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No. 358640 – III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JOSEPH M. THOMPSON, an individual,
Respondent,

vs.

PROGRESSIVE DIRECT INSURANCE COMPANY,
Appellant.

BRIEF OF RESPONDENT JOSEPH M. THOMPSON

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I. INTRODUCTION

In this case of first impression, the trial court correctly determined that Joseph M. Thompson was an insured for purposes of underinsured motorist (UIM) coverage under Stacie M. Haney's (a non-family-vehicle driver) auto insurance policy. The Walla Walla County Superior Court ruled that Progressive was required to provide UIM coverage to Mr. Thompson because he fell within the definition of "Insured" under RCW 48.22.005 ("The Definition Statute"). Therefore, Progressive could not exclude coverage under its policy to a class of individuals it is required to cover under RCW 48.22.030 ("The UIM Statute"). This holding is supported by the plain language of the statutes, as well as the stated public policy behind The UIM Statute, which both prohibits the exclusion of innocent victims of collisions and provides for their full compensation.

II. RESTATEMENT OF THE ISSUES

1. Does Washington law prohibit Progressive from excluding UIM coverage for Guest Passengers, when the plain language of The UIM Statute requires such coverage?
2. If not, does Washington's public policy of full compensation for victims of auto collisions prohibit Progressive from excluding Guest Passengers from UIM coverage?

III. RESTATEMENT OF THE CASE

On or about May 9, 2015, Joseph M. Thompson was injured in an automobile collision. CP 11, ¶ 2. Mr. Thompson was a Guest Passenger (a permissive-non-family-member passenger) in a vehicle driven by Stacey M. Haney. *Id.*, ¶ 4. Ms. Haney was insured under a policy of automobile insurance issued by Progressive. CP 95, ¶ 4. Progressive has agreed, for purposes of these proceedings, that Ms. Haney was solely responsible for this collision. CP 82, ¶ 1.

The Progressive insurance policy issued to Ms. Haney included both liability and underinsured motorist (UIM) coverage. CP 11, ¶ 1. Following the collision, Progressive paid Mr. Thompson the limits of the liability policy. CP 95, ¶ 5. Mr. Thompson then made a claim under the UIM coverage of Ms. Haney's policy. *Id.*, ¶ 5.

Progressive denied Mr. Thompson's UIM claim, stating that it agreed he was an "insured person" as defined by both The Definition Statute (RCW 48.22.005(5)(b)(i)) and Ms. Haney's policy; however, he was excluded from UIM coverage as Ms. Haney's vehicle did not meet the policy definition of "Underinsured Motor Vehicle." CP 20, ¶ 6. Mr. Thompson responded that Progressive was required to provide UIM

coverage as he was an “insured person” and was occupying an “underinsured motor vehicle” as those terms are clearly defined by statute and Progressive was prohibited by law from restricting coverage beyond the minimum coverage required by statute. CP 20-21, ¶ 7.

As Progressive continued to refuse Mr. Thompson’s UIM claim, he filed declaratory action seeking a determination that he was entitled to UIM coverage and benefits under Washington law. CP 3-6. The trial court granted Mr. Thompson’s subsequent motion for summary judgment, agreeing that Progressive was required to provide Mr. Thompson UIM coverage, and could not erode required coverage with exclusionary policy clauses. CP 134, RP 2-3. The trial court also granted Mr. Thompson attorney fees and expenses pursuant to *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). CP 134. Progressive now appeals both decisions. CP 205-211.

IV. ARGUMENT

1. The Standard of Review is De Novo.

The standard of review on appeal from an order on summary judgment is de novo. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261 138 P.3d 943 (2006). The amount of a court’s award of attorney fees and costs will be upheld barring abuse of discretion. *Tradewell Group, Inc.*, 71 Wn.App. 120, 127, 857 P.2d 1053 (1997).

2. The Plain Language of The UIM Statute Requires All Policies Issued in Washington to Insure Guest Passengers.

a. Automobile insurance statutes are read into automobile insurance policies.

Insurance, being strongly tied to the public interest, may be regulated by the State. *Touchette v. NW. Mut. Ins. Co.*, 80 Wn.2d 327, 332, 494 P.2d 479 (1972). Thus, regulatory statutes are read into and become a part of insurance policies. *Id.* In construing these statutes, courts must carry out the intent of the legislature. *State v. Alvarez*, 128 Wn.2d 1, 11, 904 P.2d 754 (1995). This intent is first and foremost evidenced by the plain language of a statute which, if clear on its face, is given effect by the court, ending its inquiry. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). It is only if a statute is susceptible to more than one reasonable interpretation that legislative history may be consulted. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). Where definitions are provided by the legislature, courts are bound to apply them. *Schrom v. Bd. for Volunteer Fire Fighters*, 153 Wn.2d 19, 27, 100 P.3d 814 (2004).

b. Mr. Thompson is an “Insured” under the statutes and Ms. Haney’s policy.

