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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JAN -9 PM 3: 07

No. 67702-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ANTHONY VASQUEZ,

Appellant,

v.

AMERICAN FIRE AND CASUALTY COMPANY,
an Ohio Corporation,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MARY YU

BRIEF OF APPELLANT

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I. INTRODUCTION

A Washington resident who has the misfortune of being hit by an underinsured teenage driver while walking in a crosswalk can take some comfort from Washington's broad UIM statute, RCW 48.22.030, which requires the auto insurer providing the liability policy under which the pedestrian is an insured to provide underinsured motorist (UIM) coverage for damages beyond the at-fault driver's limits. An insured has UIM protection whether in a "covered auto," in some other auto, a pedestrian, or even, while sitting in a "rocking chair on their front porch." ***Grange Ins. Ass'n v. Great American Ins. Co.***, 89 Wn.2d 710, 718, 575 P.2d 235 (1978) (citation and internal quotation omitted).

Appellant Anthony Vasquez, the president and majority owner of Benchmark Construction, Inc., was seriously injured when he was struck by an underinsured vehicle while walking in a crosswalk. Mr. Vasquez sought UIM benefits under the only automobile insurance policy he owned – Benchmark's business automobile policy (BAP) with respondent American Fire and Casualty Company (American Fire), which insured his personal pick-up truck.

The trial court dismissed Mr. Vasquez's motion on summary judgment because he was not occupying a covered vehicle when he was injured as a pedestrian. Because American Fire's BAP covered his personal vehicle as well as every Benchmark "employee" as a named insured for liability purposes, however, Mr. Vasquez, is entitled to the broad "rocking chair" coverage required by Washington's UIM statute, in the same way that a "family member" of a policyholder is entitled to UIM coverage as a named insured in a personal auto liability policy. This court should reverse, hold that Mr. Vasquez is entitled to UIM coverage as a matter of law, and award attorney fees to the insured.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in entering its Order Granting Summary Judgment. (CP 316-18) (Appendix A)

B. The trial court erred in denying plaintiff's motion for reconsideration. (CP 334-35) (Appendix B)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

RCW 48.22.030(2) requires an insurer issuing liability insurance "with respect to any motor vehicle registered or principally garaged in this state" to provide UIM coverage "for the protection of persons insured thereunder."

A. Is the owner of a business purchasing a business auto liability policy that provides coverage for his personal vehicle entitled to UIM coverage for injuries suffered as a pedestrian after being hit by an uninsured driver?

B. Is the president and supervisor of a construction company a named insured under a business auto policy that provides liability coverage (1) to any "employee" when using any auto that was *not* owned, hired or borrowed by their employer, (2) for claims against him in a supervisory capacity, and (3) where the insurer treated him as the named insured in paying medical benefits under the policy?

C. Did the trial court err in limiting uninsured motorist coverage to only those circumstances under which a business auto policy would provide liability coverage?

IV. STATEMENT OF THE CASE

A. American Fire Denied Mr. Vasquez UIM Benefits Under His Company's Auto Policy, Which Provided The Only Available Liability Coverage For His Personally Owned Vehicle.

Appellant Anthony Vasquez is the president, majority owner, and construction supervisor of Benchmark Underground Construction, Inc., (Benchmark). Prior to December 1, 2007, Mr.

Vasquez secured a package of commercial insurance coverages for Benchmark. As part of this coverage, Mr. Vasquez purchased the American Fire Business Automobile Policy ("BAP"), in order to have full insurance protection for himself and his company. Mr. Vasquez did not have any other auto insurance coverage, either bodily injury coverage or UIM coverage, from any other insurer. Mr. Vasquez was specifically excluded as an insured under his wife's automobile policy. (CP 43)¹

Mr. Vasquez owned a 2007 Ford F-350 Pickup ("F-350"), which he purchased and registered in his name. He used the F-350 daily in both his work and personal affairs. (CP 43) Mr. Vasquez's F-350 was specifically insured under American Fire's BAP. (CP 242, see CP 8, 12-13, 33-34) The F-350 is listed in the Declarations to the BAP as a "covered vehicle." (CP 239, 242)

Mr. Vasquez, through Benchmark, paid a total of \$5,682.00 in premiums for American Fire's BAP (CP 236, 238), including a separate premium that American Fire charged for "underinsured motorist bodily injury" coverage for Mr. Vasquez's F-350. (CP 242)

¹ The American Fire BAP included "business auto coverage form" CA 00 01 10 01 and "Washington Underinsured Motorists Coverage" endorsement CA 87 04 07 07. (CP 45-80) The policy was issued and delivered in Washington State. (CP 236-38)

American Fire also charged a premium for “NON-OWNERSHIP LIABILITY COVERAGE” to protect Benchmark employees when they were using “any” auto that was not owned by Benchmark. The premium was calculated based on the “number of employees,” listed in the Declaration as five, which included Mr. Vasquez. (CP 243)

