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No. 78534-6-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

TODD MCLAUGHLIN, a Washington resident,

Appellant,

v.

TRAVELERS COMMERCIAL INSURANCE COMPANY,
a foreign corporation,

Respondent.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii-iii
A. INTRODUCTION	1
B. REPLY ON STATEMENT OF THE CASE	2
C. ARGUMENT	2
(1) <u>Travelers Misstates the Law on the Interpretation of Insurance Contracts in Washington</u>	3
(2) <u>Travelers Fails to Cite Persuasive Caselaw, and Any Ambiguities Must Be Resolved in McLaughlin’s Favor</u>	9
D. CONCLUSION.....	14

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

<i>Ainsworth v. Progressive Cas. Ins. Co.</i> , 180 Wn. App. 52, 322 P.3d 6 (2014).....	3, 5
<i>Am. Nat. Fire Ins. Co. v. B & L Trucking & Const. Co., Inc.</i> , 134 Wn.2d 413, 951 P.2d 250 (1998).....	5, 7
<i>American Best Food, Inc. v. Alea London, Ltd.</i> , 168 Wn.2d 398, 229 P.3d 693 (2010).....	11
<i>Boggs v. Whitaker, Lipp & Helea, Inc., P.S.</i> , 56 Wn. App. 583, 784 P.2d 1273, review denied, 114 Wn.2d 1018 (1990).....	3, 5
<i>Camicia v. Howard S. Wright Const. Co.</i> , 179 Wn.2d 684, 317 P.3d 987 (2014).....	6
<i>Certain Underwriters at Lloyd’s London v. Travelers Prop. Cas. Co. of Am.</i> , 161 Wn. App. 265, 256 P.3d 368 (2011).....	13
<i>Fiscus Motor Freight, Inc. v. Universal Sec. Ins. Co.</i> , 53 Wn. App. 777, 770 P.2d 679, review denied, 113 Wn.2d 1003 (1989).....	6
<i>Hill v. Jawanda Transp. Ltd.</i> , 96 Wn. App. 537, 983 P.2d 666 (1999).....	8
<i>Int’l Marine Underwriters v. ABCD Marine, LLC</i> , 179 Wn.2d 274, 313 P.3d 395 (2013).....	13
<i>Kitsap Cty. v. Allstate Ins. Co.</i> , 136 Wn.2d 567, 964 P.2d 1173 (1998).....	12-13
<i>Lui v. Essex Ins. Co.</i> , 185 Wn.2d 703, 375 P.3d 596 (2016).....	13
<i>Mattson on Behalf of Mattson v. Stone</i> , 32 Wn. App. 630, 648 P.2d 929 (1982).....	10
<i>Mission Ins. Co. v. Guarantee Ins. Co.</i> , 37 Wn. App. 695, 683 P.2d 215 (1984).....	3
<i>Overton v. Consol. Ins. Co.</i> , 145 Wn.2d 417, 38 P.3d 322 (2002).....	4
<i>Phil Schroeder, Inc. v. Royal Globe Ins. Co.</i> , 99 Wn.2d 65, 659 P.2d 509 (1983), opinion adhered to as modified on reconsideration, 101 Wn.2d 830, 683 P.2d 186 (1984).....	7, 8
<i>Pudmaroff v. Allen</i> , 138 Wn.2d 55, 977 P.2d 574 (1999).....	6, 10
<i>Ringstad v. Metro. Life Ins. Co.</i> , 182 Wash. 550, 47 P.2d 1045 (1935).....	3, 5

<i>Safeco Ins. Co. of Am. v. Davis</i> , 44 Wn. App. 161, 721 P.2d 550 (1986).....	9
<i>See v. Willett</i> , 58 Wn.2d 39, 360 P.2d 592 (1961).....	10
<i>Stanton v. Pub. Employees Mut. Ins. Co.</i> , 39 Wn. App. 904, 697 P.2d 259, review denied, 103 Wn.2d 1039 (1985).....	4, 5
<i>State v. Morris</i> , 87 Wn. App. 654, 943 P.2d 329 (1997), review denied, 134 Wn.2d 1020 (1998).....	8
<i>Transcon. Ins. Co. v. Wash. Pub. Utils. Dists. ' Util. Sys.</i> , 111 Wn.2d 452, 760 P.2d 337 (1988).....	13
<i>Wagner v. Wagner</i> , 95 Wn.2d 94, 621 P.2d 1279 (1980).....	5, 6
<i>Weyerhaeuser Co. v. Commercial Union Ins. Co.</i> , 142 Wn.2d 654, 15 P.3d 115 (2000).....	5

