No. 32109-6 - III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

(Walla Walla County Superior Court Cause No. 12-2-00908-3)

PATRIOT GENERAL INSURANCE COMPANY, a foreign corporation,
Appellant,

v.

JORGE GUTIERREZ and JANE DOE GUTIERREZ, and their marital community, Defendant,
and
JAVIER GUTIERREZ, Respondent.

BRIEF OF RESPONDENT JAVIER GUTIERREZ

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A. INTRODUCTION

Insurance companies doing business in Washington cannot exclude their policyholder's children from UIM coverage. RCW 48.22.005 ("The Definition Statute") defines "insured" as "[t]he named insured or a person who is a resident of the named insured's household and is...related to the named insured by blood."[1] Appellant Patriot General Insurance Company issued an automobile insurance policy to Jorge Gutierrez ("Jorge"). Jorge's son, Respondent Javier Gutierrez ("Javier"), lived with Jorge. Therefore, The Definition Statute defines Javier as an "insured" under his father's policy.

The first line of The Definition Statute states, "[u]nless the context clearly requires otherwise, the definitions in this section apply throughout this chapter."[2] RCW 48.22.030 ("The UIM Statute") is in the same chapter as The Definition Statue and the context of The UIM Statute does not "clearly require" a different definition of the term "insured". Therefore, The Definition Statute's definition of "insured" applies to The UIM Statute. Because The Definition Statute defines Javier as an "insured",[3] the statutes require Patriot General to provide UIM coverage

[1]RCW 48.22.005(5)(a)
[2]RCW 48.22.005
[3]RCW 48.22.005(5)(a)

for Javier under his father's policy.

Javier was injured while riding as a passenger in an uninsured vehicle and he submitted an Uninsured Motorist ("UIM") claim to Patriot General.[4] Patriot General denied Javier's claim stating that nineteen-year-old Javier is not insured based on policy language which purportedly excludes any of Jorge's children whom are over the age of thirteen.[5] Because insurance statutes cannot be sidestepped by policy language,[6] the trial court granted summary judgment to Javier and Jorge, ruling that the statutes require Patriot General to provide coverage for the policyholder's resident children.[7] Patriot General appealed the trial court's ruling. This Court should affirm the trial court based on the plain language of the statutes.

B. STATEMENT OF THE CASE

On or about January 9, 2011, Javier Gutierrez was a passenger in an automobile that was driven by an uninsured driver.[8] That vehicle was involved in a single-vehicle-rollover collision and Javier was injured in the

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[4]CP 16.
[5]CP 19
[6]*Touchette v. NW. Mut. Ins. Co.*, 80 Wn.2d 327, 337, 494 P.2d 479 (1972).
[7]CP 162
[8]CP 149.

collision.[9] At the time of the collision, Javier was nineteen and lived with his father, Jorge Gutierrez.[10] Javier filed a policy-limit UIM claim under Jorge's policy.[11]

The first line of The Definition Statute states, "[u]nless the context clearly requires otherwise, the definitions in this section apply throughout this chapter."[12] Subsection 5(a) of the same statute defines "insured" as "[t]he named insured or a person who is a resident of the named insured's household and is either related to the named insured by blood, marriage, or adoption, or is the named insured's ward, foster child, or stepchild..."[13]

There is no dispute that Jorge is the named insured, that Javier was a resident of Jorge's household, and that Javier is related to Jorge by blood; however, Patriot General denied the claim because it contended that "Javier Gutierrez does not qualify as a 'You' under the policy."[14] The UIM section of the policy clearly provides coverage to people defined as "You".[15] The policy definitions of "You" and "Relative" are as follows:

(2) **"You"** and **"your"** mean the person shown as the

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[9] *Id.*
[10] *Id.*
[11] CP 16.
[12] RCW 48.22.005.
[13] RCW 48.22.005(5)(a).
[14] CP 19.
[15] CP 62.