The very first line of RCW 48.22.005 (“The Definition Statute”) states, “[u]nless the context clearly requires otherwise, the definitions in this section apply throughout the chapter.” The UIM Statute is RCW 48.22.030,

part of the same chapter as The Definition Statute. Ergo, The Definition Statute explicitly applies to The UIM Statute.

The Definition Statute defines the term “Insured” to include “A person who sustains bodily injury caused by accident while: (i) Occupying or using the insured automobile with the permission of the named insured...” Ms. Haney’s insurance policy mirrors the language of The Definition Statute, defining “insured person” to include “any person occupying, but not operating, a covered auto.” Progressive did not dispute that Mr. Thompson qualified as an “Insured” for purposes of UIM coverage.

c. Progressive cannot contract around The Definition Statute’s definition of “Insured”.

RCW 48.30.030 is Washington’s UIM statute. It requires that:

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 motor vehicle shall be issued with respect to any motor vehicle ... 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[.]

RCW 48.22.030(2).

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.”

RCW 48.22.030(1) defines “Underinsured motor vehicle” as:

A motor vehicle...with respect to which the sum of the limits of liability under all...insurance policies applicable to a covered person...is less than the applicable damages which the covered person is legally entitled to recover.

Mr. Thompson, as a permissive passenger in Ms. Haney’s vehicle, is a “covered person” pursuant to both The Definition Statute and the policy. Ms. Haney’s vehicle, with an applicable liability policy having limits less than the damages that Mr. Thompson is legally entitled to recover, is an “underinsured motor vehicle” under The UIM Statute. A plain reading of these two statutes clearly mandates UIM coverage for Mr. Thompson.

Progressive attempts work around the statutory UIM scheme by drafting a narrower policy definition of “underinsured motor vehicle.” Specifically, Progressive’s policy has exclusionary clauses stating that “underinsured motor vehicle” does **not** include any vehicle:

a. owned by [the named insured or spouse] or a relative or furnished or available for the regular use of [the named insured or spouse] 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 [named insured or spouse] or a relative;

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 bodily injury to [named insured or spouse] or a relative.

CP 41.

If these exclusionary clauses were enforceable, the net effect would be to exclude UIM coverage to Guest Passengers in single-car collisions, while maintaining coverage for the named insured and family. This would create separate classes of insureds.

The legislative intent is clear by the language of both The Definition Statute and The UIM Statute. Automobile insurers in Washington State are required to provide UIM coverage to “covered persons”, a term which includes persons occupying a vehicle with the permission of the insured. Progressive may not avoid this statutory mandate by simply creating a policy definition of “underinsured motor vehicle” that effectively vitiates the statutory definition of “insured” as applied to The UIM Statute.

Progressive would like to believe that it is still free to define “underinsured motor vehicle” in whatever way it pleases. 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”. There are no longer any second-class insureds. Insurance companies are not entitled to erode the legislature’s regulations with exclusionary clauses. See *Kenworthy v. Pennsylvania General Ins. Co.*, 113 Wn.2d 309, 313, 779 P.2d 257 (1989) (“In *Touchette v. Northwestern Mut. Ins. Co.* 80 Wash.2d 327, 335, 494 P.2d 479 (1972), we expressed the general philosophy that the legislative purpose of UIM coverage, to expand insurance protection for the public while reducing the consequences of risk associated with careless and insolvent drivers, “is not to be eroded or, as the cases say, whittled away by a myriad of legal niceties arising from exclusionary clauses.”)

- d. The Definition Statute, as incorporated in The UIM Statute, was enacted after *Blackburn v. Safeco Ins. Co.*, and provides the coverage mandate and evidence of legislative intent requiring UIM coverage for Mr. Thompson.**

The cornerstone of Progressive’s argument that it may contract around statutory law is based on *Blackburn v. Safeco Ins. Co.*, (115 Wn.2d 82, 794 P.2d 1259 (1990)). (Amended Brief of Appellant, Pg. 12 (May 7, 2018)). As here, the court in *Blackburn* was asked to determine whether a Guest Passenger injured in a single-vehicle collision, could be excluded from the driver’s UIM coverage after collecting the limits of the driver’s liability policy. *Id.* The policy in that case also excluded UIM coverage to any

vehicle which was a covered automobile for purposes of the liability coverage. *Id.* at 85.

