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No. 97652-0

SUPREME COURT
OF THE STATE OF WASHINGTON

TODD MCLAUGHLIN, a Washington Resident,

Petitioner,

v.

TRAVELERS COMMERCIAL INSURANCE COMPANY,
a foreign corporation,

Respondent.

**TRAVELERS COMMERCIAL INSURANCE
COMPANY'S SUPPLEMENTAL BRIEF**

Thomas Lether, WSBA #18089
Lether & Associates, PLLC
1848 Westlake Ave N., Suite 100
Seattle, WA 98109
Telephone: (206) 467-5444
Facsimile: (206) 467-5544
E-mail: tlether@letherlaw.com
Attorneys for Respondent Travelers
Commercial Insurance Company

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I. INTRODUCTION

This is an appeal from a summary judgment dismissal of plaintiff McLaughlin's claims for Medical Payment benefits under a California automobile insurance policy issued by defendant Travelers.

The case turns on whether McLaughlin was a "pedestrian" within the meaning of the policy when he was riding his bicycle down Westlake Avenue in Seattle and collided with an open car door. The word "pedestrian" is not defined in the policy. Washington law requires that undefined terms in an insurance policy be given their plain, ordinary, popular meaning as determined by reference to standard English dictionaries. The parties do not dispute that the dictionary definition of "pedestrian" is a person on foot and does not include a bicyclist.

Despite the undisputed dictionary meaning of pedestrian and undisputed conclusion that McLaughlin did not fall within that meaning at the time of his accident, McLaughlin urges the Court to adopt inapplicable statutory definitions of "pedestrian" from Washington or other states. While McLaughlin cites authority standing for the proposition that insurance policies must conform to applicable statutes, he cites no authority for the proposition that inapplicable statutory definitions override the plain meaning of a policy term. In fact, the Court of Appeals noted this omission in rejecting McLaughlin's argument. The Court concluded as follows:

But none of the authority cited by McLaughlin mandates that the plain meaning of an undefined term in an insurance policy be displaced if there is a definition of the same term

in an insurance statute. Rather, they stand for the general proposition that insurance policies cannot violate applicable statutes.

McLaughlin v. Travelers Commercial Ins. Co., ___ Wn. App. ___ 446 P.3d 654, 657 (2019).

For the reasons set forth below, this Court should uphold the plain meaning rule and affirm the judgment of the trial court and the Court of Appeals.

II. STATEMENT OF THE CASE

This is an appeal from a summary judgment dismissal of McLaughlin's claims. The following facts that are not materially in dispute. On July 31, 2017, plaintiff 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. McLaughlin suffered bodily injury as a result of the impact. *Id.*

Travelers insured McLaughlin under an Automobile policy. CP 17. The policy was issued to McLaughlin for six vehicles at an address in Pleasanton, California. CP 17, 20. McLaughlin submitted a claim under that policy for Medical Payment benefits. CP 68. For the purposes of the Medical Payments coverage, the policy defines "Insured" as follows:

- 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.

2. Any other person while “occupying”:
 - a. “Your covered auto”; or
 - b. A motor vehicle that you do not own while being operated by you or a “resident relative”.

CP 39.

Travelers adjusted the claims and issued payment of \$100,000 under the UIM portion of the policy. Transcript of Record at 14:11-12. Travelers disclaimed Medical Payments coverage to McLaughlin because he did not meet the above definition of “insured” at the time of the accident. CP 64-65. McLaughlin disagreed and filed this lawsuit, claiming that a person riding a bicycle on a street that collides with a car door is a “pedestrian” struck by a motor vehicle. CP 154. The Superior Court dismissed the lawsuit on summary judgment, holding that McLaughlin was not a pedestrian. CP 249-250. McLaughlin appealed the ruling and the Court of Appeals affirmed. *McLaughlin v. Travelers Commercial Ins. Co.*, ___ Wn. App. ___, 446 P.3d 654 (2019).