> named insured on the Declarations Page and that person's spouse if residing in the same household. You and your also means any **relative** of that person if they reside in the same household, providing they or their spouse do not own a **motor vehicle**.
>
> (3) **"Relative"** means a person living in **your** household related to **you** by blood, marriage or adoption, including a ward or foster child. **Relative** includes a minor under **your** guardianship who lives in **your** household. Any **relative** who is age fourteen (14) or older must be listed on the application or endorsed on the policy prior to a car accident or loss.[16]

Patriot General claimed that Javier is not insured because he was over 13-years-old and was not listed on the application.[17]

Patriot General further claimed that The Definition Statute's definition of "insured" does not apply to The UIM Statute, despite the fact that The UIM Statute is in the same chapter as The Definition Statute (which explicitly applies its definition to the entire chapter).[18]

On December 6, 2012, Patriot General filed a Declaratory Judgment action against Javier and Jorge in Walla Walla County Superior Court seeking a declaration that it had no duty to pay UIM benefits to Javier because he did not meet the policy definition of "insured".[19] Javier

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[16]CP 58.
[17]CP 9.
[18]CP 12-14
[19]CP 1-3.

counterclaimed for breach of contract, insurance bad faith, and violation of the Consumer Protection Act, alleging that Patriot General not only erred but also acted unreasonably in denying Javier's claim.[20]

Patriot General filed a Summary Judgment Motion, seeking a ruling that Javier was not covered by the policy.[21] Patriot General contended that The Definition Statute does not apply to The UIM Statute.[22] Patriot General reasoned that, because The UIM Statute uses the term "persons insured thereunder", it must have a different meaning than the term "insured" used in The Definition Statute.[23]

The motion was heard by a court commissioner on July 15, 2013. The commissioner denied Patriot General's motion for summary judgment and entered partial Summary Judgment for the defendants ruling that "[t]he definition of 'insured' in RCW 48.22.005(5) is read into the policy and replaces the policy definition. Accordingly, Javier qualifies as an "insured" under Jorge Gutierrez's Patriot General policy for the purpose of UIM coverage."[24] Patriot General filed a Motion for Revision and the trial

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[20]CP 147-155
[21]CP 4-15
[22]CP 12.
[23]*Id.*
[24]CP 162.

court judge denied the motion and affirmed the commissioner's order.[25]

Patriot General filed a notice for discretionary review,[26] and Jorge and Javier agreed that discretionary review was appropriate. This Court granted discretionary review under RAP 2.3(b)(4).[27]

C. SUMMARY OF ARGUMENT

The trial court correctly determined that the plain language of The Definition Statute requires Patriot General to provide UIM coverage to Javier. This is because the language of the insurance statutes must be read into all Washington policies.[28] Javier meets the definition of "insured" in The Definition Statute, and The Definition Statute expressly and unambiguously applies its definition of "insured" to The UIM Statute.[29]

Patriot General contends that there is ambiguity between The Definition Statute and The UIM Statute because The Definition Statute uses the term "insured" and The UIM Statute uses the term "persons insured thereunder".[30] However, this argument fails because the term "persons insured thereunder" does not "clearly require" a different

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[25]CP 223-226.
[26]CP 227-31.
[27]CP 248-49.
[28]*Touchette v. NW. Mut. Ins. Co.*, 80 Wn.2d 327, 332, 494 P.2d 479 (1972).
[29]RCW 48.22.005.
[30]Br. of Pet'r. 15.

meaning than the term "insured". In fact, the ordinary meaning and dictionary definition of the term "insured" is "a person who is covered... [under] an insurance policy".[31] Which means the term "persons insured thereunder" is simply the plural form of "insured".

Because this is a case of first impression, it is necessary to walk through the step-by-step framework of statutory interpretation analysis. The first step of the analysis is to look at the plain meaning of the statutes.[32] The Court should look no further than the plain meaning of the statutes because the plain meaning is unambiguous.[33]

Further, Patriot General's policy exclusion of children from UIM coverage violates public policy because exclusions that are aimed at a certain type of victim are void.[34] Especially, when the victims are children, whom are not able to purchase their own coverage. This Court should affirm the trial courts grant of summary judgment in favor of the respondents.