Blackburn was decided in 1990, prior to the enactment of The Definition Statute in 1993. 1993 Wash. Laws ch. 242. Lacking statutory guidance as to the extent of required UIM coverage, the court in *Blackburn* turned to past cases which examined insurance exclusions by identifying “classes” of insureds. Specifically, “Class 1” which covered “named insureds” and “Class 2” which covered “other insureds.” *Id.* at 89.

The *Blackburn* court then relied on the case of *Millers Cas. Ins. Co. v. Briggs* (100 Wn.2d 1, 665 P.2d 891 (1983)), for the proposition that insurers may exclude “Class 2” insureds from UIM coverage. *Blackburn* at 90-91. The *Millers* case, in turn, had relied on a Louisiana court’s interpretation of Louisiana’s UIM statute. *Id.* (Citing *Breaux v. Government Employees Ins. Co.* 369 So.2d 1335 (La. 1979)). The Louisiana court found that its state’s 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.*” *Blackburn* at 90. The *Millers* court found that a policy which excluded “Class 2” insureds was justifiable largely based on its understanding that our Legislature had contemplated two separate vehicles in The UIM Statute.

As stated in Justice Dore’s dissent in *Blackburn*, the *Millers* case failed to analyze the Louisiana case it relied on for its two-car distinction. *Id.* at 96. The Louisiana statute provided for issuance of UIM coverage for the protection of persons entitled to recover damages from the owners of **uninsured and underinsured vehicles**. *Id.* (emphasis added). By necessity, this dictates a two-car distinction. In contrast, our statute refers to a “motor vehicle covered by a liability policy” and “underinsured motor vehicles”. Thus, Justice Dore correctly reasoned, “Since a single vehicle *can be* both insured for liability purposes and underinsured for UIM purpose, there is no reason to conclude from the words of the statute alone that the Legislature contemplated two distinct policies on two distinct cars. The *Breaux* analysis is inapplicable to RCW 48.22.030(2).” *Id.* at 97.

Finding no basis in the statute which would allow a policy exclusion of passengers, Justice Dore then looked to the policy behind the original **Uninsured motorist statute**:

It was enacted to expand insurance protection for the public in using the public streets, highways and walkways and at the same time to cut down the incident and consequences of risk from the careless and insolvent drivers. The statute is both a public safety and a financial security measure. Recognizing the inevitable drain upon the public treasury through accidents caused by insolvent motor vehicle drivers who will not or cannot provide financial recompense for those whom they have negligently injured, and contemplating the correlated financial distress following in the wake of

automobile accidents and the financial loss suffered personally by the people of this state, the legislature for many sound reasons and in the exercise of the police power took this action to increase and broaden generally the public's protection against automobile accidents.

Id. at 98. (quoting *Touchette v. Northwestern Mut. Ins. Co.*, 80 Wash.2d 327, 494 P.2d 479 (1972).

Justice Dore then identified that the purpose of the Underinsured motorist statute is even broader than its progenitor, stating that while the Uninsured motorist statute “merely established a floor for insurance coverage below which no victim would fall”, The Underinsured Statute “adopted the broader goal of full compensation for victims of automobile accidents.” *Id.* at 99. This policy of full compensation has been recognized time and time again by Washington courts. See *Elovich v. Nationwide Ins. Co.*, 104 Wn.2d 543, 553, 707 P.2d 1319 (1985) (holding that consent to settle clause, forfeiting insured's underinsured motorist coverage upon failure to obtain insurer's consent to settlement agreement between insured and tortfeasors, was void as contrary to public policy of providing maximum compensation for those persons injured in automobile accidents.); See also *Hamilton v. Farmers Ins. Co.*, 107 Wn.2d 721, 727, 733 P.2d 213 (1987) (“The intent of the statute is to provide full compensation to the injured insured under an underinsured motorist policy.”)

The fatal flaw in Progressive’s reliance on *Blackburn* is stated by the *Blackburn* court itself, prior to beginning its analysis: “The legislative intent and the extent of the coverage mandated by the UIM statute have been difficult to determine.” *Id.* at 87. The *Blackburn* court, in the absence of clear statutory guidance, relied on the *Millers* case, a case decided shortly after the enactment of The UIM Statute and a case, as noted by the dissent in *Blackburn*, that “fails to give the public policy in favor of full compensation the controlling weight to which it is entitled.” With the enactment of The Definition Statute, we now have defined parameters controlling the minimum extent of UIM coverage. These parameters give this Court the legislative guidance that the *Blackburn* court was seeking. These parameters are not opaque nor open to erosion by exclusionary clauses. *Kenworthy v. Pennsylvania General Ins. Co.*, 113 Wn.2d 309, 313, 779 P.2d 257 (1989). Moreover, the breadth of this legislatively-mandated coverage aligns with the public policy behind UIM insurance: full compensation for victims of automobile accidents.

e. The plain language of The Definition Statute is clear without reference to legislative history.