Other Cases

<i>Dye v. Grose</i> , 2015 WL 1255755 (Ohio App. Mar. 12, 2015).....	10, 11
<i>Fireman's Fund Ins. Co. v. Kerger</i> , 389 S.E.2d 541 (Ga. App. 1989).....	9
<i>Harbold v. Olin</i> , 670 A.2d 117 (N.J. App. Div. 1996).....	9
<i>Pilotte v. Aetna Cas. & Sur. Co.</i> , 806, 427 N.E.2d 746 (Mass. 1981).....	9
<i>Schroeder v. Auto-Owners Ins. Co.</i> , 2004 WL 2384350 (Ohio App. Oct. 22, 2004)	11
<i>Tucker v. Fireman's Fund Ins. Co.</i> , 517 A.2d 730 (Md. 1986).....	9, 10

Statutes

RCW 48.22.005(11).....	<i>passim</i>
RCW 48.22.090-.100	4

Codes, Rules and Regulations

GR 14.1	11
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A. INTRODUCTION

Travelers Commercial Insurance Company's ("Travelers") own brief makes it crystal clear that the trial court erred in granting summary judgment, dismissing Todd McLaughlin's claims against Travelers for denying coverage for injuries he sustained while riding his bicycle in Seattle when he was struck by a car door. Travelers misstates the law on insurance coverage in Washington and chooses a restrictive definition of "pedestrian" when statutes regulating insurance, which operate as part of the contract itself, specifically define pedestrian as any person "not occupying a motor vehicle." RCW 48.22.005(11). Travelers also attempts to flip fundamental tenets of insurance contract interpretation on their head, by placing the burden on the policyholder where case law demands that all ambiguities in insurance coverage must be resolved against the insurer-drafter of a policy and in favor of finding coverage.

To support its arguments, Travelers cherry-picks from inapplicable rules of the road and relies on unpublished foreign authorities where the vast majority of jurisdictions have rejected the restrictive definition of "pedestrian" for which Travelers advocates. And even Travelers admits that "Washington Courts have ruled that insurance coverage must extend the definition of 'pedestrian' to cyclists" in some circumstances. Resp't br. at 8. In light of these authorities, Travelers was wrong to ever deny

coverage to McLaughlin due to an ambiguity in the policy which it drafted.

Travelers' insurer-friendly definition of "pedestrian" must be rejected. Its flawed arguments only highlight the fact that reversal is warranted.

B. REPLY ON STATEMENT OF THE CASE

The facts here are undisputed. Importantly, it is undisputed that the policy *which Travelers drafted* did not define the term "pedestrian." Resp't br. at 8. Nor did it contain any explicit exclusionary language for injuries sustained while traveling by bicycle. *Id.* at 6. Because Washington insurance laws define pedestrian as any person "not occupying a motor vehicle" and all ambiguities in insurance contracts must be construed against the drafter-insurer and in favor of finding coverage, Travelers wrongfully denied coverage under the MedPay (or Personal Injury Protection ("PIP")) provision of McLaughlin's policy.¹

C. ARGUMENT²

¹ Travelers admits that there is no material distinction between MedPay benefits and PIP benefits for the purposes of this case. Resp't br. at 4. Both fall into the category of casualty insurance which is governed by RCW 48.22, and that statute includes a broad definition of "pedestrian." RCW 48.22.005(11).

² As it did below, Travelers concedes on appeal that Washington law applies to this dispute, regardless of the fact that McLaughlin entered into the contract while residing in California. Resp't br. at 10-11. The Court need not engage in a conflict of law analysis in this case. *Id.*

(1) Travelers Misstates the Law on the Interpretation of Insurance Contracts in Washington

Travelers is wrong to rely on dictionary definitions where insurance statutes define a “pedestrian” as any person “not occupying a motor vehicle.” RCW 48.22.005(11). In doing so, it ignores the rule that a court must interpret insurance contracts in light of statutory provisions which operate as “a part of” the contract itself. *Ringstad v. Metro. Life Ins. Co.*, 182 Wash. 550, 553, 47 P.2d 1045 (1935); *see also, Mission Ins. Co. v. Guarantee Ins. Co.*, 37 Wn. App. 695, 699, 683 P.2d 215 (1984).