D. ARGUMENT

1. The Standard of Review is De Novo.

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[31] BLACK'S LAW DICTIONARY 823 (8th ed. 1999).
[32] *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (citations omitted).
[33] *Id.*
[34] *Tissell v. Liberty Mut. Ins. Co.*, 115 Wn.2d 107, 113, 795 P.2d 126 (1990).

The standard of review on appeal from an order on summary judgment is de novo.[35]

2. The Trial Court Correctly Determined That the Plain Language of The Definition Statute Requires Patriot General to Provide UIM Coverage to Javier.

Following the rules of statutory interpretation, the trial court correctly ruled that The Definition Statute's definition of "insured" unambiguously applied to The UIM Statute. Since, plain language of the statute is unambiguous, the courts inquiry must end there.[36]

a. The Plain Language of The Definition Statute Requires All Policies Issued in Washington to Insure the Children of the Named Insured

"The goal of statutory interpretation is to discern and implement the legislature's intent. In interpreting a statute, this court looks first to its plain language. If the plain language of the statute is unambiguous, then this court's inquiry is at an end."[37]

"There is no longer any judicial doubt that the state may regulate insurance, so closely is that industry affected with the public interest, and

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[35] *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006).
[36] *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (citations omitted).
[37] *Id.*

regulatory statutes become a part of the policy of insurance."[38]

The Definition Statute is such a regulatory statute, and section 5(a) defines "insured" as "[t]he named insured or a person who is a resident of the named insured's household and is either related to the named insured by blood, marriage, or adoption, or is the named insured's ward, foster child, or stepchild..."[39] There is no dispute that Jorge is the named insured, that Javier was a resident of Jorge's household, and that Javier is related to Jorge by blood. Based on the plain language of The Definition Statute, Javier is "insured". Appellant's brief does not refute this fact.

b. The Definition Statute's Definition of "Insured" Expressly and Unambiguously Applies to The UIM Statute.

The very first line of The Definition Statute states, "[u]nless the context ***clearly requires*** otherwise, the definitions in this section apply throughout this chapter."[40] The UIM Statute is in the same chapter as The Definition Statute. Therefore, The Definition Statute's definition of "insured" explicitly applies to The UIM Statute.

The UIM Statute states:

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[38]*Touchette v. NW. Mut. Ins. Co.*, 80 Wn.2d 327, 332, 494 P.2d 479 (1972)(emphasis added).
[39]RCW 48.22.005(5)(a).
[40]RCW 48.22.005 (emphasis added).

> No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage, suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death, or property damage, resulting therefrom, except while operating or occupying a motorcycle or motor-driven cycle, and except while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member, and which is not insured under the liability coverage of the policy. The coverage required to be offered under this chapter is not applicable to general liability policies, commonly known as umbrella policies, or other policies which apply only as excess to the insurance directly applicable to the vehicle insured.[41]

Appellant Patriot General contends that The Definition Statute's definition of "insured" does not apply to The UIM Statute because The UIM Statute uses the term "persons insured thereunder."[42] According to Patriot, this creates ambiguity as to whether The Definition Statute's definition of "insured" applies to The UIM Statute.[43] However, The Definition Statute's definitions apply unless the context "clearly requires"

[41]RCW 48.22.030(2).
[42]Br. of Pet'r. 12-17.
[43]*Id.*

otherwise.[44] The statute itself imposes a heightened-ambiguity standard. The existence of mere ambiguity (without clear contextual differences) will not move the Court past the first step in statutory interpretation analysis (the plain language). Therefore, this Court need not analyze rules of statutory construction, legislative history, or case law, unless it determines that the term "persons insured thereunder" ***clearly requires***[45] a different meaning than the term "insured". There is simply no way that this is true; thus, the Court's analysis must end with the plain meaning.

Even under the non-heightened standard of mere "ambiguity", Patriot's arguments would fail to move the court past the plain language step in the statutory interpretation analysis because the statutory language is unambiguous. "The fact that a word is not defined in a statute does not mean the statute is ambiguous. Rather, an undefined term should be given its plain and ordinary meaning unless a contrary legislative intent is indicated."[46] "Courts often look to standard dictionaries to determine the ordinary meaning of words"[47] Dictionary.com defines the word "insured"

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[44]RCW 48.22.005.
[45]*Id.*
[46]*Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 920-21, 969 P.2d 75, 80 (1998)(citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813, 828 P.2d 549 (1992)).
[47]*Id.* at 922.

as "the person, group, or organization whose life or property is covered [under] an insurance policy."[48] And, the Black's Law Dictionary definition is "a person who is covered or protected [under] an insurance policy".[49] Because the term "insured" means a person who is insured under a policy of insurance, the term "persons insured thereunder" is simply the plural form of "insured".