Progressive attempts to undertake an extended analysis of the legislative history of The Definition Statute, on the premise that its enactment was solely intended to apply to sections on Personal Injury

Protection (“PIP”) insurance coverage and was not intended to overrule *Blackburn*. This analysis fails at the gate, however, due to one of the fundamental rules of statutory analysis: 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.” *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)). Progressive does not argue that the definition of “insured persons” in The Definition Statute is ambiguous, nor does it argue that the definition of “underinsured motor vehicle” in The UIM Statute is ambiguous. Despite this, Progressive delves into legislative history seeking a justification for its UIM policy exclusion.

The absurdity of this approach is illustrated by Progressive’s argument that The Definition Statute, whose opening line is “Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter” was not actually intended to apply to Chapter 48.22, but was only intended to define the terms used in the 1993 act. A quick perusal of Title 48 brings up a plethora of statutes which use the exact same or nearly identical language in “Definition” sections. A non-exhaustive list using this language includes RCW 48.05A.010, 48.13.009, 48.15.010, 48.21A.020, 48.29.010, 48.30A.010, 48.31.020 and 48.31B.005. Moreover, Title 48 is rife with examples of the legislature

defining terms for use in specific sections. RCW 48.05.430 is just one example wherein it states, “As used in RCW 48.05.430 through 48.05.490, these terms have the following meanings:”. RCW 48.18.553, another definitions section, opens with, “For the purposes of this section.”

These examples illustrate that the legislature is able to use language effectively and clearly in definitions sections, and to denote the scope of their usage. Had the legislature wished RCW 48.22.005 to apply only to sections dealing with PIP insurance coverage, it had the tools and experience to do so. Progressive’s analysis would call into question the plain language of all definitions sections, asking that courts examine the minutiae of legislative history to satisfy parties unhappy with the meaning of any plainly written statute.

Because courts are required to first look to the plain meaning of statutes and only delve into legislative history when there is ambiguity in that plain language (*Kilian*, 147 Wn.2d at 21), parties cannot go to legislative history in an attempt to create ambiguity – that is putting the cart before the horse. Again, Progressive doesn’t contend that the statutory language is ambiguous. Consequently, Progressive’s arguments about legislative history are not applicable. Progressive is required to cover Mr. Thompson under the plain language of Washington’s statutes.

f. This is a case of first impression.

Respondent knows of no precedent, since the enactment of The Definition Statute in 1993, which has specifically addressed whether the definition of “insured” in The Definition Statute can be contracted around. In fact, there do not appear to be any published cases analyzing whether an insurer can provide UIM insurance to a lesser class of insureds than provided in the definition of “Insured” in RCW 48.22.005.

Smith v. Cont’l Cas. Co. (128 Wn.2d 73, 904 P.2d 749 (1995)) and *Vasquez v. American Fire & Cas. Co.* (174 Wn.App. 132, 298 P.3d 94 (2013)) both dealt with an insurer’s ability to limit the definition of “insured”; however, only in the context of commercial policies. Further, no argument was made in those cases that The Definition Statute’s definition of “insured” applied – The Definition Statute wasn’t even mentioned. In contrast, at least two other cases have read The Definition Statute’s definitions into The UIM Statute. *Cherry v. Truck Ins. Exch.* (77 Wn.App. 557, 892 P.2d 768 (1995)) and *Daley v. Allstate Ins. Co.* (86 Wn. App. 346, 936 P.2d 1185 (1997)) both read definitions from The Definition Statute directly into The UIM Statute (with *Cherry* actually applying the definition of “insured”).

In short, while cases have applied The Definition Statute to The UIM Statute, this is a case of first impression. No court has gone through

the proper steps of statutory interpretation. This issue was brought before this Court in *Patriot General Ins. Co. v. Gutierrez* (186 Wn.App. 103, 344 P.3d 1277 (2015)), however, this Court decided that case on narrower grounds, specifically noting “we do not address the application of RCW 48.22.005.” *Id.* at 109. Accordingly, this issue is now brought before this Court with no controlling precedent other than the plain language of The Definition Statute and The UIM Statute.

