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**Apr 13, 2015**  
Court of Appeals  
Division III

State of Washington

No. 91510-5

(Court of Appeals No. 32109-6-III)

SUPREME COURT OF THE STATE OF WASHINGTON

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PATRIOT GENERAL INSURANCE COMPANY, a foreign corporation,  
Petitioner

v.

JORGE GUTIERREZ and JANE DOE GUTIERREZ, and their marital  
community, and JAVIER GUTIERREZ,  
Respondents,

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**PATRIOT GENERAL INSURANCE COMPANY'S AMENDED  
PETITION FOR REVIEW<sup>1</sup>**

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<sup>1</sup> This Amended Petition for Review cites the Clerk's Papers rather than the Appendix attached to the Petition for Review; attaches an Amended Appendix that includes only the Court of Appeals decision; and sets forth the new firm affiliation of Patriot's attorneys. In all other respects it is identical to the Petition for Review filed on March 26, 2015.

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**A. IDENTITY OF PETITIONER**

Patriot General Insurance Company asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

**B. COURT OF APPEALS DECISION**

In a published opinion filed February 24, 2015, Division III of the Court of Appeals ruled that Javier Gutierrez was an insured under the underinsured motorist (UIM) insurance policy issued by Patriot to Javier's father, Jorge Gutierrez.<sup>2</sup> The opinion is in the Appendix.

**C. ISSUES PRESENTED FOR REVIEW**

If review is accepted, the Court will be presented with these issues:

1. The Patriot policy provides UIM coverage only to the named insured, Jorge, and to certain relatives. The policy's definition section provides that any relative who is age 14 or older must be listed on the application or policy endorsement. Javier was 19 and not listed on the application or in any endorsement. Is Javier an "insured person" under the UIM coverage?

2. Under Washington law an insurer and an insured are free to define who is insured by a UIM policy, as long as the scope of the liability

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<sup>2</sup> For clarity, the remainder of this petition will refer to the respondents by their first names. No disrespect is intended.

and UIM coverage is the same. The scope of liability and UIM coverage under the Patriot policy is the same, but the policy defines Javier as not being an “insured person.” Does the Patriot policy conform to this law?

**D. STATEMENT OF THE CASE**

**1. Patriot issued a UIM policy to Jorge Gutierrez.**

Jorge Gutierrez completed an application for a policy with Patriot on August 11, 2010.<sup>3</sup> It identifies Jorge Gutierrez as the named insured,<sup>4</sup> and it lists two drivers, Jorge Gutierrez and Maria Recarmona.<sup>5</sup> Jorge also initialed a paragraph stating that he had listed on his application everyone living with him age 14 or over:

I also certify that all persons age 14 or over who live with me temporarily or permanently and all persons who are regular operators of any vehicle to be insured have been listed on this application and reported to the Company. I declare that there are no operators of the vehicle(s) described in this application unless their names and ages are shown above or are provided in writing to the Company within 14 days of when they begin driving the vehicle(s) described in this application.<sup>6</sup>

Jorge never asked his agent or Patriot to add his son, Javier, to the policy.<sup>7</sup>

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<sup>3</sup> Declaration of Tomas Miranda ¶ 2, CP 77; CP 80–85.

<sup>4</sup> Application, CP 80.

<sup>5</sup> CP 80.

<sup>6</sup> Application, CP 84.

<sup>7</sup> Miranda Decl. ¶ 6, CP 78.

Patriot issued a personal automobile policy to Jorge with a policy period of October 29, 2010 to April 29, 2011.<sup>8</sup> The policy includes several forms, one of which is titled “Underinsured Motorists Coverage Endorsement – Washington.” Its insuring agreement provides that Patriot will pay damages that an “insured person” is entitled to recover from the owner or operator of an underinsured vehicle. The policy defines “insured person,” to mean “you”, which includes the named insured and any “relative” residing in the same household. “Relative” is specifically defined as follows:

(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.<sup>9</sup>

The Policy Declarations list the insured as Jorge and lists two drivers: Jorge and Maria Carmona. Javier is not listed on the application, the Policy Declarations, or any endorsement to the policy.<sup>10</sup>

**2. Jorge’s son, Javier Gutierrez, filed a UIM claim with Patriot.**

Jorge’s 19-year-old son, Javier was living in Jorge’s household, when he was a passenger in an automobile that was involved in an

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<sup>8</sup> Policy, CP 55.