The contextual clues in the statutes are consistent with the ordinary meaning. The term "insured" is used synonymously as the term "persons insured thereunder". In fact, the term "insured" in The Definition Statute is defined as a list of "persons",[50] and it implies that coverage is provided "under" a policy of insurance. So the term "persons insured thereunder" simply states the word "persons" and the word "thereunder", which are implied by the term "insured".

Within the context of The UIM Statute, the term "persons insured thereunder" refers to persons insured under a "new policy or renewal of an existing policy."[51] The term "persons insured thereunder", rather than

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[48]DICTIONARY.COM, http://www.dictionary.com (last visited April 26, 2014).

[49]BLACK'S LAW DICTIONARY 823 (8th ed. 1999).

[50]The Definition Statute defines that term "insured" as "(a) The named insured [who is a **person**] or a **person** who is a resident of the named insured's household...(b) A **person** who sustains bodily injury caused by accident..." RCW 48.22.005(5) (emphasis added).

[51]RCW 48.22.030(2)

clearly requiring a different meaning than the term "insured", actually clearly requires exactly the same meaning.

Patriot General's argues that "if the legislature had intended 'insrued' in [The Definition Statute] and 'persons insured thereunder in [The UIM Statute] to mean the same thing, it would have used the same term in both statutes."[52] Patriot General relies on the *Whatcom* case to support this proposition.[53] While the *Whatcom* case is about ambiguity, nowhere does it require statutes to use the exact same words.[54] The plain and ordinary meaning of "insured" and "persons insured thereunder" are exactly the same. In other words, they are unambiguous. In fact, "persons insured" is simply a plural form of "insured". There is not an easy single-word-pleural form of the word "insured" - if the term "insureds" is even a word, it is an awfully awkward one. The appropriate pleural form of the word "insured" is "persons insured thereunder".

Statutory provisions and rules should be harmonized whenever possible.[55] Here the statutes harmonize perfectly. The Definition Statute expressly applies its definition of "insured" to The UIM Statute, and The

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[52]Br. of Pet'r 14.

[53]*Whatcom Cnty. v. City of Bellingham*, 128 Wn.2d 537, 909 P.2d 1303(1996).

[54]*Id.*

[55]*Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007) (citing *Emwright v. King County*, 96 Wn.2d 538, 543, 637 P.2d 656 (1981)).

UIM Statute does not "clearly require" otherwise. Because these statutes do not conflict, the Court's analysis must stop with the plain language.[56]

c. There are No Published Cases Formally Analyzing Whether The Definition Statute Applies to The UIM Statute. Therefore, This is a Case of First Impression and All Cases Cited by Appellant are Irrelevant.

Patriot General takes the position that it is free to contract around The Definition Statute's definition of "insured" because, it contends that, The UIM Statute does not mandate any particular scope for the definition of who is an "insured" in a particular automobile insurance policy.[57] The original source for this contention is the concurring opinion in the 1976 *Touchette* opinion. In his concurring opinion, Justice Neill stated:

> The policy of RCW 48.22.030 requires that insurers make available uninsured motorist coverage to a class of 'insureds' that is at least as broad as the class in the primary liability sections of the policy. It does not preclude the parties from reaching agreement as to the scope of that class in the first instance. The majority correctly removes the exclusionary clause in the contract before us, as a ***void attempt to sidestep the statutory policy***. The additional conclusion, that plaintiff is an 'insured' for purposes of uninsured motorist coverage, results from the terms of this contract rather than any statutory policy.[58]

There are two things that are particularly noteworthy about Justice

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[56] *Id.*

[57] Br. of Pet'r. 10-12

[58] *Touchette,* 80 Wn.2d at 337 (emphasis added).

