rule is incorrect and harmful.” *Fergen v. Sestero*, 182 Wn.2d 794, 809, 346 P.3d 708 (2015) (quoting *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006)(quoting *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004)). “‘The Legislature is presumed to be aware of judicial interpretation of its enactments,’ and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language.” *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 238, 236 P.3d 182, (2010) (quoting *Riehl*

v. Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *Friends of Snoqualmie Valley v. King County Boundary Review Bd.*, 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992))).

Blackburn interpreted the UIM statute. In particular, *Blackburn* interpreted the statutory definition of underinsured motor vehicle. The legislature has not changed that definition since *Blackburn* was decided. Thus, there is no basis for overruling *Blackburn*.

One of Thompson's incorrect premises is that with the 1993 act the legislature intended to overrule *Blackburn* and/or change how the UIM statute was applied. While the legislature may abrogate a court's interpretation of a statute by amending the statute, see, e.g., *Ohio Cas. Ins. Co. v. Axis Ins. Co.*, No. 94677-9, slip op. at 9 (Mar. 22, 2018), there is no indication the legislature did or intended to do that here. The 1993 bill was entitled "Motor Vehicle Insurance – Personal Injury Protection Benefits."

1993 Wash. Laws ch. 242 . Consistent with its title, the act states its purpose: "An act relating to mandatory offering of personal injury protection insurance; adding new sections to chapter 48.22 RCW; creating a new section; and providing an effective date." *Id.* Legislative history shows that the legislature's sole focus was on providing for mandatory offering of personal injury protection insurance. See, e.g., H.B. Rep. on H.B. 1233, 53rd

Leg., Reg. Sess. (Wash. Feb. 4, 1993)(Appendix 4); S.B. Rep. on E.S.H.B. 1233, 53rd Leg., Reg. Sess. (Wash. Apr. 1, 1993)(Appendix 5); H.B. 1233, 53rd Leg., Reg. Sess., Legislative Digest (Wash. 1993) (Appendix 6); E.S.H.B. 1233, 53rd Leg., Reg. Sess., Legislative Digest (Wash. 1993)(Appendix 7). The bill itself does not mention or reference the UIM statute, UIM insurance, the definition of underinsured motor vehicle, *Blackburn* or any court decision, or even the holding stated in *Blackburn*. See generally 1993 Wash. Laws ch. 242. Nothing in the 1993 act or its history suggests the legislature intended to change how courts apply the UIM statute.

As important, nothing in the 1993 legislation even implicitly changed the underlying basis for the *Blackburn* court’s decision. As noted above, the *Blackburn* court based its decision on the fact that the UIM statute contemplated two distinct motor vehicles: the motor vehicle with respect to which uninsured motorist coverage is issued and the “uninsured or underinsured” motor vehicle. In addition, the court noted, the statute distinguishes between the person insured under the liability coverage and the owner or operator of the uninsured or underinsured motor vehicle. 115 Wn.2d at 90, quoting *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 1, 6, 665 P.2d 891 (1983). The 1993 legislation did not change any of those

characteristics of the UIM statute.

Another of Thompson’s incorrect premises is that the definitions in the 1993 act apply throughout RCW ch. 48.22, including the UIM statute. They do not. In the opening paragraph of section 1 of the 1993 act – the section that states the definitions – the legislature stated: “Unless the context clearly requires otherwise, the definitions in this section apply throughout *this chapter.*” 1993 Wash. Laws ch. 242 , Sec. 1 (Emphasis added). “This chapter,” to which the legislature is referring, is chapter 242, not RCW ch. 48.22.² The act includes twelve definitions. Every one of them appears in the act. Not one appears exclusively in other provisions in RCW ch. 48.22. This shows that the only terms the legislature was intending to define were terms used in the 1993 act.³

2. Three decisions discuss definitions included in RCW 48.22.005 in the context of UIM coverage. None, however, address whether the definitions actually apply to the UIM statute. *American States Ins. Co. v. Bolin*, 122 Wn. App. 717, 94 P.3d 1010 (2004) (refusing to apply statutory definition of automobile to interpret “motor vehicle” as use in UIM statute); *Daley v. Allstate Ins. Co.*, 86 Wn. App. 346, 355, 936 P.2d 1185 (1997) (refusing to apply statute to insurer’s argument that it showed legislature intended to exclude emotional distress damages from UIM statute), overruled on other grounds, 135 Wn.2d 777, 958 P.2d 990 (1997); *Cherry v. Truck Ins. Exchange*, 77 Wn. App. 557, 562 n.3, 892 P.2d 768 (1995)(referencing the statutory definition of insured in determining the type of causal connection needed between use of vehicle and injury under UIM statute.)

3. The legislature amended the 1993 act, including the definitions section, in 2003. 2003 Wash. Laws ch. 115. The amendments pertain exclusively to personal injury protection coverage as well. See House Comm. on Financial Institutions and Insurance, Bill Analysis on H.B. 1084, 58th Leg., Reg. Sess. (Wash. 2003); House Comm. on Financial Institutions and Insurance, Senate Comm. on Financial Services, Insurance and Housing, Final Bill Report, H.B. 1084, 58th Leg., Reg. Session (Wash. 2003).

Indeed, the definitions cannot apply to all the other sections of RCW ch. 48.22 without producing absurd results. For example, the word “insured” appears in RCW 48.22.020, which discusses the rights of persons insured under assigned risk plans to appeal particular decisions. The word also appears in RCW 48.22.050 which pertains to market insurance plans for casualty insurance. The word appears in RCW 48.22.060, which allows “insureds” to request collision and comprehensive coverage. It appears in RCW 48.22.070 which addresses longshoreman’s and harbor worker’s compensation coverage. These statutes have nothing to do with vehicle passengers or pedestrians, yet Thompson would force the definition on them.

