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No. 78534-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

TODD MCLAUGHLIN, a Washington Resident

Appellant;

v.

TRAVELERS COMMERCIAL INSURANCE COMPANY,

a foreign corporation

Respondent.

BRIEF OF RESPONDENT TRAVELERS COMMERCIAL
INSURANCE COMPANY

Thomas Lether, WSBA #18089
Eric J. Neal, WSBA #31863
Jenna Mark, WSBA #54366
Lether & Associates, PLLC
1848 Westlake Ave N., Suite 100
Seattle, WA 98109
Telephone: (206) 467-5444
Facsimile: (206) 467-5544
tlether@letherlaw.com
eneal@letherlaw.com
jmark@letherlaw.com
*Attorneys for Respondent Travelers
Commercial Insurance Company*

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I. INTRODUCTION

This appeal arises from the dismissal on summary judgment of claims by Appellant Todd McLaughlin against Respondent Travelers Commercial Insurance Company (“Travelers”) arising from McLaughlin’s claim for first-party Medical Payments (“MedPay”) benefits under his Travelers auto policy.

On July 21, 2017, McLaughlin was injured while riding his bicycle on Westlake Avenue near downtown Seattle, Washington. CP 2. Specifically, while he was riding his bicycle he collided with the open door of a vehicle driven by Daniel Moore. CP 2. McLaughlin submitted a claim for insurance benefits under the MedPay provision of his own Travelers’ automobile insurance policy. CP 2. MedPay coverage is a first-party benefit available to the insured or other injured party who is an “occupant” of a covered motor vehicle or who is a pedestrian struck by a motor vehicle. CP 39. Travelers denied MedPay coverage because McLaughlin was not occupying a covered automobile and because he was not a pedestrian at the time of the accident. CP 64.

McLaughlin sued Travelers in the King County Superior Court. CP 2. He alleged that Travelers had breached the policy of insurance. CP 5. He further asserted extra-contractual causes of action. CP 4-6.

On Travelers' Motion for Summary Judgment Regarding Coverage, the Superior Court correctly determined that McLaughlin was not entitled to MedPay benefits because he was operating a bicycle at the time of loss and was therefore not a pedestrian or occupying a covered auto. CP 238-39.

Following the Superior Court's ruling on the coverage issue, McLaughlin voluntarily dismissed his causes of action for insurance bad faith, negligence, violation of the Consumer Protection Act, and violation of the Insurance Fair Conduct Act to pursue this appeal. CP 240-41. Thus, the extra-contractual claims are not before this Court. The sole issue on appeal is McLaughlin's claim for MedPay coverage.

For the reasons set forth herein, the Superior Court should be affirmed.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

Travelers assigns no error to the rulings of the trial court.

B. Issues Related to Appellants' Assignments of Error

1. McLaughlin assigns error to the Superior Court's reliance upon the common dictionary definition of the term "pedestrian." The policy language does not involve the application of exclusionary language. Rather, the issue is whether McLaughlin can meet his

burden of establishing he is an insured under the MedPay portion of the policy. McLaughlin's argument is contrary to Washington law, the plain language of the subject policy, and the facts and circumstances relating to his claim. At the Superior Court level, McLaughlin conceded that he did not qualify for coverage as an "occupant." McLaughlin's Appellate Brief does not argue that he qualifies for coverage as an "occupant." As a result, Travelers only addressed McLaughlin's claim that he qualifies as an insured for MedPay purposes based upon his status as a "pedestrian."

2. McLaughlin also assigns error to the Court's ruling that the term "pedestrian" is ambiguous. McLaughlin erroneously insists that "pedestrian" is not a well-understood term and includes bicyclists. The term "pedestrian" is not ambiguous under Washington law. As understood by an average purchaser of insurance, a bicyclist is not a "pedestrian."
3. McLaughlin further fails to provide any legal authority for the proposition that the definition of the term "pedestrian" should be expanded to include bicyclists. McLaughlin's reliance upon RCW 48.22.005(11) is without merit. That definitional language has no relevance to the issue before the Court and there is no

legal authority that supports McLaughlin's claim that he is a "pedestrian" under the MedPay coverage.

III. STATEMENT OF THE CASE

A. Background Facts

The factual record before the Court is undisputed. On July 31, 2017, McLaughlin was riding his bicycle on Westlake Avenue when he collided with the driver's side door of a vehicle driven by Daniel Moore. CP 2. Daniel Moore was seated in his parked car and opened his car door into McLaughlin's path. CP 2. McLaughlin ran into the door and suffered bodily injuries. CP 2.

Travelers had issued to McLaughlin an Automobile Policy, numbered 995399724 203 1 (hereinafter the "McLaughlin Policy"). CP 17. This policy contained Liability coverage, MedPay coverage (often referred to a PIP coverage), and Uninsured Motorist ("UIM") coverage. The limits of the MedPay Coverage was \$5,000. CP 17. The limit of the UIM coverage was \$100,000. CP 18.

McLaughlin notified Travelers of the accident on August 10, 2017. CP 68. Travelers immediately acknowledged McLaughlin's claim and commenced its investigation. CP 62.

Travelers adjusted the claim and issued a payment for \$100,000 under the UIM portion of the policy. Report of Proceedings, p. 14:11-12.

On August 15, 2017, Travelers advised McLaughlin that it was disclaiming coverage under the MedPay portion of McLaughlin's Auto Policy because he was not a "pedestrian" at the time of the accident. CP 64. Travelers therefore determined that McLaughlin was not entitled to MedPay benefits under the policy. CP 64-65.