Neill's statement. First, this opinion was published in 1976 and, as Patriot General points out, The Definition Statute was not enacted until 1993.[59] So, at the time of the *Touchette* opinion, The Definition Statute did not exist and there was not a statutory definition of "insured".

Second, Justice Neill makes it clear that any "attempt to sidestep statutory policy" is "void". This is consistent with *Touchette*'s main opinion holding that the statute becomes part of any insurance policy issued in this State.[60] Since 1993, the term "insured" has been defined by The Definition Statute. Therefore, it is clear that Justice Neill's contention that the policy can limit the scope of the definition of "insured" was abrogated in 1993 by the enactment of The Definition Statute. Even Justice Neill would agree that The Definition Statute cannot be "sidestepped".

Patriot General has cited several other cases (all based on *Touchette*) which purportedly support its contention that UIM carriers are free to limit the scope of the definition of "insured"; however, only four were decided after 1993.[61] Two of these four cases (*Smith* and *Vasquez*)

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[59]Br. of Pet'r. 15.

[60]*Id.* at 332.

[61]*Smith v. Cont'l Cas. Co.*, 128 Wn.2d 73, 83, 904 P.2d 749 (1995); *Fin. Indem. Co. v. Keomaneethong*, 85 Wn.App. 350, 353, 931 P.2d 168 (1997); *Wheeler v. Rocky Mt. Fire and Cas. Co*, 124 Wn.App. 868, 874, 103 P.3d 240 (2004); *Vasquez v American Fire &*

involved commercial policies. Because businesses do not have family members, section 5(a) of The Definition Statute does not apply. In the other two cases (*Keomaneethong* and *Wheeler*) the policy definition of the term "insured" mirrored subsection (5)(a)'s definition.

Most importantly, none of these cases even cite The Definition Statute. In the case at hand, the trial court's Summary Judgment ruling arose from the statutory interpretation of The Definition Statute. And, when interpreting a statute, the Court must first look to its plain language.[62] "If the plain language of the statute is unambiguous, then this court's inquiry is at an end."[63] Because *none* of the cases cited by Patriot General cite (let alone analyze the plain language of) The Definition Statute, they are not instructive in this case.

Patriot General cites *Keomaneethong* for the proposition that UIM carriers can define the scope of insured;[64] however, the court in *Keomaneethong* completely failed to take into account The Definition Statute's definition of "insured".[65] In fact, the court never even mentioned

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Cas. Co., 174 Wn.App 132, 138, 298 P.3d 94 (2013), *review denied,* 178 Wn.2d 1006 (2013).

[62]*Armendariz,* 160 Wn.2d at 110.

[63]*Id.*

[64]Br. of Pet'r. 11, n. 37.

[65]*Fin. Indem. Co. v. Keomaneethong*, 85 Wn.App. 350, 353, 931 P.2d 168 (1997).

The Definition Statute.[66] Because *Keomaneethong* failed to undergo the required analysis of The Definition Statute, it offers zero instruction in this case.

Patriot General also argues that "[n]ot one of the scores of cases interpreting the UIM statute relies on [The Definition Statute] to define 'insured' or any similar term in the UIM statute."[67] This is simply not true - of the five published Washington opinions citing The Definition Statute, three of them (*Cherry*, *Daley*, and *Bolin*) read The Definition Statute's definitions into The UIM Statute.[68] Plus, *Cherry* directly supports Javier's plain language reading of the statutes and reads The Definition Statute's definition of "insured" directly into The UIM Statute.[69]

While *Bolin* implies that The Definition Statute's definition of "automobile" applies to The UIM Statute,[70] both *Daley* and *Cherry* read definitions from The Definition Statute directly into The UIM Statute (with *Cherry* actually applying the definition of "insured").[71] It is clear

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[66] *Id.*

[67] Br. of Pet'r. 16.

[68] *Cherry v. Truck Ins. Exch.*, 77 Wn. App. 557, 563 n.3, 892 P.2d 768 (1995); *Daley v. Allstate Ins. Co.*, 86 Wn. App. 346, 355, 936 P.2d 1185 (1997) *rev'd*, 135 Wn.2d 777, 958 P.2d 990 (1998); *Am. States Ins. Co. v. Bolin*, 122 Wn. App. 717, 721, 94 P.3d 1010 (2004).