Moreover, even if the definitions apply throughout RCW ch. 48.22, the legislature qualified all applications of the definitions with the phrase “Unless the context clearly requires otherwise . . .” 1993 Wash. Laws ch. 242 , Sec. 1. Here, as with the other sections of RCW ch. 48.22 discussed above, the context clearly requires otherwise. An illustration demonstrates this fact. The statutory definition of insured includes pedestrians struck by an insured vehicle. RCW 48.22.005(5)(b)(ii). Therefore, applying the statutory definition of insured to the UIM statute, especially in the way Thompson wants, would effect the dramatic and unprecedented change of requiring UIM insurers to provide UIM coverage to pedestrians struck by an

insured vehicle. Requiring such coverage would literally transform UIM coverage into liability coverage.⁴ Thompson has never addressed why the context of the UIM statute justifies such a significant change.

Another faulty premise is that the UIM statute is the only source of terms for UIM coverage, including the definition of insured. Thus, in his pleadings, Thompson argued:

It does not matter if the language in the policy excludes coverage – the plain language of the statutes are read into, and become part of the policy. The unambiguous plain language of the definition and UIM statutes require Progressive to provide UIM coverage to Mr. Thompson and that is where the Court’s inquiry must end.

(CP 14) But, this contention has long been resolved by the Supreme Court.

For example, in *Farmers Ins. Co. of Wash. v. Miller*, 87 Wn.2d 70,

4. In *Blackburn v. Safeco*, the court recognized that the typical UIM policy recognized three classes of insured: The named insured and family members; other persons while occupying the covered car; persons entitled to recover because of injury to the first two classes. The court said about the first two classes:

The underinsured motorist policy affords those “named insureds” under class 1 with first-party coverage that applies at all times, whatever may be the insured’s activity at the time of the accident. See *Kowal v. Grange Ins. Ass’n.*, 110 Wn.2d 239, 245, 751 P.2d 306 (1988). Persons, covered under class 2, occupying a covered vehicle (“other insureds”), however, are covered only while occupying a covered motor vehicle. “Other insureds” have the option of contracting with an insurance company for their own UIM coverage under a policy which provides them with UIM coverage that applies at all times as a “named insured.” Thus, insureds have the option to contract with an insurance company and pay a premium for UIM insurance that applies at all times, regardless of their status in a particular vehicle.

115 Wn.2d at 89.

549 P.2d 9 (1976), the court held with regard to defining insureds that RCW 48.22.030 “does not mandate any particular scope for the definition of who is an insured in a particular automobile insurance policy.” 87 Wn.2d at 75. In *Touchette v. Nw. Mut. Ins. Co.*, 80 Wn.2d 327, 494 P.2d 479 (1972), the Court said:

The policy of RCW 48.22.030 requires that insurers make available uninsured motorist coverage to a class of “insureds” that is at least as broad as the class in the primary liability sections of the policy. It does not preclude the parties from reaching agreement as to the scope of that class in the first instance.

80 Wn.2d at 337.⁵ Accord *Vasquez v. Am. Fire & Cas. Co.*, 174 Wn. App. 132, 138, 298 P.3d 94 (2013)(“Underinsured motorist coverage is limited personal accident insurance chiefly for the benefit of the named insured. Limiting the scope of the definition of who else is an “insured” does not run afoul of the public policy behind Washington’s UIM statute.”)

In *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 1, 6, 665 P.2d 891 (1983), the court addressed the definition of underinsured motor vehicle. Passengers in a car involved in a 1-car accident sought coverage under both the liability and underinsured motorist provisions of an insurance policy insuring the host vehicle. The policy excluded the insured vehicle from the

5. Other decisions also have addressed the issue, but they are unpublished.

definition of an underinsured vehicle. The policy provided protection to the passengers under the liability provisions only. 100 Wn.2d at 2. In rejecting coverage for the passengers, the Court stated:

Respondents contend that RCW 48.22.030 mandates that they be able to collect under both the liability and underinsured motorist provisions of the policy insuring the vehicle. They argue, therefore, that Millers' restriction which does not allow this dual recovery violates the statute. Their conclusion is based on a very narrow interpretation of the statute. They maintain that since the Legislature set forth several permissible exceptions, and did not expressly allow the insurer to restrict the definition of an underinsured vehicle as Millers' policy does, the restriction is invalid. We disagree.

100 Wn.2d at 5.

The *Blackburn* court also rejected the argument. In *Blackburn*, the claimant met all the conditions for coverage under the UIM statute. Nevertheless, the insurer denied UIM benefits because its policy more narrowly defined underinsured motor vehicle. The claimant made the same argument Thompson makes here: Because the statute defines underinsured motor vehicle, Safeco was prohibited from deviating from it. Even after specifically noting that the statutory definition becomes part of the policy (115 Wn.2d at 86), the Court still rejected the claimant's argument and affirmed the insurer's decision. Despite the statutory definition which the claimant met, the Court held that the insurer's policy limitation on the definition of underinsured motor vehicle did not violate the UIM statute, did

not violate the public policy reflected in the UIM statute, was not prohibited, and was valid and enforceable. Contrary to Thompson's argument, the Court's inquiry did not end at the statutory definition. These decisions show that, contrary to Thompson's argument, the UIM statute is not the exclusive source for the terms of UIM coverage. No Washington court has held that the UIM statute is the exclusive source of terms for UIM coverage.