III. ARGUMENT

A. Undefined Insurance Policy Terms Are Given Their Plain, Ordinary Meaning

Washington courts construe insurance policies as contracts. *Kut Suen Lui v. Essex Ins. Co.*, 185 Wn.2d 703, 710, 375 P.3d 596 (2016). The terms of a policy are given a “fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.” *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 424,

38 P.3d 322, 325 (2002). “Undefined terms, however, must be given their ‘plain, ordinary, and popular’ meaning.” *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998).

That plain or popular meaning “may be ascertained by reference to standard English dictionaries.” *Kut Suen Lui*, 185 Wn.2d at 713, 375 P.3d at 601; *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 77, 882 P.2d 703, 718 (1994); *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507, 511 (1990). As the Courts have stated:

To determine the ordinary meaning of an undefined term, our courts look to standard English language dictionaries.

Boeing, supra.

This has been the established law in Washington regarding insurance coverage for decades. If words have both a legal, technical meaning and a plain, ordinary meaning, the ordinary meaning will prevail unless it is clear that both parties intended the legal, technical meaning to apply. *Kitsap County*, 136 Wn.2d at 576, 964 P.2d at 1173. This is exactly the standard used by the Court of Appeals, which stated as follows:

Because we **must** give an undefined term in an insurance policy its plain, ordinary, and common meaning and because the dictionary definition of “pedestrian” excludes bicyclists, we hold that McLaughlin was not a pedestrian at the time of his injury and therefore not entitled to PIP benefits.

McLaughlin v. Travelers Commercial Ins. Co., ___ Wn. App. ___ 446 P.3d 654, 657 (2019) (emphasis added).

The plain meaning rule and reference to standard dictionary definitions is also utilized in most, if not all, state and federal courts throughout the country. For example, the California Courts in *Chatton v. National Union Fire Ins. Co.* used the dictionary definition to construe the term “bodily” in an insurance contract. *Chatton*, 10 Ca. App. 4th 846, 853 (1992). In *Terminal Freezers v. US Fire Ins.*, the Ninth Circuit Court of Appeals, applying Washington law, used the dictionary to define the term “ice.” *Terminal Freezers*, 345 Fed. Appx. 305 (9th Cir. 2009).

As the Court of Appeals recognized, the dictionary definition of “pedestrian” does not support McLaughlin’s argument. Webster’s Third New International Dictionary defines “pedestrian” as “a person who travels on foot: “WALKER : as a : one who walks for pleasure, sport, or exercise : HIKER ... b : one walking as distinguished from one travelling by car or cycle.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1664 (2002). McLaughlin points to no competing standard English dictionary or other general reference work containing a definition of “pedestrian” that would include a cyclist riding on a public road.

McLaughlin’s arguments in his Petition for Review based upon Washington law involving the duty to defend are not applicable. For example, McLaughlin’s relies on *Am. Best Food, Inc. v. Alea London, Ltd.* That case simply addresses the duty to defend and the rule that insurers should provide a defense if the allegations against the insured potentially trigger a duty to defend. *See Alea London*, 168 Wn.2d 398, 229 P.3d 693

(2010). That legal authority does not modify the rule that undefined terms should be given their plain and ordinary meaning or should be construed by reference to a dictionary definition. This is particularly true in first-party insurance context, such as this case, when the duty to defend is not at issue.

Finally, McLaughlin's argument that the term is ambiguous is without merit. As the Court of Appeals pointed out:

But here, "pedestrian" is not ambiguous under either the dictionary definition or RCW 48.22.005(11). Therefore, we are not required to construe "pedestrian" in McLaughlin's favor.

McLaughlin v. Travelers Commercial Ins. Co., ___ Wn. App. ___ 446 P.3d 654, 657 (2019)

A clause or phrase is only ambiguous when it is fairly susceptible to two different but *reasonable* interpretations. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 666, 15 P.3d 115, 122 (2000); *Kitsap County*, 136 Wn.2d 567 at 575, 963 P.2d at 1171 (emphasis added). Courts may not strain to find an ambiguity in an insurance contract where none exists. *Kut Suen Lui*, 185 Wn.2d at 712, 375 P.3d at 596 citing *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005); *Farmers Home Mut. Ins. Co. v. Ins. Co. of N. Am.*, 20 Wn. App. 815, 820, 583 P.2d 664 (1978). 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*, 142 Wn.2d at 666, 15 P.3d at 122.