<sup>9</sup> CP 58.

<sup>10</sup> CP 56.

accident in Walla Walla on January 9, 2011.<sup>11</sup> He alleges that he suffered personal injuries as a result of the accident.

Javier filed a UIM claim with Patriot under his father's policy.<sup>12</sup> Patriot denied the claim because Javier was not an "insured person" under that policy.<sup>13</sup>

**3. Patriot sought a declaration of no coverage.**

Patriot submitted the coverage questions to the 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 definition of "relative" and thus was not an "insured person" under the policy. Javier counterclaimed for breach of contract, insurance bad faith, and violation of the Consumer Protection Act, alleging that Patriot had not only erred but also had acted unreasonably by denying Javier's claim.<sup>14</sup>

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<sup>11</sup> See Javier Gutierrez's Response to Patriot General's Request for Admission No. 3, CP 24-30; Jorge Gutierrez's Response to Patriot General's Request for Admission No. 3, CP 33.

<sup>12</sup> Declaration of Kyle Mosbrucker ¶ 3, CP 16.

<sup>13</sup> May 22, 2012 letter from Kyle Mosbrucker to Jorge Gutierrez, CP 19-20.

<sup>14</sup> Defendant Javier Gutierrez's Answer to Complaint for Declaratory Judgment and Counterclaims, CP 147-156.

Patriot moved for summary judgment, seeking a ruling that Javier was not an “insured person” covered by the policy.<sup>15</sup> Javier and Jorge opposed the motion, claiming that the definition of “insured” in RCW 48.22.005 included members of a named insured’s household, such as Javier, and that this definition applied to the UIM statute, RCW 48.22.030. The Court Commissioner denied Patriot’s motion and entered partial summary judgment for defendants regarding UIM coverage.<sup>16</sup> The Superior Court denied Patriot’s motion for revision. The Court of Appeals granted discretionary review.

The Court of Appeals affirmed the grant of summary judgment to Javier and Jorge. However, the court did not base its decision on RCW 48.22. Rather, the court ruled that the policy definition of “relative,” i.e. “[a]ny 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” functioned as an exclusion, rather than as a definition of who is an “insured person.”<sup>17</sup> It further ruled that this policy language could be

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<sup>15</sup> Summary Judgment Motion, CP 4–15.

<sup>16</sup> Order Granting Defendants’ Motion to Strike, Denying Patriot General’s Motion for Summary Judgment and Establishing UIM Coverage for Defendant Javier Gutierrez, CP 160–63.

<sup>17</sup> Amended Appendix at 9.

interpreted to merely impose on Jorge a duty to cooperate.<sup>18</sup> Consequently, the court ruled that Javier qualified as a “relative” and thus an “insured person.”

**E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

- 1. The Court of Appeals decision conflicts with decisions from this court and Divisions of the Court of Appeals recognizing the distinction between permissible limitations on coverage grants and impermissible exclusions from coverage. (RAP 13.4(b)(1) and (2)).**

By characterizing the language of the policy’s definition of a term as an “exclusion,” the Court of Appeals has cast the basic framework for all insurance-policy analysis into disarray. And in so doing, it has placed itself in conflict with numerous decisions both from this court and from the Court of Appeals. Review is therefore proper under both RAP 13.4(b)(1) and (2).

Division III saw no difference between a limitation on a grant of coverage by defining who is an insured and an exclusion from coverage.<sup>19</sup> But the courts of this state treat grants of coverage very differently from exclusions, both in general and in the context of the UIM statute. In all insurance policies, the grant of coverage and exclusions serve different

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (“Patriot General does not explain the practical difference between a limitation on coverage and an exclusion from coverage.”).

purposes. “Exclusion clauses do not grant coverage; rather, they subtract from it.”<sup>20</sup> An insured has the initial burden of showing that the loss falls within the scope of the policy’s insured losses. If that burden is met, the insurer then has the burden to show that the loss is excluded by specific policy language.<sup>21</sup> Yet another distinction is that Washington courts strictly and narrowly construe exclusions.<sup>22</sup>