In his motion for summary judgment, Thompson cited the trial court decision in *Patriot General Ins. Co. v. Gutierrez*, 186 Wn. App. 103, 112, 344 P.3d 1277 (2015). (CP 15, 73-80) In that case, the primary issue was whether the claimant was insured under the policy. The case did not involve whether the vehicle that struck the claimant was an underinsured motor vehicle. Moreover, on appeal, the court expressly declined to consider whether the definition of insured in RCW 48.22.005 applies to the UIM statute. 186 Wn. App. at 109. Later in the decision, however, the court described the insurer's options if it wanted to preclude coverage for the claimant. The court's description indicated the insurer was not limited by the statutory definition of insured. The court stated:

If Patriot General wished to exclude underinsured motorist coverage to a household member above the age of 14 who was not disclosed in the application for insurance, Patriot General could have expressly so stated in the policy.

186 Wn. App. at 112.

The case undermines rather than supports Thompson's position. Obviously, the exclusion approved by the court would conflict with the statutory definition of insured. The appellate court could not have approved such an exclusion, and Patriot General could not have included such a provision in its policy, if the statutory definition absolutely defined the scope of who is an insured.

Another of Thompson's premises is that Progressive's position erodes the statutory definition of insured. That premise is both wrong and irrelevant. It is wrong because, at least as to Thompson, Progressive's definition of insured was neither more restrictive than, nor erosive of, the statutory definition. Thompson is an insured under both the statute and the policy. The premise is irrelevant because whether Thompson was an insured has no bearing on this case. Progressive denied coverage because Thompson was not hurt by an underinsured motor vehicle. Determining that Thompson was not hurt by an underinsured motor vehicle is an issue distinct from whether Thompson was an insured.

In summary, nothing in or about the 1993 enactment indicates the legislature intended to change how the UIM statute operates or to overrule *Blackburn*. Because the facts here are identical, *Blackburn* controls this case. The trial court failed to follow *Blackburn*. This court should reverse the trial

court's decision.

3. Thompson is not entitled to attorney fees.

Thompson sought attorney fees under *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). (CP 16) *Olympic Steamship* only authorizes an award of attorney fees if an insured prevails. *Olympic Steamship*, 117 Wn.2d at 53. If Thompson fails to establish on appeal that he is entitled to UIM benefits, he does not prevail and therefore is not entitled to *Olympic Steamship* fees and costs either on appeal or in the trial court. *Averill v. Farmers Ins. Co. of Wash.*, 155 Wn. App. 106, 119, 229 P.3d 830 (2010).

4. If Thompson is entitled to attorney fees, the trial court erred in calculating the fee award.

“Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel.” *Berryman v. Metcalf*, 177 Wn. App. 644, 657, 312 P.3d 745 (2013) (quoting *Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998)). An attorney fee award must be supported by findings of fact and conclusions of law. *Berryman*, 177 Wn. App. at 658. When a party challenges specific aspects of the proposed attorney fee award, the trial court must make specific findings of fact addressing the contested issues.

Berryman, 177 Wn. App. at 659. A trial court’s findings of fact and conclusions of law are too conclusory when “[t]here is no indication that the trial judge actively and independently confronted the question of what was a reasonable fee.” *Berryman*, 177 Wn. App. at 658.

Here, Progressive challenged both the number of hours spent by Plaintiff’s counsel and the application of a multiplier. Despite those challenges, the trial court’s written order simply sets the award. (CP 203-04) The judge’s oral comments were limited to saying “that motion will be granted.” (RP 5.) Those are not findings of fact and conclusions of law. They reflect an inactive role and unquestioning acceptance by the trial court disapproved by our appellate courts.

Ordinarily, when the trial court has entered inadequate findings and conclusions, the appropriate remedy is to remand for the proper entry of findings of fact and conclusions of law that explain the basis for the attorney fee award. *Berryman*, 177 Wn. App. at 659. Progressive suggests, however, that remand is unnecessary here. When, as here, the relevant facts are not in dispute, the appellate court may order entry of summary judgment in favor of the nonmoving party. *Patriot General*, supra, 186 Wn. App. at 110. Here, each decision made by the trial court was made solely on the basis of declarations and argument. (RP 5-6) There was no testimony and no dispute

of fact. This court has the declarations and argument. It is in an identical position to determine the amount of attorney fees as was the trial court. Remand is unnecessary.

A. Thompson failed to support his request for a multiplier.

The party requesting attorney fees under *Olympic Steamship* must establish the fees are reasonable. *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App. 283, 292, 951 P.2d 798 (1998). The “lodestar method” is the accepted starting point in that calculation. *Id.* ““After calculating a lodestar fee, the court should consider whether it needs adjustment either upward or downward to reflect factors not already taken into consideration.”” *Id.* (quoting *Ross v. State Farm Mut. Auto. Ins. Co.*, 82 Wn. App. 787, 800, 919 P.2d 1268 (1996), *reversed on other grounds*, 132 Wn.2d 507, 940 P.2d 252 (1997)).

A party seeking a deviation from the lodestar amount bears the burden of justifying the deviation. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 334, 858 P.2d 1054 (1993). Generally, “adjustments of the lodestar are discretionary and rare.” *Sanders v. State*, 169 Wn.2d 827, 869, 240 P.2d 827 (2010).

There are two broad categories of factors to consider when adjusting the fee, one for contingent risk and the other for quality of work. *McGreevy*

v. Oregon Mut. Ins. Co., 90 Wn. App. 283, 291, 951 P.2d 798 (1998). “[T]o the extent, if any, that the hourly rate underlying the lodestar fee comprehends an allowance for the contingent nature of the availability of fees, no further adjustment duplicating that allowance should be made.” *Id.* at 293 (quoting *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983)). Moreover, a contingency adjustment should not include the difficulty in establishing the merits of the case, since this will be reflected in the number of hours an attorney spends on a case and the level of skill that an attorney must have to prevail. *Pham v. City Light*, 159 Wn.2d 527, 541, 151 P.3d 976 (2007).