Travelers attempts to circumvent this fundamental principle of insurance interpretation by arguing that *Ringstad* is a case from 1935 which addressed life insurance. Resp’t br. at 30. Unfortunately for Travelers, *Ringstad’s* unchallenged holding has been repeated by this Court as recently as 2014, specifically in the context of PIP coverage under 48.22 RCW. *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 63 n.7, 322 P.3d 6 (2014) (“U]nlike other types of contracts, insurance policies must be interpreted in light of...statutory considerations.”) (quoting *Mission Ins., supra*). Likewise, Divisions II and III have both recognized the long-standing rule that, in Washington, all insurance policies must be construed in light of insurance statutes. *Boggs v. Whitaker, Lipp & Helea, Inc., P.S.*, 56 Wn. App. 583, 585, 784 P.2d 1273,

review denied, 114 Wn.2d 1018 (1990) (invoking the “familiar axiom[.]” that “[an insurance] contract will be interpreted in light of the statutes that affect its subject matter.”); *Stanton v. Pub. Employees Mut. Ins. Co.*, 39 Wn. App. 904, 907, 697 P.2d 259, *review denied*, 103 Wn.2d 1039 (1985) (“underinsured motorist provision [in title 48] applies and is a part of the policy by operation of law.”).³

The “subject matter” at issue in this case is insurance coverage, specifically first-party insurance coverage for medical expenses incurred after being struck by an automobile. Title 48 RCW is an exhaustive statute governing insurance laws in Washington. Specifically, RCW 48.22 governs automobile insurance and PIP coverage, which is the heart of this dispute. RCW 48.22.090-.100. And RCW 48.22.005(11) broadly defines the term “pedestrian” specifically in the context of automobile insurance coverage.

Travelers’ only retort is that some courts have turned to dictionaries when defining undefined terms in an insurance policy. Resp’t br. at 11 (citing *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 428, 38 P.3d 322 (2002)). But *Overton* did not involve a term also defined in an insurance statute. In fact, the Court in *Overton* distinguished the term

³ Given this clear precedent for McLaughlin’s position that insurance contracts must be interpreted in light of insurance statutes, Travelers stretches the bounds of permissible argument by claiming that “McLaughlin’s approach lacks legal support.” Resp’t br. at 18.

“damages” from “property damage” without referring to *any* statutory definition of either term. *Id.* It may make sense where no statutory definition is provided to refer to a dictionary, but where insurance statutes specifically provide a definition of a disputed term, a court must consider that definition when interpreting a term left undefined by the insurer who drafted the policy. *Ringstad, Ainsworth, Boggs, Stanton, supra.*

Travelers also incorrectly argues that the “average purchaser of insurance” would not consider “Washington statutes regarding casualty insurance” when entering into an insurance contract. Resp’t br. at 29-30. Again, Travelers is wrong. In Washington, “insurance policies are construed as contracts.” *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665, 15 P.3d 115 (2000). “[P]arties are presumed to contract with reference to existing statutes, and a statute which affects the subject matter of a contract is incorporated into and becomes a part thereof.” *Wagner v. Wagner*, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980) (citation omitted). “If the parties to a contract wish to provide for other legal principles to govern their contractual relationship, they must be expressly set forth in the contract.” *Id.* at 98-99. Courts “will not add language to the policy that the insurer did not include.” *Am. Nat. Fire Ins. Co. v. B & L Trucking & Const. Co., Inc.*, 134 Wn.2d 413, 430, 951 P.2d 250 (1998).

Indeed, the record shows that an average purchaser of insurance in Washington would expect a broad definition of “pedestrian” to apply. McLaughlin produced contracts for PIP coverage from four separate insurers who specifically include RCW 48.22.005(11)’s broad definition of “pedestrian” within their policies. CP 179-95 (defining “pedestrian” as anyone “not occupying a motor vehicle”). Courts routinely look to such evidence of custom and usage within the insurance industry when interpreting contractual provisions. *See, e.g., Fiscus Motor Freight, Inc. v. Universal Sec. Ins. Co.*, 53 Wn. App. 777, 782, 770 P.2d 679, *review denied*, 113 Wn.2d 1003 (1989). This evidence shows that average purchasers of insurance in Washington would expect that the insurance laws of this state will govern their policies.