This court and divisions of the Court of Appeals have emphasized the critical distinction between a grant of coverage and an exclusion when interpreting the UIM statute, RCW 48.22.030. Washington courts have long held that the statute “does not mandate any particular scope for the definition of who is an insured in a particular automobile insurance policy.”<sup>23</sup> As this court has explained,

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*

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<sup>20</sup> *Nat’l Union Fire Ins. Co. of Pittsburgh v. Nw. Youth Servs.*, 97 Wn. App. 226, 231, 983 P.2d 1144 (1999) (quoting *Harrison Plumbing & Heating, Inc. v. New Hampshire Ins. Grp.*, 37 Wn. App. 621, 627, 681 P.2d 875 (1984)).

<sup>21</sup> *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000 (1992).

<sup>22</sup> *Campbell v. Ticor*, 166 Wn.2d 466, 472, 209 P.3d 859 (2009).

<sup>23</sup> *Smith v. Cont’l Cas. Co.*, 128 Wn.2d 73, 83, 904 P.2d 749 (1995); *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 75, 549 P.2d 9 (1976).

*parties from reaching agreement as to the scope of the class in the first instance.*<sup>24</sup>

The Court of Appeals reiterated this holding in March 2013:

Underinsured motorist coverage is limited personal accident insurance chiefly for the benefit of the named insured. Limiting the scope of the definition of who else is an “insured” does not run afoul of the public policy behind Washington’s UIM statute.<sup>25</sup>

A total of seven Washington cases spanning almost forty years supports this holding.<sup>26</sup>

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<sup>24</sup> *Federated Am. Ins. Co. v. Raynes*, 88 Wn.2d 439, 443, 563 P.2d 815 (1977) (emphasis added) (quoting *Touchette v. Nw. Mut. Ins. Co.*, 80 Wn.2d 327, 337, 494 P.2d 479 (1972)), *abrogated in other part by statute as stated in Vadheim v. Cont’l Ins. Co.*, 107 Wn.2d 836, 844, 734 P.2d 17 (1987).

<sup>25</sup> *Vasquez v. Am. Fire & Cas. Co.*, 174 Wn. App. 132, 138, 298 P.3d 94 (citing *Smith*, 128 Wn.2d at 83), *review denied*, 178 Wn.2d 1006, 308 P.3d 641 (2013).

<sup>26</sup> *See Fin. Indem. Co. v. Keomaneethong*, 85 Wn. App. 350, 353, 931 P.2d 168 (1997) (“[W]hen the question revolves around the initial extension of coverage, that is, the definition of who is and is not an insured, public policy is not violated so long as insured persons are defined the same in the primary liability and UIM sections of the policy.”); *see also Dairyland Ins. Co. v. Uhls*, 41 Wn. App. 49, 53, 702 P.2d 1214 (1985) (“[T]he parties may agree to a narrow definition of insured so long as that definition is applied consistently throughout the policy[.]”) (quoting *Raynes*, 88 Wn.2d at 444); *Wheeler v. Rocky Mountain Fire & Cas. Co.*, 124 Wn. App. 868, 874, 103 P.3d 240 (2004) (stating that insurer may choose not to include certain persons in definition of “insured” in UIM policies).

Washington law does, by contrast, place limits on the type of exclusions in a UIM policy. For instance, a UIM policy cannot set forth an exclusion based on the identity of a victim injured by an insured driver.<sup>27</sup>

This distinction between the extension or grant of coverage and exclusions from coverage is perhaps best illustrated by this court's decision in *Farmers Insurance Co. v. Miller*.<sup>28</sup> In that case, Lane Miller obtained an auto policy, which included uninsured motorist coverage, from Farmers. Miller's son was later killed while riding as a passenger in an uninsured vehicle. Farmers rejected Miller's uninsured motorist claim because his son was not an insured. The policy stated that Farmers would provide uninsured motorist coverage to "the insured or a relative," and the policy defined "relative" to include a relative of the named insured who was a resident of the same household and who did not own a motor vehicle. The trial court granted summary judgment to Farmers because Miller's son owned a car and thus did not come within the definition of insured. On appeal, Miller argued that the public policy expressed in RCW 48.22.030 prohibited this type of clause. This court rejected the argument because the statute "does not mandate any particular scope for the

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<sup>27</sup> See *Tissell v. Liberty Mutual Ins. Co.*, 115 Wn.2d 107, 112, 795 P.2d 126 (1990).