Here Thompson failed to provide any evidence whether the hourly rate he claimed did or did not comprehend an allowance for the contingent nature of the availability of fees. Thus, the trial court could not have awarded a multiplier on that basis.

Moreover, without meaning to disrespect counsel who advocated admirably for his client, as a matter of law, the quality of the work also could not justify a multiplier. Thompson’s theory was simply that since the 1993 Act added a definition of insured and he fell within the definition, Progressive was obligated to pay UIM benefits. He provided no analysis of the Act, the history of the act, or how it related to UIM coverage. He cited

Blackburn but only in passing, giving it no analysis. (CP 15) Indeed, Thompson's primary authority in support of his motion was a trial court decision made by the same judge who decided his motion. (CP 15) Even then, he failed to disclose the decision had been affirmed on appeal on significantly different grounds.

Put simply, the record in this case does not contain evidence that justifies applying a multiplier to the lodestar amount. If Thompson remains entitled to fees after this appeal, that aspect of the trial court's award should be reversed.

B. 69 hours – of which 67 hours are for attorney time – is not a reasonable amount of hours spent on this case.

The parties conducted no discovery in this case. This matter was resolved by a single motion, Plaintiff's Motion for Summary Judgment. For that, Plaintiff filed two memoranda (CP 10-18, 99-104) and one declaration. (CP 19-80) The original motion was eight pages long, seven if the court discounts the last page which is a signature page. (CP 10-18) The supporting declaration itself was three pages. (CP 19-21) Review of the emails attached to the declaration shows that the motion was comprised almost exclusively of argument and authorities cited to Progressive in its discussions with Plaintiff's counsel before suit was filed – except the *Patriot General* case which Plaintiff's counsel had not raised previously. (Compare

CP 10-18 with CP 63-72)

Plaintiff's Reply in support of summary judgment was five pages. (CP 142-48) It did not cite a case that had not been cited previously in either the original motion, or the pleadings in response to that motion. Likewise, it did not cite or discuss a case that had not been discussed between Plaintiff's counsel and Progressive before suit was started – except the *Patriot General* case.

Defense counsel began his involvement in this matter on January 27, 2016, approximately two weeks before Plaintiff's counsel's first time entry. (CP 140, 155) Over the course of that same time period, with the same level of involvement, defense counsel (the only attorney who worked on the file) spent a total of approximately 49 hours of time. Of that, 16.7 hours was spent on travel to and from Walla Walla.⁶ (CP 140-41) That puts defense counsel's substantive time devoted to this case at approximately 32 hours, less than half of Plaintiff's claimed time for nearly identical work.

In light of these facts, Progressive suggested a reasonable number of hours for purposes of the loadstar calculation is 40 hours, divided two thirds to partner time (26.6 hours) and one third to associate time (13.4 hours), the proportion reflected in counsel's overall billing.

6. The time was extended because of flight cancellations and delays due to fog occurring at the time.

CONCLUSION

For the foregoing reasons, Progressive asks this court to 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 7th day of May, 2018.

/s/ Timothy R. Gosselin

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PART III - UNDERINSURED MOTORIST COVERAGE

INSURING AGREEMENT - UNDERINSURED MOTORIST BODILY INJURY COVERAGE

If you pay the premium for this coverage, we will pay for damages that an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of **bodily injury**:

1. sustained by that **insured person**;
2. caused by an **accident**; and
3. arising out of the ownership, maintenance, or use of an **underinsured motor vehicle**.

INSURING AGREEMENT - UNDERINSURED MOTORIST PROPERTY DAMAGE COVERAGE

If you pay the premium for this coverage, we will pay for damages that an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of **property damage**:

1. caused by an **accident**; and
2. arising out of the ownership, maintenance or use of an **underinsured motor vehicle**.

ADDITIONAL DEFINITIONS

When used in this Part III:

1. "**Accident**" means an occurrence that is unexpected and unintended from the standpoint of the **insured person**.
2. "**Insured person**" means:
 - a. **you** or a **relative**;
 - b. any person while operating a **covered auto** with the permission of **you** or a **relative**;
 - c. any person **occupying**, but not operating, a **covered auto**; and
 - d. any person who is entitled to recover damages covered by this Part III because of **bodily injury** sustained by a person described in a, b, or c above.
3. "**Phantom vehicle**" means a vehicle whose operator or owner cannot be identified and that causes an **accident** resulting in **bodily injury** to an **insured person** or **property damage**, and has no physical contact with the **insured person** or the vehicle that the **insured person** is **occupying** at the time of the **accident**, if:
 - (i) the facts of the **accident** can be corroborated by competent evidence other than **your** testimony or the testimony of an **insured person** having a claim under this Part III resulting from the **accident**; and
 - (ii) the **insured person**, or someone on his or her behalf, reports the **accident** to the police or civil authority within 72 hours after the **accident**.

4. **"Property damage"** means:
- a. physical damage to or destruction of a **covered auto**; and
 - b. damages for loss of use of a **covered auto** incurred by **you**, up to \$30 per day for up to 30 days, resulting from physical damage to or destruction of that **covered auto**.

"Property damage" does not include:

- a. damage to the contents of a **covered auto**; or
- b. any other form of property damage.

5. **"Underinsured motor vehicle"** means a land motor vehicle or trailer of any type:
- a. to which no bodily injury liability bond or policy applies at the time of the **accident**;
 - b. to which a bodily injury liability bond or policy applies at the time of the **accident**, but the bonding or insuring company:
 - (i) denies coverage; or
 - (ii) is or becomes insolvent;
 - c. that is a hit-and-run vehicle whose owner or operator cannot be identified and which strikes:
 - (i) **you** or a **relative**;
 - (ii) a vehicle that **you** or a **relative** are **occupying**; or
 - (iii) a **covered auto**;
 - d. that is a **phantom vehicle**; or
 - e. to which a liability bond or policy applies at the time of the **accident**, but the sum of all applicable limits of liability under all applicable bonds and policies is less than the damages that the **insured person** is legally entitled to recover.