Additionally, *Pudmaroff v. Allen*, 138 Wn.2d 55, 977 P.2d 574 (1999), shows that a bicyclist’s status under Washington law is ambiguous at the very least. There, our Supreme Court determined that it would be “absurd” to treat bicyclists the same as motor vehicles in all situations. *Id.* at 65-66. Elsewhere the Supreme Court has recognized that “the Legislature has viewed bicycles...on a case by case basis, and without any continuity.” *Camicia v. Howard S. Wright Const. Co.*, 179 Wn.2d 684, 700, 317 P.3d 987 (2014). As the drafter of the insurance policy, it was incumbent on Travelers to recognize and address this ambiguity if it

wished to enforce the restrictive definition of pedestrian for which it advocates. *Wagner, B & L Trucking, supra*.

Here, Travelers *chose* to leave the term pedestrian undefined. It also failed to include any exclusionary language for injuries sustained while riding on a bicycle. Thus, this Court is left only with the presumption that the parties intended the definition of “pedestrian” contained in our insurance code, RCW 48.22, to apply. *Wagner, supra*. Furthermore, as discussed below, Travelers’ choice to create this ambiguity in the contract must be construed in McLaughlin’s favor and in favor of finding coverage.

Travelers also argues that the definition of “pedestrian” in the insurance statute should not apply because it is too “broad” and “does not explicitly state that a bicyclist is a ‘pedestrian.’” Resp’t br. at 29. Again, Travelers misunderstands the law in Washington. First, it is undeniable that the definition in the insurance statute includes bicyclists – it includes any “natural person not occupying a motor vehicle.” RCW 48.22.005(11). Second, and perhaps most importantly, “the purpose of insurance is to insure.” *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983), *opinion adhered to as modified on reconsideration*, 101 Wn.2d 830, 683 P.2d 186 (1984). Thus, it is no surprise that the Legislature chose a broad definition of “pedestrian” in the context of

insurance laws, even where it may have chosen a more restrictive definition for purposes of inapplicable traffic laws dealing with the rules of the road. *See* Appellant’s br. at 10 (citing *State v. Morris*, 87 Wn. App. 654, 666, 943 P.2d 329 (1997), *review denied*, 134 Wn.2d 1020 (1998); *Hill v. Jawanda Transp. Ltd.*, 96 Wn. App. 537, 546, 983 P.2d 666 (1999)).⁴

As discussed in McLaughlin’s opening brief, the policy reasons for this choice are clear. *See* Appellant’s br. at 11. Bicyclists are particularly susceptible to serious injury on the roadway. Just like any other pedestrian, a bicyclist lacks airbags, seatbelts, impact absorbing bumpers, a surrounding steel car frame, etc. *See Morris*, 87 Wn. App. at 666. Thus, insurance laws designed to compensate vulnerable individuals for injuries caused by motor vehicles should be broadly interpreted and must be construed to provide coverage whenever possible. *Phil Schroeder, Inc.*;

⁴ Travelers blatantly misrepresents McLaughlin’s argument, claiming that “McLaughlin fails to mention that the *Hill* Court found the traffic laws immaterial to a *forums non conveniens* analysis.” Resp’t br. at 33. Not true. McLaughlin’s brief reads as follows:

This Court has recognized that these provisions generally have limited application outside of the traffic law context. *See Hill v. Jawanda Transp. Ltd.*, 96 Wn. App. 537, 546, 983 P.2d 666 (1999) (“Respect for the rules of the road is a question involving the enforcement of criminal statutes, and is not an appropriate consideration in *forum non conveniens* analysis.”)

Appellant’s br. at 10. Travelers’ misrepresentation of McLaughlin’s brief is egregious.

see also, Safeco Ins. Co. of Am. v. Davis, 44 Wn. App. 161, 164, 721 P.2d 550 (1986).

Travelers simply misunderstands these fundamental tenets of insurance law in Washington. It argues for a strained reading of the policy and Washington laws that favor its own interests over those of its insured. The Court should reject these arguments, which would turn a century of case law regarding insurance coverage on its head.