On October 10, 2017, McLaughlin advised Travelers of his interpretation of the policy language which included McLaughlin's opinion that the word "pedestrian" extended to "walkers, cyclists, skateboarders, or wheelchair users." CP 154. Travelers maintained its position with regard to McLaughlin's eligibility for MedPay benefits.

B. Applicable Policy Language

The claim at issue in this matter is limited to a dispute over coverage under the MedPay provision of the policy.

The MedPay coverage included up to \$5,000 in medical payments coverage. The policy contains the following applicable language:

**MEDICAL PAYMENTS COVERAGE
SECTION
Coverage C- Medical Payments**

Insuring Agreement

- A. We will pay the usual and customary charge for reasonable expenses incurred for necessary medical and funeral services because of "bodily injury":

1. Caused by an accident; and
2. Sustained by an “insured”.
- ...

CP 39

For purposes of the MedPay coverage, the Policy contains the following pertinent definition:

B. “Insured” as used in this Coverage Section means:

1. You or any “resident relative”:
 - a. While “occupying”; or
 - b. As a pedestrian when struck by;

a motor vehicle designed for use mainly on public roads or a trailer of any type.

CP 39

The above language does not involve any exclusionary policy language. Rather, the language involves the Insuring Agreement of the MedPay coverage portion of the McLaughlin Policy. In other words, the language involves the grant of coverage and whether McLaughlin can establish that he qualifies as an “insured” under the MedPay provision of the policy. Given the fact that he was riding a bicycle and was not a “pedestrian,” the trial court found no coverage under this specific portion

of the policy. McLaughlin has the burden of proof on the issue of whether he is an insured under the MedPay provision of the policy.

C. Procedural Posture

McLaughlin filed a civil action in King County Superior Court on December 18, 2018. CP 1-6. Both parties moved for Partial Summary Judgment regarding the definition of “pedestrian.” CP 66, 80. The Court entered a judgment in favor of Travelers and granted its Motion for Partial Summary Judgment. CP 249-50.

Following the Order granting Travelers’ Motion for Partial Summary Judgment, McLaughlin voluntarily dismissed all of his extra-contractual claims in order to pursue this appeal. CP 240-41. As a result, McLaughlin’s extra-contractual claims and the reasonableness of Travelers’ actions are not before this Court at this time. Should this Court reverse the Trial Court’s decision, litigation of McLaughlin’s extra-contractual claims, and any subsequent appeal, would remain.

IV. LEGAL ARGUMENT

A. Summary of Argument

In Washington, it is the insured’s burden to prove that a loss is covered in an insurance claim. *McDonald v. State Farm Fire Cas. Co.* 119 Wn.2d 724, 837 P.2d 1000 (1992). As a result, the insured must first prove that the loss falls within the grant of coverage. This means

McLaughlin has the burden to prove that he is an insured for purposes of MedPay coverage.

The Superior Court did not err in determining that McLaughlin was not a pedestrian at the time of the accident. Although the term “pedestrian” is not defined in the policy, the common and ordinary understanding of the word does not include “bicyclists.” McLaughlin’s argument that the term “pedestrian” includes persons on bicycles is contrary to the common sense meaning of the term, the general dictionary definition of the term, and the relevant law stating that a policy is construed as whole and is given a reasonable and fair construction by an average person purchasing insurance. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665, 15 P.3d 115 (2000).

McLaughlin fails to set forth any Washington authority which supports his position. The Washington Courts have ruled that insurance coverage must extend the definition of “pedestrian” to cyclists only in very narrow and specific circumstances that are explicably different than the facts of this case. Specifically, Washington Courts have extended the definition of “pedestrian” to apply to cyclists in locations where pedestrians have known rights of way, such as crosswalks and sidewalks. In fact, the holdings of the cases cited to by McLaughlin supports

Travelers' position that McLaughlin, as a cyclist operating on a busy roadway, is not a pedestrian.

Finally, McLaughlin's reliance on RCW 48 is without merit. McLaughlin contends a reasonable purchaser of insurance would look to this statute, which governs casualty insurance, to define the term "pedestrian." This argument is unsupported by authority of any kind. Moreover, it contradicts Washington's established rules of policy construction, which give undefined terms their plain and ordinary meaning.

B. Standard of Review

The applicable standard of review for an appellate court reviewing a summary judgment order is the same as the trial court. *See Sedwick v. Gwinn*, 73 Wn. App. 879, 884, 873 P.2d 528, 531 (1994), *referencing Marincovich v. Tarabochia*, 114 Wash.2d 271, 274, 787 P.2d 562 (1990). The appellate court reviews the facts and law with respect to summary judgment *de novo*. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

C. Summary Judgment Standard.

Summary judgment is appropriate when the pleadings, affidavits, depositions, and admissions indicate that no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). In a

summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. *See LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). The trial court should grant a motion for summary judgment if a party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Young*, 112 Wn.2d at 225, *quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

D. Washington Law Applicable to the Issues in this Case

As set forth above, the incident took place in Seattle, Washington. The McLaughlin Policy, however, was issued in California. Therefore, a possible conflict of laws issue arises.

For the Court to engage in a conflict-of-law analysis there must be an actual conflict of interests or laws with another state. *Tilden-Coil Constructors, Inc. v. Landmark Am. Ins. Co.*, 721 F. Supp.2d 1007, 1012-13 (W.D. Wash. 2010). “Absent an actual conflict, Washington law presumptively applies.” *Tilden-Coil*, 721 F. Supp.2d at 1012-13. In this case, both Washington and California law are consistent with respect to the coverage issues presented. Therefore, there is no conflict of interests or laws for the Court to engage in a conflict-of-laws analysis. Under either

California or Washington law there is no legal support for McLaughlin's claims.