3. The Trial Court’s Award of Attorney Fees and Costs was Well Within Its Discretion.

An award of attorneys’ fees and costs will be upheld barring a manifest abuse of discretion. *Berryman v. Metcalf*, 177 Wn. App. 644, 656, 312 P.3d 745 (2013). “Discretion is abused when the trial court exercises it on untenable grounds or for untenable reasons.” *Id.* at 657. (Citing *Chuong Van Pham v. City of Seattle*, 159Wn.2d 527, 538, 151 P.3d 976 (2007)).

After reviewing briefing from both sides, the trial court awarded Mr. Thompson attorney fees and costs. If this Court finds that the trial court’s findings of fact and conclusions of law in that decision are inadequate then Mr. Thompson requests that this Court remand for entry of more detailed findings, as was appropriately done in the *Berryman* case.

If this Court chooses to enter judgment on this issue, Mr. Thompson would point out that Progressive adds no additional information to its

argument beyond what were previously briefed in the lower court. Mr. Thompson's responses to Progressive's arguments remain substantially the same and can be reviewed in CP 105-112, 113-129, 142-148. What is notable, however, is that Progressive's counsel, Mr. Gosselin, continues to inaccurately argue that because he began his involvement in this matter on January 27, 2016 and because he only has billed 49 hours of time, Mr. Thompson's attorneys should have expended a lesser number of hours. 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, Plaintiff's counsel spent 13 hours of attorney time on this coverage dispute, primarily with Progressive's in-house attorney, Greg Tidwell. *Id.*

Moreover, Mr. Gosselin's hours in this case are completely irrelevant to the determination of the number of hours that Respondent's counsel expended. There are many reasons that the Respondent's dispute of the coverage denial required more attorney time, including (but not limited to): 1) Respondent's counsel spent extensive time on the coverage dispute before Mr. Gosselin appeared, 2) Respondent drafted more pleadings than Mr. Gosselin at the trial court level, and 3) Respondent is a not an experienced corporate litigant, like Appellant Progressive, and more attorney-client communication was required. It is also notable that Mr.

Gosselin seeks to reduce Respondent's attorney hours to account for the time that Mr. Gosselin expended on his own travel, in the absence of any evidence that he failed to work while traveling or bill his client for that time.

Further, Mr. Gosselin's suggestion that Respondent's attorneys' hours should be cut to some random number and divided by some random percentage between partner and associate makes no sense. Respondent's attorney's time is supported by contemporaneous records and Mr. Gosselin does not point to any of the specific entries as being unreasonable. The bottom line here is that the time it took to prosecute this case was reasonable and reasonably documented. Respondent's counsels' briefing previously addressed these issues and the trial court, as the fact finder, approved Respondent's attorneys' fee request. CP 203-204.

4. Mr. Thompson is Entitled to *Olympic Steamship* Fees and Costs for this Appeal.

“[A]n award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract.” *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 53, 811 P.2d 673 (1991). Because Progressive has wrongfully denied coverage to Mr. Thompson, he is entitled to attorney fees and expenses pursuant to *Olympic Steamship*, RAP 18.1, and any other authority allowing for attorney fees and expenses. Respondent requests that

this Court allow him to recover his attorney fees and expenses, including those incurred during this appeal.

V. CONCLUSION

Progressive was required to provide UIM coverage because Mr. Thompson was an “insured person” and was occupying an “underinsured motor vehicle”, as those terms are defined by statute. The 1993 enactment of The Definition Statute defined who is covered under The UIM Statute and required coverage for Guest Passengers. The Definition Statute also provided the legislative direction that the *Blackburn* court was seeking, a direction which comports with the public policy behind The UIM Statute: full compensation for innocent victims of automobile collisions.

Progressive is not entitled to use exclusionary clauses to restrict UIM coverage to the Guest Passengers because the coverage is required by law and supported by public policy. Consequently, Respondent asks this Court to affirm the trial court’s ruling that The Definition Statute, in conjunction with The UIM Statute, requires Progressive to provide UIM coverage to Respondent. Respondent also requests that this Court allow him to recover his attorney fees and costs.

DATED: June 4, 2018.

Respectfully Submitted,

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No. 358640 – III

COURT OF APPEALS, DIVISION III
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I declare under penalty of perjury under the laws of the State of Washington that I caused the below listed documents to be served on the following counsel in the manner described below:

1. Brief of Respondent Joseph M. Thompson; and
2. Proof of Service.

Mr. Timothy R. Gosselin, Attorney for Appellant
Gosselin Law Office, PLLC
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Via Email (per agreement) to tim@gosselinlawoffice.com

Executed at Walla Walla, Washington on June 4th, 2018.



Ryan Armentrout

HESS LAW OFFICE

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