(2) Travelers Fails to Cite Persuasive Caselaw, and Any Ambiguities Must Be Resolved in McLaughlin's Favor

McLaughlin has provided this Court with ample authorities from both Washington and other jurisdictions to support its arguments. As discussed in McLaughlin's opening brief, many jurisdictions have specifically held that bicyclists are considered pedestrians for insurance purposes. Appellant's br. at 9-10 (citing, *e.g.*, *Fireman's Fund Ins. Co. v. Kerger*, 389 S.E.2d 541 (Ga. App. 1989); *Harbold v. Olin*, 670 A.2d 117 (N.J. App. Div. 1996); *Pilote v. Aetna Cas. & Sur. Co.*, 806, 427 N.E.2d 746 (Mass. 1981). And others have concluded that the term "pedestrian" is much broader than simply someone traveling "on foot," as Travelers would have this Court hold. Appellant's br. at 12-13 (citing *Tucker v.*

Fireman's Fund Ins. Co., 517 A.2d 730 (Md. 1986) (surveying the law from 28 jurisdictions including Washington)).⁵

Moreover, as Travelers admits, “Washington Courts have ruled that insurance coverage must extend the definition of ‘pedestrian’ to cyclists” in some circumstances. Resp’t br. at 8 (presumably referring to *Mattson on Behalf of Mattson v. Stone*, 32 Wn. App. 630, 632, 648 P.2d 929 (1982) (passenger on bicycle received personal injury protection benefits “as a pedestrian injured in [the] accident.”). Even under the traffic laws which Travelers cites, bicyclists are treated as pedestrians in some situations. *Pudmaroff*, 138 Wn.2d at 70 (at the very least bicyclists “are to be treated akin to pedestrians when they use crosswalks to traverse a roadway” under state traffic laws).

To distinguish these numerous authorities, Travelers relies most heavily on an unpublished opinion from Ohio. Resp’t br. at 21-23 (citing *Dye v. Grose*, 2015 WL 1255755 at *4 (Ohio App. Mar. 12, 2015)). This is flawed for many reasons. First, this unpublished, foreign authority has

⁵ Travelers also misrepresents *Tucker* claiming that “the only time Washington’s laws are mentioned in *Tucker* is in a footnote designating Washington as one of 28 states which share similar rules regarding No-Fault insurance plans.” Resp’t br. at 36. Again, this is not true. In the body of its opinion, the *Tucker* court specifically analyzed *See v. Willett*, 58 Wn.2d 39, 360 P.2d 592 (1961), and its holding that the statutory definition of “pedestrian” in Washington at the time was “broad enough to include persons standing upon the highway, as well as those traversing it.” 517 A.2d at 735. Thus, the court used *See* as one case to illustrate the reality that across the country “the components of movement and of being on foot implied in the literal definition of ‘pedestrian’ have not been strictly applied within the context of motor vehicle laws.” *Id.* Again, such an egregious misrepresentation should not be tolerated by this Court.

no precedential value in Washington and should be given little, if any, weight by this Court. GR 14.1. Second, as discussed in McLaughlin's opening brief, Ohio courts are split on the issue, and the *Dye* opinion represents a minority of the judges in Ohio who have considered the definition of "pedestrian." Appellant's br. at 9-10 n.6 (citing *Schroeder v. Auto-Owners Ins. Co.*, 2004 WL 2384350 (Ohio App. Oct. 22, 2004)).⁶

More importantly however, even assuming *arguendo* that some out-of-state opinions might support Travelers' position, Travelers still cannot prevail. When Washington courts consider an issue of first impression regarding insurance coverage, a conflict among foreign authorities must be resolved in favor of the insured. For example, in *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 229 P.3d 693 (2010), our Supreme Court considered a question of first impression regarding an insurer's duty to defend under an insurance policy. The policyholder cited one federal case from Texas in notifying its insurer that coverage may apply. *Id.* at 403. The Court held that this was enough to put the insurer on notice that it had a duty to defend under the policy

⁶ Travelers' attempt to distinguish *Schroeder* is baffling, arguing that the cases are different because the term "pedestrian" was printed in "bold face" in the policy at issue in *Schroeder*. Resp't br. at 22. As the dissenting judge pointed out in *Dye*, this fact is "irrelevant" – not even the *Schroeder* court ascribed some special meaning to the fact that the term appeared in bold face in the policy. *Dye*, 2015 WL 1255755 at *4 n.1. Rather, when read together the majority of judges who have considered this issue in Ohio have simply determined that the term "pedestrian" is broad enough to include bicyclists, especially when the term is not clearly defined in an insurance policy.

because a court must look for “any reasonable interpretation of the facts or the law that could result in coverage.” *Id.* at 413. The Court reasoned:

Washington courts have yet to consider the factual scenario before us today. Evaluation of out-of-state cases was appropriate in deciding which rule to apply. The lack of any Washington case directly on point and a recognized [possibility of coverage] in other states presented a legal uncertainty with regard to [the insurer’s] duty. Because any uncertainty works in favor of providing a defense to an insured, [the insurer’s] duty to defend arose when [a lawsuit was filed].