On September 15, 2008, while in a marked crosswalk, Mr. Vasquez sustained serious injuries when he was struck by an underinsured motorist. (CP 42, see CP 12-13) Mr. Vasquez claimed benefits under the UIM endorsement to American Fire’s BAP for Benchmark, the only auto policy he had. (CP 43) American Fire paid Mr. Vasquez benefits as an insured under the medical benefits protection portion of its BAP. (CP 43) However, American Fire denied Mr. Vasquez’ claim for UIM coverage, asserting that its BAP provided coverage only to the corporation, Benchmark, or to “any other person occupying an insured vehicle.” (CP 221) American Fire claimed that because “Mr. Vasquez was a pedestrian and was not occupying a covered auto, . . . Underinsured Motorists Coverage is not afforded for this loss.” (CP 221)

B. The Trial Court Granted Summary Judgment Dismissing Mr. Vasquez's Declaratory Judgment Action.

Mr. Vasquez filed this action against American Fire to establish UIM coverage under the BAP on January 10, 2009. (CP 1-7) American Fire counterclaimed for a declaration that there is no UIM coverage. (CP 8-9) On cross-motions for summary judgment, King County Superior Court Judge Mary Yu ("the trial court") concluded that Mr. Vasquez had UIM coverage under the policy only "as an employee while using a covered vehicle or as a supervisor in a case of vicarious policy," and, therefore, he was not entitled to "broad UIM coverage for injuries suffered as a pedestrian." (CP 317) On August 26, 2011, the trial court dismissed Mr. Vasquez's action (CP 317) and then denied his motion for reconsideration. (CP 334-35) Mr. Vasquez timely appealed. (CP 328-29)

V. ARGUMENT

A. This Court Reviews De Novo The Trial Court's Summary Judgment Ruling, Which Misapplied Washington State's Public Policy Providing Broad UIM Coverage Under Auto Liability Policies.

The trial court committed an error of law in denying Mr. Vasquez UIM benefits for injuries suffered as a pedestrian. Mr. Vasquez was insured under the liability portion of American Fire's BAP because (1) his personal vehicle was a covered auto under the policy, and (2) he qualified as a named insured for liability purposes. The trial court erred in limiting his UIM coverage to his occupancy of a covered vehicle. This court reviews the trial court's summary judgment de novo. **Butzberger v. Foster**, 151 Wn.2d 396, 401, 89 P.3d 689 (2004). Interpretation of an insurance policy is a question of law that this court also reviews de novo. **Safeco Insurance Co. v. Country Mutual Insurance Co.**, __ Wn. App. __, ¶ 4, __ P.3d __ 2011 WL 6149841 (2011). Finally, interpretation of the insurance code, RCW ch. 48.22, is also a legal issue. **Boag v. Farmers Ins. Co.**, 117 Wn. App. 116, 123, 69 P.3d 370 (2003).

The scope of UIM coverage under American Fire's BAP is governed by the legislature's declared public policy to broadly provide UIM coverage to anyone entitled to coverage under an auto

liability policy. By statute, an insurer providing liability coverage “with respect to any motor vehicle registered or principally garaged in this state” must also provide coverage “for the protection of persons insured thereunder who are legally entitled to recover damages from owners of operators of underinsured motor vehicles . . .” RCW 48.22.030(2). Such UIM coverage must be “in the same amount as the insured’s third party liability coverage.” RCW 48.22.030(3).

The broad public protection required by RCW 48.22.030 is “read into and become(s) part of the contract of insurance,” overriding exclusionary language in the policy that would narrow UIM coverage. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 251, 850 P.2d 1298 (1993), quoting *Touchette v. Northwestern Mut. Ins. Co.*, 80 Wn.2d 327, 335, 494 P.2d 479 (1972). Because the UIM statute “is to be liberally construed in order to provide broad protection against financially irresponsible motorists,” Washington courts will “void[] any provision in an insurance policy which is inconsistent with the statute, which is not authorized by the statute, or which thwarts the broad purpose of the statute.” *Clements*, 121 Wn.2d at 251.

Under both the plain language and the public policy behind RCW 48.22.030, “once it is determined that a person is an insured under the policy, that person is entitled to uninsured motorist coverage.” *Federated American Ins. Co. v. Raynes*, 88 Wn.2d 439, 444, 563 P.2d 815 (1977); accord, *Rau v. Liberty Mutual Ins. Co.*, 21 Wn. App. 326, 329, 585 P.2d 157 (1978) (“once it is determined that a person is insured under the liability section of the policy, that person is also entitled to be considered as an insured under the uninsured motorist endorsement of the policy”). Moreover, a person entitled to coverage as an insured under the liability portion of the policy is entitled to UIM benefits “whatever her activity may have been when she was injured by an underinsured motorist.” *Kowal v. Grange Insurance Ass’n*, 110 Wn.2d 239, 245, 751 P.2d 306 (1988).

The trial court misapplied these principles and misread the BAP policy in sanctioning American Fire’s denial of UIM coverage to Mr. Vasquez on the ground that he was not using a covered auto or at risk for vicarious liability when he was injured as a pedestrian. Its decision improperly grafts auto liability coverage restrictions onto UIM coverage. RCW 48.22.030 does not permit insurers to deny

UIM coverage on the basis of restrictions contained in the *liability* provisions of the policy. If they could, no named insured in an auto liability policy would be covered for injuries suffered as a pedestrian. As a person specifically insured under the liability portion of American Fire's BAP, Mr. Vasquez was entitled to broad UIM coverage for injuries that he sustained as a pedestrian.