<sup>28</sup> 87 Wn.2d 70, 549 P.2d 9 (1976).

definition of who is an insured in a particular automobile insurance policy.” Cases invalidating exclusions were not on point because the issue before the court was the scope of the policy’s initial grant of coverage, and not an exclusionary clause, and because the insured was defined consistently throughout the policy.

By disregarding the distinction between a coverage grant and an exclusion, Division III’s decision conflicts with prior Washington law as set forth in *Miller* and subsequent cases.

**2. The lower court’s decision conflicts with Washington law regarding an insured’s duty to cooperate.**

Review is appropriate under RAP 13.4(b)(1) and (2) because the decision also conflicts with Washington case law regarding an insured’s duty to cooperate with its insurer. The court held that the critical policy language, which provides that “[a]ny 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,” could be interpreted as merely imposing a duty to cooperate, rather than defining who is or is not an insured. By implication, the court also ruled that Jorge’s failure to disclose Javier on the application justified denial of coverage only if Patriot could show it was prejudiced by

that failure.<sup>29</sup> Both rulings conflict with decisions from this court and the Court of Appeals.

An insured's duty to cooperate arises from a condition in most insurance policies explicitly requiring an insured to cooperate with the insurer's handling of claims.<sup>30</sup> No Washington case has held that the definition section of a policy, which does not mention cooperation, imposes a duty to cooperate in disclosing who is to be insured under a policy. Yet Division III's opinion now does just that.

Washington courts also have never imposed a prejudice requirement on a policy's definition of insured. The need to show prejudice has only been applied to procedures for handling a claim after a loss: the duty to notify the insurer of a claim,<sup>31</sup> the duty to cooperate with the insurer's investigation and defense of the claim,<sup>32</sup> and the duty not to

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<sup>29</sup> See Amended Appx. at 11 ("Patriot General forwarded no evidence before the trial court that Jorge Gutierrez knew of any false statement. Nor did it provide evidence that Jorge's risk rating would change based on the fact that his two teenage children resided with him.").

<sup>30</sup> *Staples v. Allstate Ins. Co.*, 176 Wn. 2d 404, 410, 295 P.3d 201 (2013).

<sup>31</sup> *Canron, Inc. v. Federal Ins. Co.*, 82 Wn. App. 480, 485, 918 P.2d 937 (1996).

<sup>32</sup> *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 377, 35 P.2d 816 (1975).

settle a claim without authorization.<sup>33</sup> Division III's opinion is alone in extending the prejudice requirement to policy definitions determining who is insured by a policy. Now any policy definition can be parsed as merely imposing a "condition" subject to the prejudice requirement rather than imposing a bright-line definition. Under Division III's decision, consistent policy interpretation will disappear.

**3. This case presents an issue of substantial public interest applicable to auto insurance policies in this state. (RAP 13.4(b)(4)).**

Finally, review should be granted under RAP 13.4(b)(4) because interpretation of this policy involves an issue of substantial public interest. Because the definition at issue is included in a standard policy form rather than a manuscript policy, Division III's opinion has a broad impact on a large number of automobile insurance policies now in effect throughout the state.<sup>34</sup> A ruling from this court would bring clarity to all such policies.

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<sup>33</sup> *Pub. Util. Dist. No. 1 of Klickitat Cnty. v. International Ins. Co.*, 124 Wn.2d 789, 803-04, 881 P.2d 1020 (1994).

<sup>34</sup> In accordance with RCW 48.18.100, Patriot obtained the Washington State Office of the Insurance Commissioner's approval of the form before it was issued to policyholders in this state. Documents regarding OIC's approval of the form, known as PAP1, can be found at <https://fortress.wa.gov/oic/onlinefilingsearch/>.

**F. CONCLUSION**

The Court of Appeals' decision contradicts the decisions of this court as to the distinction between a coverage grant and an exclusion, as well as the distinction between language in an insuring agreement defining who is insured and the cooperation clause.

This court should accept discretionary review under RAP 13.4 and, on acceptance of review, reverse the trial court's entry of summary judgment for respondents and its denial of summary judgment to Patriot.

Dated this 10<sup>th</sup> day of April, 2014.