An **"underinsured motor vehicle"** does not include any vehicle or equipment:

- a. owned by **you** or a **relative** or furnished or available for the regular use of **you** or a **relative**. However, this exclusion to the definition of **underinsured motor vehicle** does not apply to a **covered auto** with respect to **bodily injury to you or a relative**;
- b. owned by any governmental unit or agency. However, this exclusion to the definition of **underinsured motor vehicle** does not apply if the governmental entity is unable to satisfy a claim because of financial inability or its insolvency;
- c. operated on rails or crawler treads;
- d. designed mainly for use off public roads, while not on public roads;
- e. while located for use as a residence or premises; or
- f. that is a **covered auto**. However, this limitation on the definition of **underinsured motor vehicle** does not apply to a **covered auto** with respect to **bodily injury to you or a relative**.

RCW 48.22.030**Underinsured, hit-and-run, phantom vehicle coverage to be provided—Purpose—Definitions—Exceptions—Conditions—Deductibles—Information on motorcycle or motor-driven cycle coverage—Intended victims.**

(1) "Underinsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance, or use of which either no bodily injury or property damage liability bond or insurance policy applies at the time of an accident, or with respect to which the sum of the limits of liability under all bodily injury or property damage liability bonds and insurance policies applicable to a covered person after an accident is less than the applicable damages which the covered person is legally entitled to recover.

(2) No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage, suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death, or property damage, resulting therefrom, except while operating or occupying a motorcycle or motor-driven cycle, and except while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member, and which is not insured under the liability coverage of the policy. The coverage required to be offered under this chapter is not applicable to general liability policies, commonly known as umbrella policies, or other policies which apply only as excess to the insurance directly applicable to the vehicle insured.

(3) Except as to property damage, coverage required under subsection (2) of this section shall be in the same amount as the insured's third party liability coverage unless the insured rejects all or part of the coverage as provided in subsection (4) of this section. Coverage for property damage need only be issued in conjunction with coverage for bodily injury or death. Property damage coverage required under subsection (2) of this section shall mean physical damage to the insured motor vehicle unless the policy specifically provides coverage for the contents thereof or other forms of property damage.

(4) A named insured or spouse may reject, in writing, underinsured coverage for bodily injury or death, or property damage, and the requirements of subsections (2) and (3) of this section shall not apply. If a named insured or spouse has rejected underinsured coverage, such coverage shall not be included in any supplemental or renewal policy unless a named insured or spouse subsequently requests such coverage in writing. The requirement of a written rejection under this subsection shall apply only to the original issuance of policies issued after July 24, 1983, and not to any renewal or replacement policy. When a named insured or spouse chooses a property damage coverage that is less than the insured's third party liability coverage for property damage, a written rejection is not required.

(5) The limit of liability under the policy coverage may be defined as the maximum limits of liability for all damages resulting from any one accident regardless of the number of covered persons, claims made, or vehicles or premiums shown on the policy, or premiums paid, or vehicles involved in an accident.

(6) The policy may provide that if an injured person has other similar insurance available to him or her under other policies, the total limits of liability of all coverages shall not exceed the higher of the applicable limits of the respective coverages.

(7)(a) The policy may provide for a deductible of not more than three hundred dollars for payment for property damage when the damage is caused by a hit-and-run driver or a phantom vehicle.

(b) In all other cases of underinsured property damage coverage, the policy may provide for a deductible of not more than one hundred dollars.

(8) For the purposes of this chapter, a "phantom vehicle" shall mean a motor vehicle which causes bodily injury, death, or property damage to an insured and has no physical contact with the insured or the vehicle which the insured is occupying at the time of the accident if:

(a) The facts of the accident can be corroborated by competent evidence other than the testimony of the insured or any person having an underinsured motorist claim resulting from the accident; and

(b) The accident has been reported to the appropriate law enforcement agency within seventy-two hours of the accident.

(9) An insurer who elects to write motorcycle or motor-driven cycle insurance in this state must provide information to prospective insureds about the coverage.

(10) An insurer who elects to write motorcycle or motor-driven cycle insurance in this state must provide an opportunity for named insureds, who have purchased liability coverage for a motorcycle or motor-driven cycle, to reject underinsured coverage for that motorcycle or motor-driven cycle in writing.

(11) If the covered person seeking underinsured motorist coverage under this section was the intended victim of the tortfeasor, the incident must be reported to the appropriate law enforcement agency and the covered person must cooperate with any related law enforcement investigation.

(12) The purpose of this section is to protect innocent victims of motorists of underinsured motor vehicles. Covered persons are entitled to coverage without regard to whether an incident was intentionally caused. However, a person is not entitled to coverage if the insurer can demonstrate that the covered person intended to cause the event for which a claim is made under the coverage described in this section. As used in this section, and in the section of policies providing the underinsured motorist coverage described in this section, "accident" means an occurrence that is unexpected and unintended from the standpoint of the covered person.

(13) The coverage under this section may be excluded as provided for under [RCW 48.177.010\(6\)](#).

(14) "Underinsured coverage," for the purposes of this section, means coverage for "underinsured motor vehicles," as defined in subsection (1) of this section.

[2015 c 236 § 7; 2009 c 549 § 7106; 2007 c 80 § 14. Prior: 2006 c 187 § 1; 2006 c 110 § 1; 2006 c 25 § 17; 2004 c 90 § 1; 1985 c 328 § 1; 1983 c 182 § 1; 1981 c 150 § 1; 1980 c 117 § 1; 1967 c 150 § 27.]

NOTES:

Severability—1983 c 182: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1983 c 182 § 3.]