In Washington, insurance policies are construed as contracts and it is the obligation of the court to enforce the terms and conditions of the policy as it is written. *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 378, 917 P.2d 116 (1996). Moreover, the interpretation of an insurance policy is a question of law, not a question of fact. *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 424, 38 P.3d 322 (2002).

If a term in the policy is defined, those definitions provided are controlling. *Overton, supra* at 427. However, if a term is left undefined, it is given the plain and ordinary meaning found in a Standard English dictionary. *Overton* at 428; *See Also Queen City Farms v. Cent. Nat'l Ins.*, 126 Wn.2d 50, 77, 882 P.2d 703 (1994). The terms of a policy are given a fair and reasonable construction that would be given to the contract by the average person buying insurance. *Queen City* at 733. Those undefined terms should be given their plain, ordinary, and popular meaning in "accord with the understanding of the average purchaser..." *Queen City Farms* at 712.

It is the insured's burden of proof to establish that the loss is covered in an insurance claim. The Supreme Court of Washington has described the relative burdens of the insured and insurer as follows:

The insured must show the loss falls within the scope of the policy's insured losses. To avoid coverage, the insurer must then show the loss is excluded by specific policy language.

McDonald at 731

Relying upon *McDonald*, the Supreme Court further clarified the process for determining whether coverage exists as follows:

A determination of coverage involves two steps: first, “[t]he insured must show the loss falls within the scope of the policy's insured losses.” Then, in order to avoid coverage, the insurer must “show the loss is excluded by specific policy language.” *Id.*; see also *State Farm Fire & Cas. Co. v. Ham & Rye, LLC*, 142 Wn. App. 6, 13, 174 P.3d 1175 (2007).

Moeller v. Farmers Ins. Co. of Wash., 173 Wn.2d 264, 272, 267 P.3d 998 (2011) citing *McDonald* at 731; *State Farm v. Ham & Rye*, 142 Wn.App 6, 13, 174 P.3d 1175 (2007).

Finally, an ambiguity in regard to policy language only exists if there are two separate and reasonable interpretations. A Court cannot find an ambiguity where none exists. *Lui v. Essex Ins. Co.*, 185 Wn.2d 703, 712, 375 P.3d 596 (2016) citing *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005).

E. McLaughlin has Failed to Establish that He is an Insured Under the MedPay Provision of the Policy

In this case, McLaughlin has the initial burden to prove his loss falls within the grant of coverage under the MedPay provision. This means he must prove that he qualified as an “insured” for purposes of the MedPay provision. The issue in this case does not involve the application of any exclusionary language.

McLaughlin cannot meet this burden. As set forth above, the MedPay coverage requires that McLaughlin prove that he was a “pedestrian” at the time of the accident. CP 39. He has failed to come forth with any legal support for his claim that he was a “pedestrian” when he was injured while riding his bicycle.

Instead, McLaughlin argues that this Court should abandon Washington law regarding the rules of policy construction. He relies upon inapplicable and irrelevant case law, including several non-Washington court opinions. Moreover, he attempts to define “pedestrian” using irrelevant statutory definitions.

McLaughlin has failed to meet his burden to prove that he qualifies as an “insured” under the MedPay provision. As a result, there is no coverage available to the McLaughlin. This Court should affirm the decision of the Trial Court.

F. According to The Plain And Ordinary Meaning Of The Term “Pedestrian,” Coverage Is Precluded

As set forth above, the MedPay coverage’s definition of the word “insured” requires that McLaughlin be a pedestrian when struck by a vehicle to receive MedPay benefits under the policy.

When there is no explicit definition within the policy, the Washington Courts interpret insurance policies by giving them a “fair, reasonable and sensible construction, consonant with the apparent object and intent of the parties, a construction such as would be given the contract by the average [person] purchasing insurance.” *Morgan v. Prudential Ins. Co. of Am.*, 86 Wn.2d 432, 545 P.2d 1193, 1195 (1976) (citing *Ames v. Baker*, 68 Wn.2d 713, 415 P.2d 74 (1966)). As set forth above, if a term is left undefined, it is given the plain and ordinary meaning found in a Standard English dictionary. *Overton, supra*, at 428; *See Also Queen City Farms v. Cent. Nat’l Ins.*, 126 Wn.2d 50, 77, 882 P.2d 703 (1994). The dictionary definition of the word “pedestrian” according to Merriam-Webster is as follows:

“a person going on foot: WALKER.”

Merriam-Webster Dictionary, 2018.

Merriam-Webster includes the history and etymology for the word pedestrian as:

Latin *pedestr-*, *pedester*, literally, going on foot, from *ped-*, *pes* foot.

Merriam-Webster Dictionary, 2018.

According to Washington law, this dictionary definition establishes the plain and ordinary meaning of the term “pedestrian.” The definition is clear. The term refers only to a person on foot or walking. In addition to being consistent with Washington law, this construction of the term is a sensible and reasonable interpretation that the ordinary purchaser of insurance would understand.

In applying the dictionary definition to the issues involved in this appeal, McLaughlin is not entitled to relief from this Court. The definition is inconsistent with McLaughlin’s position that a bicyclist is a “pedestrian.” A bicyclist cannot reasonably be described as a person on foot or walking. As a result, pursuant to the plain meaning of the word, McLaughlin is not entitled to MedPay coverage.