B. Mr. Vasquez Had Broad Liability Coverage Under The American Fire BAP.

Mr. Vasquez's auto liability coverage under American Fire's BAP could not have been broader. American Fire provided liability coverage to Mr. Vasquez (1) because his car was a "covered auto," (2) as an employee of Benchmark when operating *any* auto, (3) as a Benchmark supervisor who could be vicariously liable for the conduct of other insureds, and (4) because he fell within the definition of "you" in the American Fire BAP. Because Mr. Vasquez qualified as an insured for liability purposes, the trial court erred in denying him UIM coverage.

1. Mr. Vasquez Was Entitled to Liability Coverage Because His Truck Was A Covered Auto.

Mr. Vasquez obtained liability insurance for his F-350 under the American Fire policy, which was the only liability coverage he

had. The “Business Auto Coverage Form” to American Fire’s BAP named the following insureds:

SECTION II – LIABILITY COVERAGE

A. Coverage

...

1. Who Is An Insured

The following are “insureds”:

- a. You for any covered “auto.”
- b. Anyone else while using with your permission a covered “auto” you own, hire or borrow except:

...

(2) Your “employee” if the covered “auto” is owned by that “employee” or a member of his or her household.²

(CP 55-56) Mr. Vasquez thus was an insured under the liability portion of American Fire’s BAP when he was using his personally owned F-350, any other vehicle listed in the policy’s declaration pages, or any auto that Benchmark owned, hired or borrowed.

² This exception, which could have excluded Mr. Vasquez’s F-350 from coverage, was overridden by a policy endorsement entitled “Hired Autos Specified as Covered Autos You Own” (the “Hired Autos Endorsement”), which stated:

A. Any “auto” described in the **Schedule** will be considered a covered “auto” you own and not a covered “auto” you hire, borrow or lease under the coverage for which it is a covered “auto.” (Emphasis added)

(CP 77) The “Schedule” portion of the endorsement is blank. The endorsement refers the reader to the policy Declarations as applicable where “no entry appears in the Schedule.” Mr. Vasquez’s F-350 was listed in the policy Declarations. (CP 239)

American Fire's BAP was the only auto liability and UIM coverage that Mr. Vasquez had or needed. Mr. Vasquez, through his company Benchmark, paid a premium for UIM coverage specifically on his F-350. (CP 242) As the *de facto* purchaser of the American Fire policy, Mr. Vasquez was entitled to the broad UIM coverage mandated by statute:

Where the victim is the purchaser of the UIM policy, however, the denial of UIM benefits will thwart the public policy in favor of full compensation. In those situations, the victim does not have any alternative source of UIM coverage. It is not reasonable to expect that any motorist will buy more than one UIM policy.

Tissell By and Through Cayce v. Liberty Mutual Ins. Co., 115 Wn.2d 107, 111, 795 P.2d 126 (1990). The trial court's limitation of UIM coverage to those circumstances under which the BAP would provide liability coverage deprives Mr. Vasquez of all UIM coverage, and "frustrates the Legislature's intent to provide UIM coverage to all potential victims." ***Tissell***, 115 Wn.2d at 111.

2. Mr. Vasquez Was A Named Insured As An "Employee" Of Benchmark.

Mr. Vasquez was also an *employee* of Benchmark, in his capacity as President and construction supervisor. (CP 42) Benchmark employees were *named* as insureds under American

Fire's auto liability coverage when they were using any auto that was not owned, hired or borrowed by Benchmark.

An endorsement to American Fire's BAP entitled "Master Pak for Commercial Automobile" (CP 68-71) specifically added employees of Benchmark as insureds under the liability portion of American Fire's BAP. The Master Pak Endorsement expanded the definition of an "insured" in the "Business Auto Coverage Form" portion of the policy, as follows:

2. Who is An Insured

Paragraph **A.1** - Who is An Insured - of Section II, Liability Coverage, is amended to add:

...

F. Any employee of yours while using a covered "auto" you don't own, hire or borrow in your business or your personal affairs.

(CP 69) (emphasis added)

American Fire's BAP Declarations contain "covered auto symbols" identifying the types of vehicles that are "covered autos" under the various coverages. (CP 47) For liability insurance under the BAP, the symbol given is 01 (CP 47), defined on the first page of the Business Auto Form as "any auto". (CP 54) Mr. Vasquez, as an employee and therefore a named insured under American Fire's

BAP, had broad liability coverage protecting him whether he was using an auto owned, hired or borrowed by Benchmark, or “any” other auto. According to the BAP, American Fire’s liability coverage for Mr. Vasquez when he was using his F-350 was “primary”. When Mr. Vasquez, as a Benchmark employee, was using “any auto” that was not owned by Benchmark, American Fire’s liability coverage was “excess over any other collectible insurance.” (CP 63)

Given the plain language of its policy, American Fire cannot reasonably argue that Benchmark employees are entitled to insurance coverage only while occupying a specific vehicle. American Fire set the Benchmark premium based on its risk in providing coverage to Mr. Vasquez and the other Benchmark employees for “any auto” not owned by Benchmark, as reflected on the Declaration page. (CP 236, 238) American Fire’s premium for the “NON-OWNERSHIP LIABILITY COVERAGE” is based on the number of Benchmark employees – five – listed in the Declaration page. (CP 243) The five employees included Mr. Vasquez. If Benchmark had more employees, the premium for this “NON-

OWNERSHIP LIABILITY COVERAGE” presumably would have increased.