McLaughlin's arguments that there are competing interpretations of the word "pedestrian" are without merit. McLaughlin's two interpretations 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, neither the dictionary nor any other standard reference provides an alternative "technical" definition of "pedestrian" that would include a bicyclist riding on a public street. But even if such a definition existed, the ordinary popular meaning would prevail unless it was "clear that both parties intended the legal, technical meaning to apply." *Kitsap County*, 136 Wn.2d 567 at 576, 964 P.2d at 1178. Here, no evidence shows that the parties intended some other meaning of the word.

B. No Statute Governs the Interpretation of the Word "Pedestrian" in the Policy

McLaughlin provides no legal support for his position that a statute governs this policy or requires any particular scope of coverage. In the absence of such legal support, the argument fails. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

Moreover, even if this were a Washington policy, the definition would have no effect in this accident scenario. The purpose of the statute

is not to define the word “pedestrian” whenever it appears in an insurance policy and it does not purport to do so. The RCW 48.22.005(11) definition of “pedestrian” as a “natural person not occupying a motor vehicle as defined in RCW 46.04.0320” has the sole function of informing the definition of “insured” in RCW 48.22.005(5)(b), which includes a “person who sustains bodily injury caused by an accident while . . . (ii) a pedestrian accidentally struck by the insured automobile.” The word “pedestrian” appears nowhere else in the chapter. Here, *McLaughlin* was *not struck by one of the insured vehicles on the policy*, so even if this was a Washington policy, that statutory definition of “pedestrian” would not govern the outcome.

The Court of Appeals expressly rejected *McLaughlin*’s statutory argument. It noted that even if the Court could look to the statutory definitions, they did not support *McLaughlin*’s argument because he used an impermissibly narrow reading of the Washington statutes. The Court of Appeals explained this as follows:

RCW 48.22.005(11) states that “[p]edestrian’ means a natural person not occupying a motor vehicle *as defined in RCW 46.04.320* . . . Title 46 RCW not only includes a definition of “motor vehicle,” it also includes definitions for the terms “pedestrians” and “vehicle.” See RCW 46.04.400 (“Pedestrian” is defined as “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.”), .670 (“Vehicle” is defined as “every device being 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.”). Under those related definitions, the legislature expressly determined that a bicyclist was not a

pedestrian, but a vehicle. The definition of “pedestrian” in RCW 48.22.005(11) specifically refers the reader to Title 46 RCW. Therefore, we attempt to harmonize the definition of “pedestrian” in that statute with the definition of “pedestrian” found in RCW 46.04.400. Because RCW 48.22.005(11) does not explicitly refer to bicyclists, the statutes can be harmonized by excluding bicyclists from that definition of “pedestrian,” in accordance with RCW 48.04.400.

McLaughlin v. Travelers Commercial Ins. Co., ___ Wn. App. ___ 446 P.3d 654, 657 (2019).

For this reason, the Court correctly held as follows:

McLaughlin argues that we must narrowly read RCW 48.22.005(11) to incorporate only the definition of “motor vehicle” from chapter 46.04 RCW. But doing so would violate the maxims of statutory construction that require us to determine the legislature’s intent in part by reading a statute within the context of its related provisions and the statutory scheme as a whole. See Segura, 184 Wn.2d at 591. Therefore, we do not read RCW 48.22.005(11) narrowly.

McLaughlin v. Travelers Commercial Ins. Co., ___ Wn. App. ___ 446 P.3d 654, 657 (2019).

Moreover, the Court correctly pointed out that reliance on non-Washington case law involving statutory construction is simply inapplicable because the issue in this case involves insurance contract construction and not statutory construction. *McLaughlin v. Travelers Commercial Ins. Co.*, ___ Wn. App. ___ 446 P.3d 654, 657 (2019).