McLaughlin argues that the dictionary definition should not apply. Without any legal support or analysis, McLaughlin claims that the dictionary definitions do not control the plain and ordinary interpretation of undefined terms.

This position directly conflicts with the rules of policy construction followed by Courts in Washington. In fact, the Supreme Court of Washington has stated as follows:

The Court of Appeals seemingly confused the concept of "property damage" with that of "damages." The difference may seem miniscule, but the impact on the outcome of this case cannot be overstated. Although the policy provides the insurer must pay out the amount "the insured shall become legally obligated to pay as *damages*," it does not define "damages." Undefined terms in an insurance contract are given "plain, ordinary, and popular meaning" as set forth in standard English language dictionaries.

Overton at 428, citing *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990).

In *Overton*, the Washington Supreme Court criticized the same approach advocated by McLaughlin. Specifically, that dictionary definitions of undefined terms be disregarded, especially when the issue of coverage turns on the construction of such terms. The Court expressly stated that the use of dictionary definitions is to be used to give a term its plain and ordinary meaning. *Overton* at 428.

Furthermore, Washington Courts have held that the term "bicycle" is mutually exclusive from the term "pedestrian." In fact, this Court has reviewed the connection between the rules of the road and bicyclists, and stated as follows:

A bicycle is a vehicle. A roadway is “that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder even though such sidewalk or shoulder is used by persons riding bicycles.” Thus, a plain reading of the statutes shows that unlike a multiuse trail or a crosswalk, a bicycle lane adjacent to regular traffic lanes is both designed and ordinarily used for vehicular travel, and is thus part of the roadway.

Borromeo v. Shea, 138 Wn. App. 290, 293, 156 P.3d 946, 948 (2007) (emphasis added).

Borromeo illustrates the reasoning behind distinguishing bicyclists from pedestrians. Bicyclists are often held to the same standard as motor vehicles and must follow the same rules of the road. Conversely, pedestrians often have the “right of way” and are not held to the same standard as bicyclists and drivers of motor vehicles. This Court, in a different case, emphasized this reasoning, stating:

We note also that the expansion of the definition of pedestrians to include human-powered conveyances "other than bicycles" does not indicate a legislative intent to change the law as to bicycles; bicyclists were not within the definition of pedestrian before the amendment. Nor does amendment of the "vehicle" definition to include bicycles change the rights and duties of bicyclists. **Since 1965, RCW 46.61.755 has subjected bicyclists using a roadway to the rights and duties of vehicle drivers.**

Pudmaroff v. Allen, 89 Wn. App. 928, 933, 951 P.2d 335, 337 (1998) (emphasis added).

It is clear that “pedestrian” and “bicyclist” are not interchangeable terms. Pursuant to the dictionary definition, Washington law, and common sense, a bicyclist cannot be considered a pedestrian.

However, it is McLaughlin’s position that defining a “pedestrian” as “going on foot” or “a walker” is absurd. App. Brief, pg. 13. McLaughlin argues that under this interpretation, a person pushing a stroller would be covered if struck by a car but the baby would not. This example has no relevance at all to the facts of this case. McLaughlin was operating his bicycle on Westlake Avenue. A busy roadway is not a place one would expect to find a person pushing a stroller, outside of a designated crosswalk. McLaughlin’s hypothetical example is in no way applicable to the actual facts of this case.

McLaughlin further argues that the Court must disregard Washington law regarding the rules of policy construction. McLaughlin contends that the Court must instead undertake a nuanced examination of insurance laws and regulations to determine the meaning of the word “pedestrian.”

McLaughlin’s approach lacks legal support. As set forth above, in Washington, if a term is left undefined, it is given the plain and ordinary

meaning found in a Standard English dictionary. *Overton* at 428. However, McLaughlin’s Brief does not recognize or even cite to *Overton*. Rather, McLaughlin argues that the Court should consider alternative definitions as well as inapplicable court decisions from other states. It is clear, however, that McLaughlin cannot reconcile the plain meaning of the term “pedestrian,” as defined in common dictionaries, with his position that he was a pedestrian at the time of the accident.

Rather, McLaughlin argues that the plain and ordinary meaning must be construed within the context of an insurance claim. This argument is unsupported, and in fact is inconsistent with Washington law regarding policy construction.

G. Relevant Washington Laws and Codes Are Consistent With The Dictionary Definition Of “Pedestrian”

While the plain and ordinary meaning of the term “pedestrian” as found in the dictionary dictates the Court’s analysis, it is notable that Washington laws and regulations governing the rules of the road are consistent with the dictionary definition of “pedestrian.”

For example, the Seattle Municipal Codes have defined “pedestrian” in the context of roads and traffic as “any person afoot or using a wheelchair, a power wheelchair or a means of conveyance

propelled by human power other than a bicycle.” Seattle Municipal Code 11.14.445.

Additionally, the Revised Code of Washington and the Seattle Municipal Code make clear that Washington law does not include bicyclists in its definition of pedestrian. RCW 46.04.400 *explicitly* excludes bicycles from its definition of pedestrian. It states as follows:

“Pedestrian” means any person who is afoot or who is using a wheelchair, a power wheelchair, or a means of conveyance propelled by human power other than a bicycle.

RCW 46.04.400.

Moreover, the Washington legislature includes bicycles under the statutory definition of “vehicle.” The statute expressly states:

Vehicle includes every device capable of being moved upon a public highway and in, upon, or by which any persons or property is or may be transported or drawn upon a public highway, *including bicycles*.