As an “employee,” Mr. Vasquez was a named insured for liability purposes under the American Fire BAP. He was therefore entitled to broad UIM coverage.

3. Mr. Vasquez Was Also A Named Insured For Any Vicarious Liability Based On The Conduct Of Other Benchmark Employees.

Although Mr. Vasquez was a named insured under American Fire’s BAP as an “employee,” he also qualified as an insured for liability purposes in other ways. For one, the Business Auto Form included in the definition of “Who Is An Insured” persons in authority, such as Mr. Vasquez, for vicarious liability:

- c. Anyone liable for the conduct of an “insured” described above but only to the extent of that liability.

(CP 56)

As President and construction supervisor of Benchmark, Mr. Vasquez would have been potentially “liable for the conduct of” other employees/insureds. He was therefore an insured under American Fire’s BAP liability coverage as a supervisor as well as an employee.

4. American Fire Treated Mr. Vasquez As The Named Insured Under The Medical Payments Coverage Of The BAP.

Mr. Vasquez also qualified as an insured under the definition of “you” in the BAP. The policy states that the term “you” “... refer(s) to the Named Insured shown in the declarations.” (CP 54) The Declarations identify Benchmark as the named insured. (CP 236) However, Mr. Vasquez’s personally owned vehicle, the F-350, was specifically listed in the BAP’s Declarations (CP 242), and the Hired Autos Endorsement modified the policy by stating that any auto described in the declarations would be considered a “covered ‘auto’ you own...”. (CP 77)³

This language brings Mr. Vasquez within the definition of “you.” If Mr. Vasquez is the legal owner of the F-350 identified in

³ The “Hired Autos Endorsement” stated:

A. Any “auto” described in the **Schedule** will be considered a covered “auto” you own and not a covered “auto” you hire, borrow or lease under the coverage for which it is a covered “auto.” (Emphasis added)

The “Schedule” portion of the endorsement is blank. The endorsement refers the reader to the policy Declarations to “complete the endorsement”. Mr. Vasquez’s F-350 was listed in the policy Declarations. (CP 242)

the Declarations, and the Hired Autos Endorsement converts the F-350 into a vehicle “you” own, the term “you” has been expanded to include Mr. Vasquez.

That Mr. Vasquez was included in the term “you” for BAP coverage purposes is further supported by American Fire’s conduct in paying medical expenses for Mr. Vasquez under its “Auto Medical Payments Coverage” endorsement to the BAP. (CP 79-80) That endorsement identified insureds, in pertinent part, as follows:

B. WHO IS AN INSURED.

- 1. You** while “occupying” or, while a pedestrian, when struck by any “auto”. (Emphasis added)

(CP 79) By paying medical benefits to Mr. Vasquez under this coverage, (CP 43), American Fire treated Mr. Vasquez as being included in the term “you” for purposes of coverage under the BAP.

In summary, Mr. Vasquez was an insured under American Fire’s auto liability coverage when operating his personally owned F-350, any other auto identified in the Declarations of American Fire’s BAP, or any other auto owned, hired or borrowed by Benchmark. Additionally, Mr. Vasquez was a *named* insured under American Fire’s auto liability policy in multiple ways:

- As an “employee” of Benchmark when operating “any” other “auto” not owned, hired or borrowed by Benchmark.
- As a supervisor of Benchmark “liable for the conduct of other insureds”, and
- Because Mr. Vasquez came within the definition of “you” in the American Fire BAP.

If Mr. Vasquez was negligent in operating a vehicle listed in the American Fire Declaration, including his personal F-350, he was covered under American Fire’s auto liability policy. If Mr. Vasquez was negligent in operating *any* other automobile for *any* purpose, he was covered under American Fire’s auto liability policy. If Mr. Vasquez became vicariously liable for the conduct of another Benchmark employee/insured, he was covered under American Fire’s auto liability policy.

C. American Fire Cannot Deny UIM Coverage to Mr. Vasquez on the Basis of His Activity at the Time of Injury.

Washington courts have consistently ordered insurers to provide UIM coverage to persons identified as insureds under the liability portion of auto policies. The trial court erred in holding that “Mr. Vasquez is not a named insured according to his Business Auto Policy” (CP 317), and in erroneously limiting the scope of UIM

coverage to the *circumstances* under which the policy would provide liability coverage.

The fact that Benchmark is identified as the named insured on the declaration page of the BAP does not end the inquiry. A named insured in an auto liability policy may be identified by name, or by position or status relative to the policyholder. For instance, “family members” or “relatives” are commonly named as a category of insureds in personal auto policies, while “employees” such as Mr. Vasquez can be named insureds in business automobile policies. While the cases distinguish between “first party” insureds who are named in the policy, *i.e.* “employees” such as Vasquez, and strangers to the policy who have coverage only while occupying a covered vehicle, a named insured with first party coverage, such as the policyholder or any family members, has UIM coverage “that applies at all times, whatever may be the insured’s activity at the time of the accident.” ***Blackburn v. Safeco Ins. Co.***, 115 Wn.2d 82, 89, 794 P.2d 1259 (1990); ***Kowal v. Grange Ins. Ass’n***, 110 Wn.2d 239, 245, 751 P.2d 306 (1988).