Effective date—1981 c 150: "This act shall take effect on September 1, 1981." [1981 c 150 § 3.]

Effective date—1980 c 117: "This act shall take effect on September 1, 1980." [1980 c 117 § 8.]

CHAPTER 242

[Engrossed Substitute House Bill 1233]

MOTOR VEHICLE INSURANCE—PERSONAL INJURY PROTECTION BENEFITS

Effective Date: 7/25/93 - Except Sections 1 through 5 which become effective on 7/1/94

AN ACT Relating to mandatory offering of personal injury protection insurance; adding new sections to chapter 48.22 RCW; creating a new section; and providing an effective date.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Automobile" means 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.

(2) "Bodily injury" means bodily injury, sickness, or disease, including death at any time resulting from the injury, sickness, or disease.

(3) "Income continuation benefits" means payments of at least eighty-five percent of the insured's loss of income from work, because of bodily injury sustained by him or her in the accident, less income earned during the benefit payment period. The benefit payment period begins fourteen days after the date of the accident and ends at the earliest of the following:

(a) The date on which the insured is reasonably able to perform the duties of his or her usual occupation;

(b) The expiration of not more than fifty-two weeks from the fourteenth day; or

(c) The date of the insured's death.

(4) "Insured automobile" means an automobile described on the declarations page of the policy.

(5) "Insured" means:

(a) The named insured or a person who is a resident of the named insured's household and is either related to the named insured by blood, marriage, or adoption, or is the named insured's ward, foster child, or stepchild; or

(b) A person who sustains bodily injury caused by accident while: (i) Occupying or using the insured automobile with the permission of the named insured; or (ii) a pedestrian accidentally struck by the insured automobile.

(6) "Loss of services benefits" means reimbursement for payment to others, not members of the insured's household, for expenses reasonably incurred for services in lieu of those the insured would usually have performed for his or her household without compensation, provided the services are actually rendered, and ending the earliest of the following:

(a) The date on which the insured person is reasonably able to perform those services;

(b) The expiration of fifty-two weeks; or

(c) The date of the insured's death.

(7) "Medical and hospital benefits" means payments for all reasonable and necessary expenses incurred by or on behalf of the insured for injuries sustained as a result of an automobile accident for health care services provided by persons licensed under Title 18 RCW, including pharmaceuticals, prosthetic devices and eye glasses, and necessary ambulance, hospital, and professional nursing service.

(8) "Automobile liability insurance policy" means a policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage suffered by any person and arising out of the ownership, maintenance, or use of an insured automobile.

(9) "Named insured" means the individual named in the declarations of the policy and includes his or her spouse if a resident of the same household.

(10) "Occupying" means in or upon or entering into or alighting from.

(11) "Pedestrian" means a natural person not occupying a motor vehicle as defined in RCW 46.04.320.

(12) "Personal injury protection" means the benefits described in sections 1 through 5 of this act.

NEW SECTION. Sec. 2. (1) No new automobile liability insurance policy or renewal of such an existing policy may be issued unless personal injury protection coverage benefits at limits established in this chapter for medical and hospital expenses, funeral expenses, income continuation, and loss of services sustained by an insured because of bodily injury caused by an automobile accident are offered as an optional coverage.

(2) A named insured may reject, in writing, personal injury protection coverage and the requirements of subsection (1) of this section shall not apply. If a named insured has rejected personal injury protection coverage, that rejection shall be valid and binding as to all levels of coverage and on all persons who might have otherwise been insured under such coverage. If a named insured has rejected personal injury protection coverage, such coverage shall not be included in any supplemental, renewal, or replacement policy unless a named insured subsequently requests such coverage in writing.

NEW SECTION. Sec. 3. (1) Personal injury protection coverage need not be provided for vendor's single interest policies, general liability policies, or other policies, commonly known as umbrella policies, that apply only as excess to the automobile liability policy directly applicable to the insured motor vehicle.

(2) Personal injury protection coverage need not be provided to or on behalf of:

(a) A person who intentionally causes injury to himself or herself;

(b) A person who is injured while participating in a prearranged or organized racing or speed contest or in practice or preparation for such a contest;

(c) A person whose bodily injury is due to war, whether or not declared, or to an act or condition incident to such circumstances;

(d) A person whose bodily injury results from the radioactive, toxic, explosive, or other hazardous properties of nuclear material;

(e) The named insured or a relative while occupying a motor vehicle owned by the named insured or furnished for the named insured's regular use, if such motor vehicle is not described on the declaration page of the policy under which a claim is made;

(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; or

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

NEW SECTION. Sec. 4. Insurers providing automobile insurance policies must offer minimum personal injury protection coverage for each insured with maximum benefit limits as follows:

(1) Medical and hospital benefits of ten thousand dollars for expenses incurred within three years of the automobile accident;

(2) Benefits for funeral expenses in an amount of two thousand dollars;

(3) Income continuation benefits covering income losses incurred within one year after the date of the insured's injury in an amount of ten thousand dollars, subject to a limit of the lesser of two hundred dollars per week or eighty-five percent of the weekly income. The combined weekly payment receivable by the insured under any workers' compensation or other disability insurance benefits or other income continuation benefit and this insurance may not exceed eighty-five percent of the insured's weekly income;

(4) Loss of services benefits in an amount of five thousand dollars, subject to a limit of forty dollars per day not to exceed two hundred dollars per week; and

(5) Payments made under personal injury protection coverage are limited to the amount of actual loss or expense incurred.