McLaughlin does not argue that the actual intent of the parties to this California insurance contract was to silently incorporate by reference a Washington statutory definition. Moreover, McLaughlin fails to identify

any legal principle showing that parties should be presumed to intend that undefined words in their contract be given definitions from inapplicable statutes from jurisdictions that have no connection to the formation of the contract.

Definitions found in statutes are not evidence of the plain ordinary meaning of a word. Because legislatures are not in the dictionary business, they typically bother to define words only when they intend a meaning other than plain, ordinary meaning of the word. As a result, “[i]n the absence of a specific statutory definition, words in a statute are given their common law or ordinary meaning.” *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 395, 325 P.3d 904, 907 (2014). Thus, if the legislature wanted a term to be given its plain ordinary meaning, it could simply leave the word undefined. The fact that the legislature defined the term indicates that they intended to employ a definition other than the common, ordinary meaning.

Regardless, McLaughlin asks the Court to declare that the parties to a California contract meant to adopt this legal, statutory definition from Washington when they simply wrote “pedestrian.” In addition, RCW 48.22.005, interpreted in the manner urged by McLaughlin, conflicts with the legislature’s direct definition of “pedestrian” in RCW 46.04.400 as “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.” Because RCW 48.22.005(11) and statutes like it in other jurisdictions are neither evidence of the parties’ intent nor evidence of the plain ordinary meaning of “pedestrian,” they have no relevance to the contract interpretation question before the Court.

Moreover, because the statute does not actually direct the outcome in this case the case law relied on by McLaughlin is easily distinguishable. McLaughlin cites *Mission Ins. Co. v. Guar. Ins. Co.*, 37 Wn. App. 695, 699, 683 P.2d 215, 218–19 (1984), where the court stated as follows:

a motor vehicle liability policy must contain an omnibus clause, RCW 46.29.490(2)(b), and the liability of the insurer becomes absolute when injury or damage covered by the policy occurs. RCW 46.29.490(6)(a); *Tibbs v. Johnson, supra* at 111, 632 P.2d 904. The form of an automobile policy must be filed with and approved by the insurance commissioner. RCW 48.18.100. Therefore, the omnibus clause cannot be modified simply by agreement of the insurance carrier and the named insured.

Mission stands for the proposition that if the legislature dictates the contract must have a specific term in it, then the ordinary rules of contract construction are irrelevant and the statutorily required term will be deemed a part of the contract whether the parties intended that result or not. *Id.* But here, unlike in *Mission*, the legislature has nothing at all to say about the definition of “pedestrian” in the Medical Payments coverage section of a policy issued on California vehicles.

In the same vein, McLaughlin cites *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 63 n.7, 322 P.3d 6, 12 (2014), where, in a footnote, the court observed that a provisions of a Washington policy’s Personal Injury Benefits coverage closely tracked the provisions of RCW

48.22.005(3). But the policy before the Court is not a Washington PIP policy and it is not governed by RCW 48.22.

McLaughlin also cites *Boggs v. Whitaker, Lipp & Helea, Inc.*, 56 Wn. App. 583, 585, 784 P.2d 1273 (1990) for the observation that “a contract will be interpreted in light of the statutes that affect its subject matter.” But again, McLaughlin points to no Washington statute that affects the definition of “pedestrian” in a policy issued in California.

McLaughlin’s citation to cases from other jurisdictions where there was an applicable statutory definition of “pedestrian” is also of no avail. McLaughlin cites to *Fireman’s Fund Ins. Co. v. Kerger*, 194 Ga. App. 20, 20, 389 S.E.2d 541, 542 (1989)(“The parties agree that for the purposes of this case plaintiff must be considered a “pedestrian” under Georgia law. See OCGA § 33–34–2(11).”); *Harbold v. Olin*, 287 N.J. Super. 35, 39, 670 A.2d 117, 119 (N.J. Super. Ct. App. Div. 1996)(“A person riding a bicycle is considered a pedestrian for purposes of our State automobile insurance laws. See N.J.S.A. 39:6A–2h”); *Pilotte v. Aetna Cas. & Sur. Co.*, 384 Mass. 805, 806, 427 N.E.2d 746, 747 (1981)(“the Legislature expanded the common meaning of ‘pedestrian’ to include those on bicycles, tricycles, horses, or in carriages drawn by an animal”). These cases stand for the unremarkable proposition that while a bicyclist might not ordinarily be considered a pedestrian, they will be so considered when an applicable statute directs that outcome. In this matter, no applicable statute dictates that the word “pedestrian” in the policy before the Court be read to include bicyclists. McLaughlin fails to identify any case law