[69] *Cherry v. Truck Ins. Exch.*, 77 Wn. App. 557, 563 n.3, 892 P.2d 768 (1995).

[70] *Am. States Ins. Co. v. Bolin*, 122 Wn. App. 717, 721, 94 P.3d 1010 (2004).

[71] *Daley v. Allstate Ins. Co.*, 86 Wn. App. 346, 355, 936 P.2d 1185 (1997) *rev'd*, 135 Wn.2d 777, 958 P.2d 990 (1998); *Cherry*, 77 Wn.App at 563 n.3, 892 P.2d 768 (1995).

that, when courts consider the plain language of The Definition Statute, they realize that the definitions must be read into The UIM statute.

Patriot General concludes its argument by stating, "not a single legal authority supports the respondents' position regarding [The Definition Statute]." Because this is a case of first impression, there are no cases directly on point for either party's position. However, as discussed above, *Cherry*, *Daley*, and *Bolin* all support Respondent's position and the trial court's ruling. More importantly, our legal authority comes from the plain language of The Definition Statute, which states that, "unless the context clearly requires otherwise, the definitions [of The Definition Statute] apply [to The UIM Statute]."[72]

Patriot contends that "[i]f [The Definition Statute] actually abrogated [the *Touchette*] line of cases, surely the Supreme Court or the Court of Appeals would have made that clear in the 20 years since the statute's passage."[73] However, the vast majority of Washington carriers have adopted The Definition Statute's definition of "insured" into their UIM policy language simply because the plain language of the statute is already so clear. Therefore, this has not been an issue over the last 20

[72]RCW 48.22.005.
[73]Br. of Pet'r. 16.

years. Patriot General is now attempting to erode the law and the victims are the children of our state, whom have no other way to obtain UIM coverage except through their parents' policies. It is because of this danger that it is important for this Court to be the first to publish its statutory interpretation analysis confirming that The Definition Statute's definitions apply to The UIM Statute.

d. Even if the Court Does Find Ambiguity, the Canons of Statutory Construction Require that the Term "Insured" and the Term "Persons Insured Thereunder" Mean the Same Thing.

The term "persons insured thereunder" is simply the pleural form of "insured", the two terms have the same meaning. Nevertheless, Patriot General argues that these terms have conflicting meanings and, thus, create ambiguity.[74] Even if this Court does find that ambiguity exists (which it should not), the following canons of statutory construction instruct the Court to give these two terms the same meaning:

I. "[A]n undefined term should be given its plain and ordinary meaning unless a contrary legislative intent is indicated."[75] The plain and ordinary meaning of "persons

[74]Br. of Pet'r 15.

[75]*Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 920-21, 969 P.2d 75, 80 (1998)(citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813, 828 P.2d 549 (1992)).

insured thereunder" is the pleural of "insured".

II. "Courts often look to standard dictionaries to determine the ordinary meaning of words"[76] Dictionaries define "insured" to mean "a person who is [covered]...[under] an insurance policy."[77] The pleural of that is "persons insured thereunder."

III. Similar statutes should be interpreted similarly (*in pari materia* rule).[78] The Definition Statue and The UIM Statute are from the same chapter dealing with first-party coverages under automobile insurance policies. It makes perfect sense that the same definition of "insured" would be used throughout the chapter. Patriot General would like the definition of "insured" to apply only to PIP coverage,[79] but does that make any sense? Insurance policies are complicated enough. Do we really want to have a different

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[76] *Id.* at 922.

[77] Dictionary.com defines the word "insured" as "The person, group, or organization whose life or property is covered by an insurance policy."DICTIONARY.COM, http://www.dictionary.com (last visited April 26, 2014). And, the Black's Law Dictionary definition is "a person who is covered or protected by an insurance policy." BLACK'S LAW DICTIONARY 823 (8th ed. 1999).