In ***Kowal*** the policyholders' daughter was identified as an insured on the liability portion of the policy, but only while operating one of two autos listed as covered autos in the policy. ***Kowal***, 110 Wn.2d at 241-42. She was injured while riding as a passenger in an uninsured vehicle. The trial court held that since the daughter was insured under the liability portion of its policy only when using an auto covered under that policy, she was entitled to UIM benefits under the policy only if she was injured in a covered auto. ***Kowal***, 110 Wn.2d at 242-44. The Supreme Court disagreed, holding that as an insured under the liability portion of the policy, the daughter was entitled to UIM benefits regardless of her activity at the time of injury:

As an insured, [Ms. Kowal] is entitled to the protection of the underinsured motorist coverage of the policy which provides coverage for her whatever her activity may have been when she was injured by an underinsured motorist.

Kelly Kowal is "an insured" under the liability section and is therefore an insured under the underinsured motorist endorsement as well. Once it is determined that a person is an insured under the policy, the person is entitled to underinsured motorist coverage and that coverage is not dependent on the insured occupying a vehicle named in the policy.

Kowal, 110 Wn.2d at 245.

By contrast, in *General Ins. Co. of America v. Icelandic Builders, Inc.*, 24 Wn. App. 656, 604 P.2d 966 (1979), relied upon by American Fire below, the only named insured in the policy was the policyholder, a corporation. The Court of Appeals rejected a UIM claim by the son of the owner of the corporation who was injured while operating his personal vehicle. The father owned all the stock in the corporation. The son resided in the same household with the father. The son and his father were directors of the corporation, but neither father nor son were named as insureds in the policy and the son's personal car was not listed as a covered vehicle. *Icelandic*, 24 Wn. App. at 657. The policy defined an "insured", in pertinent part, as

- A. The named insured and any designated insured and, while residents of the same household, the spouse and relatives of either;

Icelandic, 24 Wn. App. at 658. The Court of Appeals held that "[t]he named insured is the corporation and there is no other designated insured." *Icelandic*, 24 Wn. App. at 660.

If the policy in *Icelandic* had identified officers and directors of the corporation as insureds, the son would have qualified as a named insured and would have been entitled to UIM benefits.

Here, like the daughter in *Kowal*, and in contrast to the son in *Icelandic*, Mr. Vasquez is a named insured as an employee, and as a supervisor under American Fire's policy. Mr. Vasquez was covered while operating *any* auto for *any* purpose and was even named as an insured if he became liable for the conduct of another employee/insured. Moreover, American Fire was the *only* insurer providing coverage for Mr. Vasquez's personally owned F-350, and it charged a UIM premium specifically for Mr. Vasquez's vehicle. (CP 242)

Just as the limitations in the liability portion of the policy cannot define the scope of UIM coverage, once a claimant is defined as an insured in the liability policy, exclusionary language in the UIM portion of the policy is ineffective to limit UIM coverage. *Grange Ins. v. Great American Ins.*, 89 Wn.2d 710, 575 P.2d 235 (1978). In *Grange*, a police officer was rear ended while sitting in his police car. He made a UIM claim under his personal auto liability policy. The insurer denied the claim citing language in its policy excluding UIM coverage when the insured is injured while occupying a vehicle not listed in the policy but furnished for the

insured's regular use – i.e. the police car. **Grange**, 89 Wn.2d at 712-13.

In concluding that the exclusionary language was “repugnant” to the UIM statute, the Supreme Court held that “Officer Vogt is an insured person under the policy issued by Grange. . . . Therefore Grange must provide UMC protection to Officer Vogt without regard to the particular situation in which he was injured.” **Grange**, 89 Wn.2d at 718. The Court held that once it is determined that the plaintiff is an insured under the liability policy, UIM coverage applies whether the “named insured, was occupying the Ford described in his policy, or was *on foot, or on horseback, or while sitting in his rocking chair on his front porch* or while occupying a nonowned automobile furnished for his regular use...” **Grange**, 89 Wn.2d at 718, *quoting Motorists Mutual Ins. Co. v. Bittler*, 14 Ohio Misc. 23, 235 N.E.2d 745 (1968) (emphasis added). *Accord*, **First National Ins. Co. of America v. Perala**, 32 Wn. App. 527, 532-33, 648 P.2d 472, *rev. denied*, 98 Wn.2d 1002 (1982) (*quoting Grange*).