RCW 46.04.670 (emphasis added)

As stated above, McLaughlin was operating his bicycle on Westlake Avenue near downtown Seattle. CP 2. A roadway such as Westlake Avenue is not a place designated for walkers or other pedestrians – it is specifically part of the road in which vehicles such as cars and bicycles are permitted to travel.

McLaughlin contends that bicyclists occupy an “anomalous place in the traffic safety law of Washington.” However, as referenced in the statutes relied upon by Travelers, those same traffic safety laws treat bicyclists and pedestrians differently. The legislative concerns regarding bicyclists and traffic are clear. The legislature clearly intends to treat bicyclists as vehicles, and not as pedestrians.

Although the Washington Courts have not yet specifically ruled on this issue, other jurisdictions have ruled decidedly against including bicyclists in the definition of “pedestrian” within the insurance coverage context. For example, in *Dye v. Grose*, the Court held that the term ‘pedestrian’ was not defined in the policy and was therefore subject to its common ordinary meaning. *Dye v. Grose*, 2015-Ohio-1001, *16 (Ohio Ct. App. Mar. 12, 2015). The Court further stated that “just because the policy does not define a term does not mean the policy is ambiguous.” *Dye*, citing *Chicago Title Ins. Co. v. Huntington Nat’l Bank*, 87 Ohio St.3d 270, 719 N.E.2d 955 (1999). Finally, the Court held “appellees failed to present any evidence that there is a meaning of the word ‘pedestrian’ in the auto industry that is different from that of the customary meaning of ‘going on foot’.” *Dye* at *P14.

McLaughlin argues that *Dye* is inapplicable because the Ohio Courts have split on this issue. McLaughlin relies upon the *Schroeder* case for support. However, the *Schroeder* case is factually distinguishable.

In *Schroeder*, the Ohio Court of Appeals found that for purposes of UIM coverage, the term “pedestrian” is ambiguous with respect to a bicyclist. *Schroeder v. Auto-Owners Ins. Co.*, 2004-Ohio-5667 (2004). In that case, the term “pedestrian” was not defined in the policy, but did appear in bold face. *Schroeder* at *P10. As a result, the Court determined that a different meaning may be ascribed to the term, *Schroeder* at *P28-29.

The *Dye* case was decided later, in 2015. In *Dye*, the Court specifically addressed *Schroeder* as follows:

In this case, the term "pedestrian" is not defined in the policy. However, just because the policy does not define a term does not mean the policy is ambiguous. Unlike in the *Schroeder* case, the term "pedestrian" is not in bold face in the policy, so there is no indication that the policy ascribed a specific, unusual meaning to the term due to bold face type.

Dye, supra, at *P12

Dye clearly distinguished *Schroeder*. Moreover, the facts of *Dye* are consistent with the instant matter. As in *Dye*, the McLaughlin Policy

ascribed no unusual meaning to the term “pedestrian.” As a result, McLaughlin’s reliance upon *Schroeder* fails to support his argument.

McLaughlin insists that the Court must seek to define the term “pedestrian” in a manner that is favorable to his position. However, this is contrary to Washington’s rules of policy construction. This argument is without merit. The Court should not be persuaded to engage in any form of tortured analysis in order to interpret the word “pedestrian.”

H. The Term “Pedestrian” Is Not Ambiguous

McLaughlin also argues that the term “pedestrian” is ambiguous and therefore must be construed against Travelers. This argument is without merit.

A clause or phrase is only ambiguous when, on its face, it is fairly susceptible to two different but reasonable interpretations. *Weyerhaeuser* at 666; *Kitsap County v. Allstate Insurance Company*, 136 Wn.2d 567, 575, 963 P.2d 1171 (1998). Courts may not strain to find an ambiguity in an insurance contract where none exists. *Lui v. Essex Ins. Co.*, 185 Wn.2d 703, 712, 375 P.3d 596 (2016) citing *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005); *Farmers Home Mutual Insurance Company v. Insurance Company of North America*, 20 Wn. App. 815, 820, 583 P.2d 664 (1978).

Moreover, courts cannot create ambiguity or doubt where none exists. The Washington State Supreme Court has described this rule as follows:

A court, however, may not interpret a policy in such a way that it creates nonexistent ambiguities that result in the policy being construed in favor of the insured. *See, e.g., W. Am. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 80 Wn.2d 38, 44, 491 P.2d 641 (1971); *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 734, 837 P.2d 1000 (1992)(recognizing that just because the policy language is complicated or confusing does not mean the provision in question is ambiguous).

Int'l Marine Underwriters v. ABCD Marine, LLC, 179 Wn.2d 274, 283, 313 P.3d 395 (2013); *see also Truck Insurance Exchange v. Aetna Casualty Insurance*, 13 Wn. App. 775, 778, 538 P.2d 529 (1975); *Britton v. SAFECO*, 104 Wn.2d 518, 528, 707 P.2d 125 (1985).

If the language of a term is clear and unambiguous, the court must enforce the policy as written. *American National Fire Insurance Company v. B & L Trucking and Construction Company*, 134 Wn.2d 413, 428, 951 P.2d 250 (1998).

McLaughlin argues that an ambiguity exists because the parties offer differing interpretations of the term “pedestrian.” McLaughlin claims these competing definitions require the Court to construe the term against Travelers. This argument lacks legal or factual support.

McLaughlin's argument presupposes there is an ambiguity. McLaughlin does not address the first part of the analysis. The first part of the analysis is whether there are two reasonable interpretations of the term "pedestrian." *E.g. Weyerhaeuser* at 666. In fact, the trial court concluded there was not two separate and reasonable interpretations of this term. As a result, the ambiguity issue does not even arise.