[78] *Washington State Legislature v. Lowry*, 131 Wn.2d 309, 327, 931 P.2d 885 (1997); *See also, Harmon v. Dep't of Soc. & Health Servs., State of Wash.*, 134 Wn.2d 523, 542, 951 P.2d 770, 779 (1998).

[79] Br. of Pet'r. 16.

definition clause, with a different definition of "insured", under each section of the policy? How is the consumer (policyholder) supposed to know what he is buying?

IV. "When two statutes apparently conflict, the rules of statutory construction direct the court to, if possible, reconcile them so as to give effect to each provision."[80] The way to reconcile these two statutes is to give the same meaning to "insureds" and "persons insured thereunder".

V. "When two statutory provisions dealing with the same subject matter are in conflict, the latest enacted provision prevails when it is more specific than its predecessor."[81] The Definition Statute is more recent, it specifically defines "insured", and specifically applies the definition throughout the chapter. There is no way that the legislature could have intended for The UIM Statute to modify The Definition Statute because it was enacted long after The UIM Statute.

VI. Finally, there is a canon of construction specific to The UIM Statute - it should be interpreted "to increase and

[80] *State v. Landrum*, 66 Wn. App. 791, 796, 832 P.2d 1359 (1992).
[81] *Id.*

broaden the protection of members of the public who are involved in automobile accidents."[82] Patriot General's position is exactly contrary to this canon. It narrows protection to members of the public, particularly children.

These six canons of statutory construction make it clear that Patriot General is required to provide insurance to Javier even if the statutes are ambiguous.

e. Patriot General's Policy Exclusion of Children Violates Public Policy.

If the Court were to agree with Patriot General's interpretation, The UIM Statute could be effectively gutted by creative, sneaky and inconspicuous policy language. For example, a policy may define the term "relative" as "a person living in the named insured's household that is over the age of six"; and this language may appear deep within a definition section on page ten of a twenty-page policy. This would, of course, be devastating to little Washingtonians age six and under. Nevertheless, under Patriot General's interpretation of the statutes, this would be perfectly acceptable.

Because of this danger, the Washington State Supreme Court has

[82] *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 251, 850 P.2d 1298 (1993).

held that the type of exclusion that Patriot General wishes to enforce (that is, the exclusion of resident relatives based on age) is void as it is against public policy.[83] In the *Tissell* case, the Supreme Court held that "an exclusion may be justified where an insurer's risk is affected by the nature of the persons or conduct excluded - such as when an unauthorized driver takes the wheel. However, where the exclusion is aimed at a certain type of victim, that justification does not apply. The nature of the victim has no bearing on the risk of an accident's occurring."[84]

> The family or household exclusion clause strikes at the heart of this public policy. This clause prevents a specific class of innocent victims, those persons related to and living with the negligent driver, from receiving financial protection under an insurance policy containing such a clause. In essence, this clause excludes from protection an entire class of innocent victims for no good reason."[85]

Whether Patriot General wishes to exclude children under six or children over 13, such an exclusion is aimed at a type of victim, and not the nature of their conduct. *Tissell* is on point, Patriot General's exclusion of Javier is void as against public policy.

Patriot General claims that its insurance policy language complies with public policy because there is no insurance policy "exclusion", but

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[83] *Tissell v. Liberty Mut. Ins. Co.*, 115 Wn.2d 107, 113, 795 P.2d 126 (1990).
[84] *Id.*
[85] *Id.* (citing *Mut. of Enumclaw Ins. Co. v. Wiscomb*, 97 Wn.2d 203, 643 P.2d 441 (1982)).

rather a limited "grant of coverage".[86] This is just word play. Patriot General's policy language attempts to narrow the definition of the word "relative". When the policy clause sets a narrower definition of "relative" than the traditional (and statutory) definition, it seeks to "exclude" people from coverage. Hence it is an "exclusionary clause". In this case, Patriot General's narrow definition is an attempt to "exclude" children, such as Javier. This exclusionary clause does not comply with public policy simply because Patriot General wants to call it a "grant of coverage".