Id. at 408. The Court reiterated the longstanding principle that any ambiguities must “be resolved in favor of the insured” and held as a matter of law that the insurer acted in bad faith when it “put its own interest ahead of its insured when it denied a defense based on an arguable legal interpretation of its own policy.” *Id.* at 411-13.

Here, McLaughlin has advanced more than just an *arguable interpretation* of the policy; he has offered a *clear and compelling interpretation* of the term “pedestrian” based on Washington insurance law. Not only has he cited a plethora of out-of-state authorities which treat bicyclists as pedestrians for insurance purposes, but McLaughlin has cited a definition of the term in this state’s applicable insurance statute and multiple Washington authorities which, *at the very least*, create ambiguity over whether bicyclists should be treated as pedestrians in the case at hand. *See Kitsap Cty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d

1173 (1998) (“An ambiguity in an insurance policy is present if the language used is fairly susceptible to two different reasonable interpretations.”). This ambiguity must be resolved in favor of McLaughlin and in favor of providing coverage. *Int’l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 288, 313 P.3d 395 (2013); *Certain Underwriters at Lloyd’s London v. Travelers Prop. Cas. Co. of Am.*, 161 Wn. App. 265, 278, 256 P.3d 368 (2011).⁷

Despite McLaughlin’s reasonable and well-supported interpretation of an undefined term in Travelers’ policy, Travelers argues that “competing and reasonable interpretations do not exist” and relies on *Lui v. Essex Ins. Co.*, 185 Wn.2d 703, 375 P.3d 596 (2016), to support its argument. *Lui* is nothing like this case. *Lui* involved a term previously defined by controlling case law. *Id.* at 714. But as Travelers admits, “Washington Courts have not specifically ruled on” the definition at issue in this case before. Resp’t br. at 21. In fact, as Travelers again admits, to the extent Washington courts have touched on the issue, they “have ruled that insurance coverage must extend the definition of ‘pedestrian’ to

⁷ Throughout its brief Travelers tries to place the burden on McLaughlin to prove he qualifies for coverage under the policy. Resp’t br. at 7. However, it is undeniable that the burden of drafting a clear insurance contract was on Travelers, yet if failed to define the term “pedestrian” or include any exclusionary language regarding bicycles. Courts must interpret an arguably ambiguous contract most favorably for the insured “even though the insurer may have intended another meaning.” *Transcon. Ins. Co. v. Wash. Pub. Utils. Dists.’ Util. Sys.*, 111 Wn.2d 452, 456-57, 760 P.2d 337 (1988).

cyclists” at least in some circumstances. Resp’t br. at 8. Moreover, the very fact that there are two distinct definitions within Washington statutes itself establishes that there are at least two reasonable interpretations of the term. Travelers’ argument fails.

Given the authorities cited above and the applicable definition of “pedestrian” in the Washington insurance statute, McLaughlin’s interpretation of a term left undefined in Travelers’ policy is reasonable. The trial court erred in failing to construe “pedestrian” in favor of the insured and in favor of providing coverage. Summary judgment should be reversed.

D. CONCLUSION

The trial court erred in ruling that a person traveling by bicycle is not a pedestrian for insurance purposes. Summary judgment should be reversed, the Court should remand with instructions to enter summary judgment in favor of McLaughlin, and costs on appeal should be awarded to McLaughlin.

DATED this 4th day of January, 2019.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the *Reply Brief of Appellant* in Court of Appeals, Division I Cause No. 78534-6-I to the following:

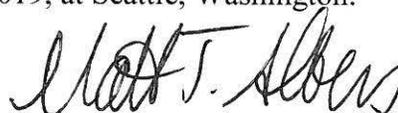
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 4, 2019, at Seattle, Washington.



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