Regardless, there are not two reasonable interpretations. As set forth above, a term in an insurance policy should be given the plain, ordinary, and popular meaning set forth in the common dictionary definition. This approach is consistent with Washington law regarding construction of undefined terms. Moreover, the dictionary definition is supported by Washington and Seattle laws regarding the rules of the road.

McLaughlin, on the other hand, claims to have a reasonable but competing definition based upon a disregard for the dictionary definition. McLaughlin relies instead upon Washington insurance regulations, claiming an ordinary purchaser of insurance would consult insurance laws to define the term "pedestrian."

As stated above, an ambiguity exists only when a term is susceptible to multiple reasonable interpretations. Courts cannot create an ambiguity where none exists. *Lui, supra*. In *Lui*, the insureds made a claim following a burst water pipe. *Lui* at 706. The insurer ultimately suspended

coverage. *Lui* at 706. The lawsuit that followed turned on the interpretation of the word “inception.” *Lui* at 714.

The *Lui* Court determined that Washington Courts have already ruled regarding the term “inception.” *Lui* at 714, citing *Panorama Vill. Condo. Owners Assoc. Bd. of Dir. v. Allstate Ins. Co.*, 144 Wn.2d 130, 139, 26 P.3d 910 (2001). It held that the average insured would use the dictionary definition of the term. *Lui* at 714.

Moreover, the *Lui* Court held that no ambiguity existed. *Lui* at 717. The Court focused solely on the plain language of the relevant policy provision. *Lui* at 717. It held that “[b]ecause the [Plaintiffs’] interpretation of the endorsement and the overall policy is unreasonable, it does not create an ambiguity that must be resolved in their favor.” *Lui* at 717.

Based upon the foregoing, the *Lui* Court found there was no coverage available for the insured. *Lui* at 719-720.

In this case, as in *Lui*, competing and reasonable interpretations do not exist. The two interpretations cited by McLaughlin are Travelers’ interpretation, which follows Washington law, and McLaughlin’s novel approach, which ignores established practices for interpreting undefined terms. McLaughlin’s interpretation is not reasonable.

Moreover, McLaughlin’s position that there are ambiguities within the dictionary definitions is also without merit. McLaughlin claims that

the dictionary definition fails to account for the fact that bicyclists power bikes with their feet. This inconsistency, according to McLaughlin, results in an ambiguity.

However, the interpretation of an undefined term does not require a reasonable interpretation by an attorney or a linguist, but *exclusively* of an average, ordinary person purchasing insurance. *Weyerhaeuser* at 665.

McLaughlin's insistence that there are other interpretations that exist regarding the word "pedestrian" do not create an ambiguity nor require the Court to investigate the definition further than the term's ordinary and plain meaning.

The common dictionary definition of the term "pedestrian" is clear and unambiguous. The definition does not include bicyclists. There is a common sense basis for this interpretation. Unlike a true "pedestrian," a bicyclist involves the use of a vehicle, whether foot powered or not. A bicycle is granted access to areas such as bike lanes and roadways, which clearly place it into a category more akin to a vehicle than a person, on foot, using a sidewalk. These facts distinguish a bicyclist from a "pedestrian." This is why the vehicle codes referenced above draw clear distinctions between "pedestrians" and bicyclists.

As a result, the plain and ordinary interpretation of the word means McLaughlin was not a “pedestrian” and therefore not entitled to MedPay coverage.

McLaughlin also argues that Travelers had “every opportunity” to define “pedestrian” in its policy and therefore should have done so. There is no requirement that insurers define every term in a policy. It is simply not feasible to define every word used in an insurance policy to avoid this type of issue. This is why the Washington Courts have rules on policy construction. Some terms are inherently not ambiguous and do not need definitions, despite McLaughlin’s suggestion to the contrary.

I. McLaughlin’s Reliance Upon RCW 48 Is Without Merit

Insurance is highly regulated in Washington. There are hundreds of regulations and statutes which control and interpret insurance issues. In addition to a significant number of statutes and regulations, there are innumerable cases from the Courts of Washington interpreting nearly every aspect of insurance. In not one of those cases has any Court in Washington ever held that a bicyclist in McLaughlin’s position is a “pedestrian.” The legislature and the Washington Administrative Codes also do not expressly state that a bicyclists is a “pedestrian.”

McLaughlin’s primary argument is that an ordinary purchaser of insurance would look to statutes on casualty insurance to interpret the term

“pedestrian.” McLaughlin relies on RCW 48.22.005 as its controlling definition of the term “pedestrian.” This statute defines “pedestrian” as “a natural person not occupying a motor vehicle as defined in RCW 46.04.320.” RCW 48.22.055(11).

This argument is not applicable to this case. This broad definition does not explicitly state that a bicyclist is a “pedestrian.” Moreover, it is located in the statutes governing casualty insurance. This is a claim for MedPay coverage. McLaughlin supplies no legislative history to indicate that this definition was intended to include bicyclists as “pedestrians” for purposes of MedPay or PIP coverage.

Moreover, by relying solely upon the definition of a term found in the statutes governing casualty insurance, McLaughlin is arguing this Court should disregard Washington’s established rules for policy construction. As set forth above, undefined terms are given their plain and ordinary meaning and a reasonable and fair construction by an *average person purchasing insurance*. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665, 15 P.3d 115 (2000) (emphasis added).

For McLaughlin’s argument to have merit, he must show that an average purchaser of insurance would construe the term “pedestrian” by looking to Washington statutes regarding casualty insurance. McLaughlin provides no legal support for this analysis or process of policy

construction. McLaughlin cites no basis for this deviation from the standard Washington practice of looking to the dictionary definitions.