In *Hobbs v. Rhodes*, 667 So.2d 1112 (La. App. 1995), *writ denied*, 672 So.2d 691 (1996), the Louisiana Court of Appeals reviewed a UIM claim involving facts, policy language and insurer arguments similar to those involved here.⁴ Hobbs was injured when he was struck by an uninsured vehicle while walking in the yard area of a company for whom his employer contracted to perform on-site repair work. Hobbs claimed uninsured benefits under his employer's business auto coverage with National Union Fire Ins. Co.⁵

The National Union BAP contained an addendum similar to American Fire's Master Pak endorsement, which also expanded the definition of an insured for liability purposes:

⁴ The Washington Supreme Court has looked to Louisiana decisions for guidance in construing RCW 4.22.030 because Louisiana's UIM statute is similar to Washington's. *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 688, n.6, 801 P.2d 207 (1990), *overruled on other grounds*, *Butzberger v. Foster*, 151 Wn.2d 396, 401, 89 P.3d 689 (2004).

⁵ Unlike Mr. Vasquez, Hobbs was not an owner or supervisor of his company and Hobbs' personally owned vehicle was not a "covered auto" for liability and UIM coverage purposes under National Union's BAP. Furthermore, Hobbs did not come within the definition "you" for purposes of National Union's liability coverage, as Mr. Vasquez does in this case.

The following is added to the LIABILITY COVERAGE WHO IS AN INSURED provision: Any employee of your is an “insured” while using a covered “auto” you don’t own, hire or borrow in your business or personal affairs.

Hobbs, 667 So.2d at 1115-16. The Louisiana Court of Appeals held that this language in the National Union policy specifically provided auto liability coverage for employees such as **Hobbs**, and that **Hobbs** was entitled to full uninsured motorist benefits. The Louisiana court rejected National Union’s claim that there had to be a relationship between **Hobbs** and a covered auto by noting that “[UIM] coverage attaches to the person not the vehicle...” and that “[t]he uninsured motorists protection covers the insured . . . while riding in uninsured vehicles, while riding in commercial vehicles, while pedestrians or while rocking on the front porch.” **Hobbs**, 667 So.2d at 1117.

Under RCW 48.22.030, a UIM endorsement cannot limit UIM coverage where, as here, the claimant qualifies as an insured for liability purposes. **Touchette v. Northwestern Mut. Ins.**, 80 Wn.2d 327, 494 P.2d 479 (1972). In **Touchette**, the policyholders’ son was injured by an uninsured motorist while driving a vehicle that was not insured on his parent’s policy. The liability provisions

of that policy identified as insureds the parents and any “relative” who was a resident of the same household. ***Touchette***, 80 Wn.2d at 330. The insurer denied UIM benefits relying on an exclusion in the UIM portion of the policy for bodily injury to an insured while occupying an automobile that was not identified in the policy. In holding that the son was entitled to the broad UIM protection mandated by RCW 48.22.030, the Supreme Court held that such protection “...is not to be eroded or, as the cases say, “whittled away by a myriad of legal niceties arising from exclusionary clauses.” ***Touchette***, 80 Wn.2d at 335.

Similarly, in ***Federated American Ins. v. Raynes***, 88 Wn.2d 439, 563 P.2d 815 (1977), the Supreme Court held that a UIM exclusion violated the statutory policy granting broad protection from underinsured motorists regardless of what the insured was doing or operating at the time of injury. The insured claimed UIM benefits under his automobile policy for injuries caused by an underinsured motorist while the insured was operating his motorcycle. The motorcycle was not listed on the insured’s auto policy. ***Raynes***, 88 Wn.2d at 440. The insurer argued that its UIM exclusion did not violate RCW 48.22.030 because coverage under

the UIM portion of the policy was not narrower than that under the primary liability section, since the insured would not have had liability coverage under the auto policy while operating his motorcycle. The Court rejected the argument:

[O]nce it is determined that a person is an insured under the policy, that person is entitled to uninsured motorist coverage. Respondent is the named insured in FAI's policy. Exclusion (b) does not narrow the definition of insured so as to exclude respondent from being an insured under the policy. Rather, the exclusion merely excludes coverage when the insured is injured in a certain situation, *i.e.*, occupying a car owned by him but not insured by FAI. This attempt to exclude [UIM] coverage for an insured is impermissible under RCW 48.22.030.

Raynes, 88 Wn.2d at 444.⁶

The state of Illinois has a UIM statute and public policy similar to Washington's. In **DeSaga v. West Bend Mutual Ins. Co.**, 391 Ill.App.3d 1062, 910 N.E.2d 159, 331 Ill.Dec. 86 (2009), *app. denied*, 236 Ill.2d 552 (2010), the Illinois Court of Appeals held that an employee who was injured as a pedestrian was entitled to UIM benefits under a business auto policy, rejecting the insurer's attempt to define an insured for UIM purposes as limited to persons

⁶ A motorcycle exclusion to UIM coverage was later authorized by the Legislature and added to RCW 48.22.030. It is not at issue here.

“occupying” a covered vehicle, because it was a narrower definition than that provided under the liability portion of the policy:

Once it has been determined who will be insured under the liability section of the policy, the insurer may not, either directly or indirectly, deny UM or UIM coverage to an insured. An insurer’s attempt to define the term “insured” differently for UM or UIM coverage than it did for liability coverage is exactly what our Supreme Court condemned . . . – an indirect attempt by the insurer to deny UM or UIM coverage to an “insured.” Thus, we find in the present case that respondent’s attempt to define the term “insured” more narrowly for UIM coverage under the policy than did for liability coverage violates Illinois law.