NEW SECTION. Sec. 5. In lieu of minimum coverage required under section 4 of this act, an insurer providing automobile liability insurance policies shall offer and provide, upon request, personal injury protection coverage with benefit limits for each insured of:

(1) Up to thirty-five thousand dollars for medical and hospital benefits incurred within three years of the automobile accident;

(2) Up to two thousand dollars for funeral expenses incurred;

(3) Up to thirty-five thousand dollars for one year's income continuation benefits, subject to a limit of the lesser of seven hundred dollars per week or eighty-five percent of the weekly income; and

(4) Up to forty dollars per day for loss of services benefits, for up to one year from the date of the automobile accident.

Payments made under personal injury protection coverage are limited to the amount of actual loss or expense incurred.

NEW SECTION. Sec. 6. Sections 1 through 5 of this act are each added to chapter 48.22 RCW.

NEW SECTION. Sec. 7. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 8. Sections 1 through 5 of this act shall take effect July 1, 1994.

NEW SECTION. Sec. 9. The commissioner may adopt such rules as are necessary to implement sections 1 through 5 of this act.

Passed the House April 20, 1993.

Passed the Senate April 16, 1993.

Approved by the Governor May 7, 1993.

Filed in Office of Secretary of State May 7, 1993.

CHAPTER 243

[Engrossed Substitute House Bill 1259]

FORFEITED FIREARMS—DESTRUCTION, SALE, OR TRADE OF

Effective Date: 5/7/93

AN ACT Relating to forfeiture of firearms; amending RCW 9.41.098; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 9.41.098 and 1989 c 222 s 8 are each amended to read as follows:

(1) The superior courts and the courts of limited jurisdiction of the state may order forfeiture of a firearm which is proven to be:

(a) Found concealed on a person not authorized by RCW 9.41.060 or 9.41.070 to carry a concealed pistol: PROVIDED, That it is an absolute defense to forfeiture if the person possessed a valid Washington concealed pistol license within the preceding two years and has not become ineligible for a concealed pistol license in the interim. Before the firearm may be returned, the person must pay the past due renewal fee and the current renewal fee;

(b) Commercially sold to any person without an application as required by RCW 9.41.090;

(c) Found in the possession or under the control of a person at the time the person committed or was arrested for committing a crime of violence or a crime in which a firearm was used or displayed or a felony violation of the uniform controlled substances act, chapter 69.50 RCW;

(d) Found concealed on a person who is in any place in which a concealed pistol license is required, and who is under the influence of any drug or under

HOUSE BILL REPORT

HB 1233

As Reported By House Committee On:
Financial Institutions & Insurance

Title: An act relating to mandatory offering of personal injury protection insurance.

Brief Description: Regulating the mandatory offering of personal injury protection insurance.

Sponsors: Representatives R. Meyers, Zellinsky, Dellwo, R. Johnson, Scott, Riley, Kessler, Dunshee, Dorn, Foreman, Grant, Kremen and Johanson.

Brief History:

Reported by House Committee on:
Financial Institutions & Insurance, February 4, 1993,
DPS.

HOUSE COMMITTEE ON FINANCIAL INSTITUTIONS & INSURANCE

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 16 members: Representatives Zellinsky, Chair; Scott, Vice Chair; Mielke, Ranking Minority Member; Dyer, Assistant Ranking Minority Member; Anderson; Dellwo; Dorn; Grant; R. Johnson; Kessler; Kremen; Lemmon; R. Meyers; Reams; Schmidt; and Tate.

Staff: John Conniff (786-7119).

Background: Most automobile insurance companies offer medical coverage, also referred to as personal injury protection (PIP) coverage, as part of a comprehensive auto insurance policy. PIP coverage includes disability, wage loss, and death benefit coverage. The Insurance Commissioner has adopted limited rules setting basic standards for the amount of coverage to be offered by insurers who market PIP coverage.

Summary of Substitute Bill: Automobile liability insurance companies must provide PIP coverage under nonbusiness auto insurance policies unless the named insured rejects PIP coverage in writing. Insurers need not provide PIP coverage for motor homes or motorcycles, for intentional injuries, for injuries arising from war, from toxic waste exposure or from accidents while the insured is occupying an owned but

uninsured auto, or from accidents to the insured's relatives while occupying an auto owned by the relative.

Coverage must extend to reasonable and necessary medical and hospital expenses incurred within three years from the date of the insured's injury up to \$10,000. Funeral expenses must be covered up to \$2,000. Loss of income benefits must be provided up to \$10,000 subject to certain limits. Loss of services benefits must be provided up to \$40 per day and not exceeding a total of \$5,000. Insurers must offer higher limits for all such benefits as provided.

Insurers and policyholders must adhere to the claim procedures outlined.

Insurance companies may not settle subrogation claims through intercompany arbitration until the policyholder's claim has been settled.

An insurer may not incorporate any exclusion, condition, or other provision in a policy that limits the PIP benefits required without the approval of the Insurance Commissioner.

Substitute Bill Compared to Original Bill: Many technical changes are made to clarify requirements for offering PIP coverage and several substantive changes are made to satisfy insurance company objections. Among these substantive changes: the deletion of rules requiring insurance companies to pay for plaintiff's attorney's recovery of amounts owed to the company; further limitations on the required PIP benefits including a weekly limit on loss of services coverage; and authority to condition or limit coverage as permitted by the Insurance Commissioner.

Fiscal Note: Requested January 28, 1993.

Effective Date of Substitute Bill: The bill takes effect July 1, 1994.

Testimony For: None.

Testimony Against: (Original Bill): Insurers should not be required to pay the policyholder's attorney a share of amounts owed to the insurer simply because such amounts were included in the settlement of the policyholder's claim. Required PIP benefits should be clarified in several sections to prevent benefit payments and limit benefit payments for persons not intended as beneficiaries of PIP coverage. (No testimony on substitute bill).