McLaughlin also argues that Washington law requires that this statutory definition becomes part of the policy. He relies upon *Ringstad v. Metro. Life Ins. Co.* for support. However, *Ringstad*, is a life insurance case from 1935, has never been cited for this purpose by any Washington Court. *See Ringstad*, 182 Wash. 550, 47 P.2d 1045 (1935).

Moreover, McLaughlin's argument that policies must be interpreted so as not to conflict with the public policy governing insurance does not mean he is entitled to coverage. McLaughlin supplies no legislative history showing that there is a public policy concern regarding whether or not a bicyclist is considered a "pedestrian" for purposes of MedPay coverage. He further provides no case law to show that there are public policy concerns associated with this issue.

Furthermore, the term "pedestrian" never appears in Title 48, other than in the definition section. As a result, there is no way to discern how the term was to be applied in the insurance context, because the laws set forth in Title 48 never address "pedestrians" in any way.

Regardless, McLaughlin almost entirely relies on this definition of "pedestrian" in RCW 48.22.005. This argument lacks common sense, since an average purchaser of insurance would not consult Title 48 for the

plain and ordinary meaning of the term “pedestrian.” This argument is inconsistent with Washington law. As a result, the Court should not grant McLaughlin’s request that the Trial Court be reversed.

J. McLaughlin’s Cited Authority is Not Applicable

McLaughlin relies heavily upon strained interpretations of Washington case law. These interpretations should not be accepted by this Court. Moreover, he cites to a number of non-Washington cases which are either legally or factually distinguishable. This Court should not be persuaded by McLaughlin’s attempts to use these cases to argue that the Court should stray from Washington’s well-established rules for policy construction.

McLaughlin repeatedly cites to *Pudmaroff* in support of his assertion that the Washington courts have already recognized that treating bicyclists differently than pedestrians is “absurd.” However, McLaughlin misapplies the holding of this case. In fact, the *Pudmaroff* case supports Travelers’ position that cyclists are not pedestrians.

In *Pudmaroff*, the plaintiff was riding his bicycle in a marked crosswalk. *Pudmaroff* at 57. The plaintiff stopped at a stop sign before entering the crosswalk, waited for traffic, and then proceeded into the intersection. *Pudmaroff* at 59. As the plaintiff was riding his bicycle in the

crosswalk, he was struck by Defendant's vehicle, throwing him off his bicycle and causing injuries. *Pudmaroff* at 59.

The defendant claimed that the plaintiff was a motorist at the time of the collision and should be subject to the rules of the road and not afforded the protections extended to pedestrians crossing sidewalks. *Pudmaroff* at 59. The Court disagreed, and determined that the plaintiff was a pedestrian while in the crosswalk. The Court explained its rationale as follows:

Although our State's laws on bicycles and traffic safety do not present a picture of clarity, we do not believe the Legislature's 1990 and 1991 amendment to the laws pertaining to pedestrians, crosswalks, and bicycles evidenced to overrule *Crawford*. We continue to adhere to the rule that bicyclists, ***although not pedestrians***, are to be treated akin to pedestrians when they use crosswalks to traverse a roadway in the same manner as a pedestrian.

Pudmaroff at 70 (emphasis added).

The narrow and limited exception discussed in the *Pudmaroff* case applies specifically to crosswalks where one would *expect* to find pedestrians. Moreover, the Court expressly noted that it continued to follow the rule that bicyclists are not pedestrians. *Pudmaroff* at 70.

McLaughlin also relies upon other authority which is either not applicable or not controlling. For example, McLaughlin cites to *Hill* to

argue that provisions in traffic laws have a limited scope of application outside of the traffic law context. *Hill v. Jawanda Transp. Ltd.*, 96 Wn. App. 537, 546, 983 P.2d 666 (1999). McLaughlin fails to mention that the *Hill* Court found the traffic laws immaterial to a *forums non conveniens* analysis. *Hill* at 546. Obviously, that is a much different analysis. Therefore, McLaughlin's argument that the traffic laws should be disregarded in this matter is without merit.

McLaughlin also relies on cases in which the facts vastly differ from the situation at hand, such as *Mattson*. In *Mattson* a 12-year old girl riding as a passenger on a bicycle was hit and injured during a collision with a car. *Mattson ex. Rel. Mattson v. Stone*, 32 Wn. App. 630, 631 P.2d 929 (1982). Again, these facts are distinguishable from the instant case, where McLaughlin operated the bicycle himself at the time of the accident. The injured party in *Mattson* was a passenger. Moreover, the *Mattson* Court provided no analysis of the "pedestrian" issue. In fact, it appears the insurer, PEMCO, simply accepted coverage. PEMCO's coverage decision in that matter, however, does not bind Travelers in this case.

K. McLaughlin's Arguments Based On Out of State Authority are Without Merit

McLaughlin cites a host of out of state cases that have purportedly held that a bicyclist is a pedestrian. Specifically, he cites to case law in Georgia, New Jersey, and Massachusetts.

As the Court is aware, out of state case law is not binding on this Court. *See Citizens All. For Prop. Rights Legal Fund v. San Juan County, et al.*, 181 Wn. App. 538, 546, 326 P.3d 730 (2014) (“As an out-of-state case, it is not binding on this court.”).