Desaga, 391 Ill.App.3d at 1070 (citations omitted).

Similarly here, American Fire claimed that its UIM endorsement narrowly defined insureds for UIM coverage as only those *occupying* a covered auto. Taken literally, American Fire’s definition of an insured for UIM purposes would deprive *any* insured from obtaining UIM benefits when injured as a pedestrian.

American Fire’s UIM Endorsement (CP 73-75) states:

A. Coverage

1. We will pay all sums the “insured” is legally entitled to recover as compensatory damages from the owner or driver of an “underinsured motor vehicle”. The damages must result from “bodily injury” or “property damage” sustained b the “insured” caused by an “accident”. The owner’s or driver’s liability for these damages must result from

the ownership, maintenance or use of the "underinsured motor vehicle".

B. Who Is An Insured

1. Anyone "occupying" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, loss or destruction.
2. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".

(CP 73) The "Coverage" section correctly states the broad UIM coverage mandated by statute. However, American Fire interprets the "Who Is An Insured" section of its UIM Endorsement to be restrictive and thus act as an exclusion, limiting coverage to circumstances in which an insured is occupying certain vehicles. In fact, that section actually broadens UIM coverage. Mr. Vasquez and other insureds named in the liability portion of the policy already qualify for broad UIM coverage under RCW 48.22.030(2) because that statute is written into and becomes a part of American Fire's policy. *Touchette*, 80 Wn.2d at 335. Thus, the "Who Is An Insured" section of American Fire's UIM Endorsement *adds*, rather than subtracts, insureds for UIM purposes.

If there was *no* UIM endorsement in the American Fire BAP, Mr. Vasquez, as owner of the F-350, and as a Benchmark employee, would still be entitled to UIM coverage, because employees are insureds named in the policy. RCW 48.22.030(2); ***Clements v. Travelers Indemnity Co.***, 121 Wn.2d 243, 255, 850 P.2d 1298 (1993). American Fire's attempt to narrow the definition of an insured for UIM purposes so that UIM coverage only applies to someone occupying a covered auto violates Washington law. This court should reverse and hold that Mr. Vasquez is entitled to UIM coverage as a matter of law.

D. Mr. Vasquez Is Entitled To Attorney Fees On Appeal.

Because Mr. Vasquez was forced to incur attorney fees in order to compel American Fire to provide UIM coverage, he is entitled to his attorney fees in the trial court and on appeal, under ***Olympic S.S. Co., Inc. v. Centennial Ins. Co.***, 117 Wn.2d 37, 811 P.2d 673 (1991). See ***American Economy Ins. Co. v. Lyford***, 94 Wn. App. 347, 357, 971 P.2d 964 (1999). This court should direct the commissioner to award Mr. Vasquez his fees under RAP 18.1 and direct the trial court's judgment for Mr. Vasquez to include his attorney fees incurred in the trial court.

VI. CONCLUSION

American Fire insured Mr. Vasquez's F-350 and charged a separate premium for UIM coverage specifically for his vehicle. American Fire's BAP was the only insurance coverage, liability or UIM, that Mr. Vasquez had or needed. Mr. Vasquez was an insured under the liability portion of American Fire's BAP when operating his personally owned F-350, any other auto identified in American Fire's BAP Declarations, or any other auto owned, hired or borrowed by Benchmark. Additionally, Mr. Vasquez was a *named* insured under American Fire's auto liability policy:

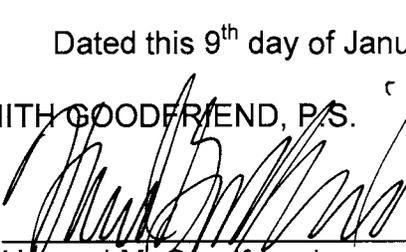
- As an "employee" of Benchmark when operating "any" other auto *not* owned, hired or borrowed by Benchmark.
- As a supervisor of Benchmark "liable for the conduct of other insureds".
- Because Mr. Vasquez came within the definition of "you" in the BAP.

As an insured named in the liability portion of the policy, Mr. Vasquez automatically had the broad UIM coverage required by RCW 4.22.030 whether he was in a vehicle, on foot, on horseback, or in a "rocking chair." This court should reverse the trial court's decision and remand with instructions to enter a

declaratory judgment in favor of Mr. Vasquez, plus his attorney fees and costs.

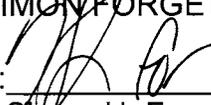
Dated this 9th day of January, 2012.

SMITH GOODFRIEND, P.S.

By: 

Howard M. Goodfriend
WSBA No. 14355

LAW OFFICES OF
SIMON FORGETTE, P.S.

By: 

Simon H. Forgette
WSBA No. 9911

ADLER GIERSCH PS

By: 

Richard H. Adler
WSBA No. 10961
Arthur D. Leritz
WSBA No. 29344

Attorneys for Appellant

FILED
KING COUNTY SUPERIOR COURT

AUG 26 2011

SUPERIOR COURT CLERK
BY Sarah Hudson
DEPUTY

Honorable Judge Mary Yu

Hearing Date: August 26, 2011 at 1:30 p.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

ANTHONY VASQUEZ,

Plaintiff,

vs.