Witnesses: Craig McGee, PEMCO (Con); Jean Leonard and Paul Danner, State Farm Insurance Company (Con); Clark Sitzes,

Independent Agents (Con); Mike Kupphahn, Farmers Insurance
(neither pro nor con but amend); and Melodie Bankers,
Insurance Commissioner's Office (with some concerns).

SENATE BILL REPORT

ESHB 1233

AS REPORTED BY COMMITTEE ON LABOR & COMMERCE, APRIL 1, 1993

Brief Description: Regulating the mandatory offering of personal injury protection insurance.

SPONSORS: House Committee on Financial Institutions & Insurance (originally sponsored by Representatives R. Meyers, Zellinsky, Dellwo, R. Johnson, Scott, Riley, Kessler, Dunshee, Dorn, Foreman, Grant, Kremen and Johanson)

HOUSE COMMITTEE ON FINANCIAL INSTITUTIONS & INSURANCE

SENATE COMMITTEE ON LABOR & COMMERCE

Majority Report: Do pass as amended.

Signed by Senators Moore, Chairman; Prentice, Vice Chairman; Fraser, McAuliffe, Pelz, Sutherland, Vognild, and Wojahn.

Staff: Benson Porter (786-7470)

Hearing Dates: March 19, 1993; April 1, 1993

BACKGROUND:

Most automobile insurance companies offer medical coverage, often referred to as personal injury protection (PIP) coverage, as part of an auto insurance policy. PIP coverage includes medical, wage loss, and death benefit coverage.

The Insurance Commissioner has adopted rules setting the minimum amount of coverages to be provided by auto insurers upon the request of and payment by the consumer. The minimum coverages are as follows: (1) \$35,000 for medical and hospital benefits incurred within three years of the accident; (2) \$35,000 for one year's income continuation subject to limitations; and (3) \$40 per day for loss of services for at least one year.

SUMMARY:

Automobile liability insurance companies must provide PIP coverage under nonbusiness auto insurance policies unless the named insured rejects PIP coverage in writing. Insurers need not provide PIP coverage for motor homes, motorcycles, intentional injuries, and certain other specified situations.

Coverage must extend to reasonable and necessary medical and hospital expenses incurred within three years from the date of the insured's injury up to \$10,000. Funeral expenses must be covered up to \$2,000. Loss of income benefits must be provided up to \$10,000 subject to certain limits. Loss of

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services benefits must be provided up to \$40 per day and not exceeding a total of \$5,000. Insurers must offer higher benefit limits equal to those contained in existing rules upon request.

Insurers and policyholders must adhere to the claim procedures outlined.

Insurance companies may not settle subrogation claims through intercompany arbitration until the policyholder's claim has been settled.

An insurer may not incorporate any exclusion, condition, or other provision in a policy that limits the PIP benefits required without the approval of the Insurance Commissioner.

SUMMARY OF PROPOSED SENATE AMENDMENT:

The provisions concerning claim procedures, including access to medical records, are deleted. Various clarifying amendments are made.

Appropriation: none

Revenue: none

Fiscal Note: requested January 28, 1993

Effective Date: The bill takes effect July 1, 1994.

TESTIMONY FOR:

Personal injury protection coverage provides first dollar coverage regardless of fault. This legislation will establish a similar offer and rejection system that exists for uninsured/underinsured motorist coverage.

TESTIMONY AGAINST:

The mandatory offer of PIP coverage is not necessary because over 90 percent of auto insurance purchasers have PIP coverage. Concerns exist over provisions concerning access to medical records, rejection, and dispute resolution. In addition, the bill fails to contain cost controls and will generate litigation.

TESTIFIED: Dennis Martin, Washington State Trial Lawyers Association (pro); Jean Leonard, Washington Insurers; Craig McGee, PEMCO; Mike Kapphahn, Farmers Insurance; Dan Wolfe, Safeco

1233

Sponsor(s): Representatives R. Meyers, Zellinsky, Dellwo, R. Johnson, Scott, Riley, Kessler, Dunshee, Dorn, Foreman, Grant, Kremen and Johanson

Brief Description: Regulating the mandatory offering of personal injury protection insurance.

HB 1233 - DIGEST

(SUBSTITUTED FOR - SEE 1ST SUB)

Prohibits the issuance or renewal of a motor vehicle liability insurance policy unless personal injury protection benefits are provided therein.

Allows an insured to reject, in writing, such coverage.

Specifies additional exceptions to the required coverage.

Establishes minimum and maximum benefits requirements.

Requires written notice to the insurer in the event of an accident and specifies claims processing procedures.

Provides for arbitration to resolve disputed claims.

Provides for subrogation when the insured receives compensation from other sources.

Takes effect January 1, 1994.

1233-S

Sponsor(s): House Committee on Financial Institutions & Insurance
(originally sponsored by Representatives R. Meyers, Zellinsky,
Dellwo, R. Johnson, Scott, Riley, Kessler, Dunshee, Dorn, Foreman,
Grant, Kremen and Johanson)

Brief Description: Regulating the mandatory offering of personal
injury protection insurance.

HB 1233-S.E - DIGEST

(DIGEST AS ENACTED)

Prohibits the issuance or renewal of a motor vehicle liability
insurance policy unless personal injury protection benefits are
provided therein.

Allows an insured to reject, in writing, such coverage.

Specifies additional exceptions to the required coverage.

Establishes minimum and maximum benefits requirements.

Requires written notice to the insurer in the event of an
accident and specifies claims processing procedures.

Provides for arbitration to resolve disputed claims.

Provides for subrogation when the insured receives
compensation from other sources.

Takes effect July 1, 1994.

GOSSELIN LAW OFFICE PLLC

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Transmittal Information

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Appellate Court Case Number: 35864-0
Appellate Court Case Title: Joseph M. Thompson v. Progressive Direct Insurance Co.
Superior Court Case Number: 17-2-00275-6

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