holding that the word “pedestrian” includes a bicyclist in the absence of an express statute requiring that interpretation.

C. Statutory Definitions of Pedestrian Are Not Evidence of the Plain Meaning of the Word or Evidence of the Parties’ Intent

Despite the absence of an actual legislative directive, McLaughlin argues that the mere existence of insurance statutes in some jurisdictions with broad definitions of “pedestrian” creates a general “insurance definition” of “pedestrian” that trumps the ordinary meaning of that word. No legal authority whatsoever supports this notion. As a result, the Court of Appeals correctly applied long standing Washington law regarding the construction and interpretation of insurance contracts.

In *DeHeer*, this Court held “[w]here no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after a diligent search, has found none.” *DeHeer*, 60 Wn.2d at 126, 372 P.2d at 193.

The ordinary meaning, of a person “on foot,” should therefore govern.

Finally, McLaughlin argues that public policy requires coverage be extended to bicyclists in this situation. The Court of Appeals held that public policy is not a basis for construing insurance contracts, and that McLaughlin has no legal support for this argument. *McLaughlin v. Travelers Commercial Ins. Co.*, ___ Wn. App. ___ 446 P.3d 654, 657 (2019). As a result, the Court of Appeals correctly rejected this argument.

IV. CONCLUSION

Travelers respectfully requests that the Supreme Court apply the plain meaning rule to the undefined word “pedestrian” and affirm the Court of Appeals.

RESPECTFULLY SUBMITTED this 7th day of February, 2020.

LEATHER & ASSOCIATES, PLLC

/s/ Thomas Lether

Thomas Lether, WSBA #18089
Lether & Associates, PLLC
1848 Westlake Ave N., Suite 100
Seattle, WA 98109
Telephone: (206) 467-5444
Facsimile: (206) 467-5544
tlether@letherlaw.com
*Attorney for Respondent Travelers
Commercial Insurance Company*

CERTIFICATE OF SERVICE

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing on the party mentioned below as indicated:

<p><i>Counsel for Appellant Todd McLaughlin</i> Robert Levin Anderton Law Office - Washington Bike Law 705 Second Avenue, Suite 1000 Seattle, WA 98104 rob@washingtonbikelaw.com</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail</p>
<p><i>Counsel for Appellant Todd McLaughlin</i> Philip A. Talmadge Aaron Paul Orheim 2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126 phil@tal-fitzlaw.com Aaron@tal-fitzlaw.com</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight <input checked="" type="checkbox"/> E-mail</p>
<p><i>Counsel for Amicus Curiae United Policyholders</i> Ian S. Birk Gabriel E. Verdugo Keller Rohrback 1201 Third Ave., Suite 3200 Seattle, WA 98101-3052 ibirk@KellerRohrback.com gverdugo@kellerrohrback.com</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail</p>
<p><i>Counsel for Amicus Curiae Cascade Bicycle Club</i> Stephanie Taplin Newbry Law Office 623 Dwight Street Port Orchard, WA 98366 stephanie@newbrylaw.com</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail</p>

DATED this 7th day of February, 2020.

/s/ Elizabeth Kruh
 Elizabeth Kruh | Paralegal

LEATHER AND ASSOCIATES, PLLC

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Sender Name: Lindsay Hartt - Email: lhartt@letherlaw.com

Filing on Behalf of: Thomas Lether - Email: tlether@letherlaw.com (Alternate Email: lhartt@letherlaw.com)

Address:
1848 Westlake Ave. N.
Suite 100
SEATTLE, WA, 98109
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