AMERICAN FIRE AND CASUALTY
COMPANY, an Ohio Corporation,

Defendants.

No. 10-2-05277-1 SEA

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Mov's Action Requested

THIS MATTER HAVING COME ON regularly before the undersigned judge of the above-entitled Court upon Defendant American Fire and Casualty Company's Motion for Summary Judgment, and the Court, having considered the same, the record and files herein, including the following:

1. Defendant American Fire and Casualty Company's Motion for Summary Judgment;
2. Declaration of Kimberly Reppart in Support of Defendant American Fire and Casualty Company's Motion for Summary Judgment, and attachments thereto;

ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT - 1

CP 316

Fallon & McKinley, PLLC
1111 3rd Ave., Suite 2400
Seattle, Washington 98101
Telephone (206) 682-7580

3. Declaration of Shay Sweet in Support of Defendant American Fire and Casualty Company's Motion for Summary Judgment, and attachments thereto;
4. Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment;
5. Defendant's Reply in Support of Defendant's Motion for Summary Judgment; and
6. (see page 3)

It is NOW, THEREFORE, ORDERED, ADJUDGED and DECREED that Defendant American Fire and Casualty Company's Motion for Summary Judgment is GRANTED; and

It is FURTHER, ORDERED ADJUDGED and DECREED that the Court finds there is no coverage for Plaintiff under the Underinsured Motorist provision of the American Fire and Casualty Company policy at issue in this case. * Consequently, Plaintiff's Complaint for Declaratory Judgment against Defendant American Fire and Casualty Company is DISMISSED WITH PREJUDICE.

DONE IN OPEN COURT this 26 day of August, 2011.


 JUDGE

* The Ct. concludes that Mr. Vasquez is not a named insured according to his Business Auto policy and therefore does not qualify for broad UIM coverage for injuries suffered as a pedestrian. Under the policy Mr. Vasquez had UIM coverage as an employee while using a covered vehicle or as a supervisor in a case of vicarious liability.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 2

CP 317

Fallon & McKinley, PLLC
 1111 3rd Ave., Suite 2400
 Seattle, Washington 98101
 Telephone (206) 682-7680

1 Presented by:
2 FALLON & MCKINLEY, PLLC

3
4 By: *[Signature]*

5 R. Scott Fallon, WSBA #2574
6 Kimberly Reppart, WSBA #30643
7 Attorneys for Defendant

8 Form of Order Accepted:

9
10
11 By: *[Signature]*

12 Simon Forgette, #
13 Attorney for Plaintiff
14
15
16

- 17 6. Plaintiff's Motion for Summary Judgment;
18
19 7. Declaration of Simon Forgette in Support
20 of Motion for Summary Judgment, with attachments;
21
22 8. Defendants' Response to Plaintiff's Motion for
23 Summary Judgment
24
25 9. Plaintiff's Reply in Support of Plaintiff's Motion
26 for Summary Judgment
27
28 10. Errata to Declaration of Shay Sweet and
29 attachment thereto.
30
31
32

FILED
KING COUNTY CLERK

OCT 14 2011

The Honorable Mary Yu

SUPERIOR COURT CLERK
BY Sarah Hudson
DEPUTY

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

ANTHONY VASQUEZ, individually,

Plaintiff

vs

AMERICAN FIRE AND CASUALTY
COMPANY, a Ohio Corporation

Defendant,

NO. 10-2-05277-1SEA

~~(Proposed)~~ Denying
ORDER GRANTING PLAINTIFF'S
MOTION FOR RECONSIDERATION

THIS MATTER came on regularly before the undersigned Judge requesting
Reconsideration of the Court's Order Granting Defendant's Motion for Summary
Judgment which was entered on August 26, 2011. The Court has reviewed the
following:

1. Plaintiff's Motion for Reconsideration of Order Granting Defendant's Motion for
Summary Judgment.

2.

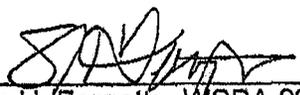
3.

1 The Court being otherwise fully advised in the premises, it is hereby
2 ORDERED, ADJUDGED AND DECREED that:

- 3
4 1. Plaintiff's Motion for Reconsideration is ~~GRANTED~~ ^{Denied} 
5 2. (Request by the Court for a Response/further relief granted)
6
7
8
9

10
11
12 DONE IN OPEN COURT this 13 Day of Oct, 2011.

13
14 
15 _____
Judge Mary Yu

16 Presented by
17 
18 _____
Simon H. Forgette, WSBA 9911
19 Attorney for Plaintiff

20
21
22
23
24
25

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 9, 2012, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Richard H. Adler Arthur Leritz Adler Giersch PS 333 Taylor Ave. N Seattle, WA 98109-4619	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Simon Forgette Attorney at Law 406 Market St., Suite A Kirkland, WA 98033-6135	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
R. Scott Fallon Kimberly Reppart Fallon & McKinley, PLLC 1111 3rd Ave., Suite 2400 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail

DATED at Seattle, Washington this 9th day of January, 2012.



Victoria K. Isaksen