Moreover, the laws of these three states are fundamentally different from Washington with regard to policy interpretation. In each of these states, the Courts employ the Reasonable Expectation Doctrine. This doctrine requires that the Court construe a policy from the standpoint of the insured's expectations. *Ruggerio Ambulance Serv. v. National Grange, Ins. Co.*, 430 Mass. 794, 798, 724 N.E.2d 295 (2000) (“[Plaintiff] is correct in its assertion that we consider what an objectively reasonable insured, reading the relevant policy language, would expect to be covered.” (internal quotations omitted)(internal citations omitted)). *See also Richards v. Hanover Ins. Co.*, 250 Ga. 613, 615, 299 S.E.2d 561 (1983) (“...and insurance contracts are to be read in accordance with the reasonable expectations of the insured where possible.”)(internal citations

omitted); *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 175, 607 A.2d 1255 (1992)(“When the meaning of a phrase is ambiguous, the ambiguity is resolved in favor of the insured, and in line with the insured’s objectively-reasonable expectations.”) (internal citations omitted).

Washington has expressly rejected the Reasonable Expectation Doctrine. *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 378, 917 P.2d 116 (1996). The Washington State Supreme Court made this clear in no uncertain terms. That Court has clearly stated that “in Washington the expectations of the insured cannot override the plain language of the contract.” *Quadrant Corp v. Am. States Ins. Co.*, 154 Wn.2d 165, 172, 110 P.3d 733 (2005), citing *Findlay, supra*.

McLaughlin argues this Court should follow these non-Washington cases, which are based upon an entirely different standard of policy construction, and find that the term “pedestrian” includes a bicyclist. He resorts to these cases because Washington law is clear – the plain and ordinary meaning of the term is applied. The insured’s expectation cannot override this analysis. As a result, his non-Washington case law should be disregarded by this Court as legally distinguishable.

Moreover, many of the Non-Washington cases McLaughlin cites to are factually distinguishable. For example, McLaughlin refers to a Maryland decision where the Court surveyed other states’ laws regarding

the interpretation of “pedestrian” and noted that its meaning occasionally applies to more than just “persons walking.” *Tucker v. Fireman’s Fund Ins. Co.*, 308 Md. 69, 517 A.2d 730 (1986). McLaughlin attempts to extend the holding of the *Tucker* case, where the Maryland Court decided “pedestrian” was ambiguous, to Washington solely because Washington was included in the states surveyed. In fact, 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. *Tucker* at 75. McLaughlin’s analysis of *Tucker* is a mischaracterization of the footnote. This is not only a misleading argument, but the cited decision is not binding in any way on the Washington Courts.

Moreover, *Tucker* is about a person sitting on a stool in a parking lot. *Tucker* at 72. *Tucker* has nothing to do with someone riding a bicycle in a road. Again, *Tucker* is not binding, and it has no applicability to the matter at hand.

Finally, even if this Court were to consider non-Washington case law, the result would still be favorable to Travelers.

For example, in *Cole v. Auto-Owners Ins Co.*, the Michigan Court of Appeals reversed the decision that a bicycle is a pedestrian solely because it is a person not occupying a motor vehicle. *Cole v. Auto Owners*

Ins. Co., 272 Mich. App. 50, 53, 723 N.W.2d 922 (2006). It instead held that “pedestrian,” although undefined in the policy, retains its plain and ordinary meaning of a person on foot. *Cole* at 53. The Court’s analysis on policy construction in Michigan is also the same as Washington - if the term is undefined, it retains its plain and ordinary meaning unless ambiguous. *Cole* at 54. The *Cole* Court rejected the plaintiff’s argument that a Utah case that defined “pedestrian” in its favor should persuade the Court that “pedestrian” was ambiguous. The Court in *Cole* reasoned that the parties did not agree to be bound by language in policies from out of state and that there is “no legal reason for [them] to adopt the definitional language in Utah... particularly when the meaning of the term “pedestrian” is clear and unambiguous.” *Cole* at 56.

Although McLaughlin cites to a variety of sources that appear to support his argument, McLaughlin’s authority is misleading. In fact, holdings from Courts outside of Washington clearly support Travelers’ position. “Pedestrian” is not ambiguous and maintains its plain and ordinary meaning.

V. CONCLUSION

Based on the foregoing, Travelers asks that the Superior Court be affirmed in its entirety.

DATED this 5th day of December, 2018.

LEATHER & ASSOCIATES, PLLC

/s/ Thomas Lether

Thomas Lether, WSBA #18089

Eric J. Neal, WSBA #31863

Jenna Mark, WSBA #54366

Lether & Associates, PLLC

1848 Westlake Ave N., Suite 100

Seattle, WA 98109

Telephone: (206) 467-5444

Facsimile: (206) 467-5544

tlether@letherlaw.com

eneal@letherlaw.com

jmark@letherlaw.com

Attorneys for Respondent

Travelers Commercial Insurance Company

CERTIFICATE OF SERVICE

The undersigned certifies that on the date below stated they caused the foregoing Respondent's Brief to be served upon the below party(ies) at the address(es) and via COA Div. I - E-service.

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| Robert Levin, WSBA #18092 Anderton Law Office - Washington Bike Law 705 Second Avenue, Suite 1000 Seattle, WA 98104 (206) 262-9290 rob@washingtonbikelaw.com <i>Counsel for Plaintiff</i> | Philip A. Talmadge, WSBA #6973 Talmadge/Fitzpatrick/Tribe 2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126 (206) 574-6661 phil@tal-fitzlaw.com <i>Counsel for Plaintiff</i> |
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DATED this 5th day of December, 2018.

/s/ Stephanie Forbis
Stephanie Forbis | Paralegal

LEATHER AND ASSOCIATES, PLLC

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