> The UIM statute does not contain a "legislative intent" section, but this court has consistently stated that the *Legislature enacted the UIM statute to increase and broaden the protection of members of the public who are involved in automobile accidents. This legislative purpose "is not to be eroded ... by a myriad of legal niceties arising from exclusionary clauses. RCW 48.22.030 should be read, therefore, to declare a public policy overriding the exclusionary language so that the intendments of the statute are read into and become part of the contract of insurance."* The UIM statute "is to be liberally construed in order to provide broad protection against financially irresponsible motorists." This interpretation of legislative purpose has generally resulted in this court's voiding 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. The public policy of protecting the innocent victim of an uninsured motorist is applied to the underinsured motorist to the extent that it

[86]CP 139

is compatible.[87]

Because, The Definition Statute's definition of "insured" was explicitly incorporated into The UIM Statute in 1993, The UIM statute now, indeed, mandates a particular scope for the definition of who is "insured". Patriot General, in its attempt to "erode" the coverage required by The UIM Statute by limiting the so-called "grant of coverage", is engaging in the exact same "legal niceties" that the *Clements* Court condemned. Patriot General is attempting to insure fewer people than the statute requires. This type of erosion creates a slippery slope.

Patriot General seeks to decrease and narrow "the protection of members of the public who are involved in automobile accidents."[88] Not only is this contrary to the intent of the Legislature, it violates public policy and threatens the welfare of the children of Washington State.

3. Respondents are Entitled to *Olympic Steamship* Fees and Costs.

"[A]n award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract."[89] Because Patriot General has

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[87] *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 251-52, 850 P.2d 1298 (1993) (emphasis added) (citations omitted).
[88] *Tissell v. Liberty Mut. Ins. Co.*, 115 Wn.2d 107, 113, 795 P.2d 126 (1990).
[89] *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 53, 811 P.2d 673 (1991).

wrongfully denied coverage to Javier, he is entitled to attorney fees and expenses pursuant to *Olympic Steamship,* RAP 18.1, and any other authority allowing for attorney fees and expenses.

E. CONCLUSION

The Definition Statute and The UIM Statute regulate the insurance industry in Washington. When insurance policy language conflicts with these statutes, the policy language is void and the statutory language is read into the policy.[90] The Definition Statute defines Respondent Javier Gutierrez as an "insured",[91] and The Definition Statute unambiguously states that its definitions apply to The UIM Statute.[92] Therefore, the statutes require Patriot General to provide UIM coverage to Javier.

Patriot General claims that the policy language excludes Javier from coverage.[93] This attempt to narrow the statutory definition of "insured" goes against the very purpose of The UIM Statute which is "to increase and broaden the protection of members of the public who are involved in automobile accidents."[94] Plus, the policy language is void because it conflicts with the plain language of the statute. Consequently,

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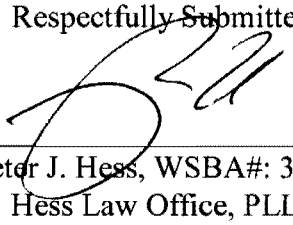
[90]*Touchette v. NW. Mut. Ins. Co.*, 80 Wn.2d 327, 332, 494 P.2d 479 (1972).
[91]RCW 48.22.005(5)(a).
[92]RCW 48.22.005.
[93]Br. of Pet'r at 9-10.
[94]*Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 251, 850 P.2d 1298 (1993).

the trial court was correct when it entered summary judgment in favor of Respondents, ruling that the definition of 'insured' in The Definition Statute is read into the policy and replaces the policy definition.[95] The trial courts summary judgment ruling should be affirmed and this Court should order Appellant Patriot General to pay Respondents' attorney fees and expenses.

DATED: April 28, 2014

Respectfully Submitted,



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[95]CP 162.

No. 62109-6 - III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

(Walla Walla County Superior Court Cause No. 12-2-00908-3)

PATRIOT GENERAL INSURANCE COMPANY, a foreign corporation,
Appellant,

v.

JORGE GUTIERREZ and JANE DOE GUTIERREZ, and their marital community, Defendant,
and
JAVIER GUTIERREZ, Respondent.

PROOF OF SERVICE

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

1. Brief of Respondent Javier Gutierrez; and

2. Proof of Service.

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Executed at Walla Walla, Washington this 28th Day of April, 2014

Adrienne King