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# AMENDED APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

PATRIOT GENERAL INSURANCE	)	
COMPANY, a foreign corporation,	)	No. 32109-6-III
	)	
Petitioner,	)	
	)	
v.	)	
	)	PUBLISHED OPINION
JORGE GUTIERREZ and JANE DOE	)	
GUTIERREZ, and their marital	)	
community, and JAVIER GUTIERREZ,	)	
	)	
Respondents.	)	

FEARING, J. — We granted discretionary review of the trial court's summary judgment ruling that Javier Gutierrez is an insured for purposes of underinsured motorist coverage on an automobile insurance policy purchased from Patriot General Insurance by Jorge Gutierrez, Javier's father. Patriot General insists that Javier is not an insured because Jorge failed to disclose him, on his initial insurance application, as a member of

Jorge's household over the age of 14 years. We affirm summary judgment based on policy language that qualifies Javier as an "insured person," despite his father's failure to disclose him.

#### FACTS

On August 11, 2010, Jorge Gutierrez applied for car insurance from Patriot General Insurance Company, through the Tomas Miranda Insurance Agency, a local agency in Walla Walla. The application listed Jorge as the named insured, and Jorge and his wife, Maria Carmona, as authorized drivers. Jorge initialed a paragraph stating that he had listed on his application everyone living with him age 14 or older. That paragraph reads:

I also certify that all persons age 14 or over who live with me temporarily or permanently and all persons who are regular operators of any vehicle to be insured have been listed on this application and reported to the Company. I declare that there are no operators of the vehicle(s) described in this application unless their names and ages are shown above or are provided in writing to the Company within 14 days of when they begin driving the vehicle(s) described in this application.

Clerks Papers (CP) at 84. The policy application further states:

I hereby apply to the Company for a policy of insurance as set forth in this application on the basis of statements contained herein. I understand and agree that a routine inquiry may be made which will provide applicable information concerning character, general reputation, personal characteristics, mode of living and credit history. Upon written request, additional information as to the nature and scope of the report, if one is made, will be provided. I understand and agree that such policy shall be cancelled and the benefits available under such policy may be denied if

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such information is known to be false and would affect acceptance of the risk or would in any way affect the rating of the risk by the Company.

CP at 84.

At the time of completing the policy application, Jorge Gutierrez's son, Javier, age 18, lived at home with his father. In a declaration opposing Patriot General Insurance Company's summary judgment motion, Jorge Gutierrez testified he desired "full coverage" for his family, and he averred that he relied on Patriot General's agent, Tomas Miranda, to translate and help him complete the application. CP at 106. Jorge is a monolingual Spanish-speaker and insists he did not understand that the application asked him to certify that his children would not be using the vehicles. Jorge Gutierrez recalls telling Tomas Miranda that his son, Javier, and his daughter, Viviana, would also be drivers. Neither party provided information to the trial court as to whether Patriot General would have charged a higher premium for the insurance policy if Jorge Gutierrez had listed his son in the application.

Patriot General issued an auto policy to Jorge Gutierrez with a coverage period running from October 29, 2010 to April 29, 2011. The policy listed only Jorge Gutierrez and Maria Carmona as authorized drivers.

The first page of the twelve-page Patriot General Insurance Company policy provides:

In return for **your** premium payment and subject to the terms and conditions of this policy, **we** will insure **you** for the coverages up to the

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limits of liability for which a premium is shown on the Declarations Page of this policy. This insurance applies only to **car accidents** and losses which happen while this policy is in force. This policy is issued by **us** in reliance upon the statements which **you** made in **your** application for insurance. If **you** have made any false statement in **your** application, this policy may not provide any coverage.

CP at 57. The policy includes a separate three-page amended “Underinsured Motorists Coverage Endorsement,” which covers injuries caused by an underinsured motorist. In relevant part, the endorsement reads:

**We will pay damages for bodily injury or property damage which an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle. The bodily injury or property damage must be caused by a car accident and result from the ownership, maintenance or use of an underinsured motor vehicle.**

CP at 74.

To determine who constitutes “you” and, in turn, an “insured person” under the underinsured motorist endorsement, the reader must first journey to the beginning of the policy and then return to the endorsement. In a policy section titled “DEFINITIONS USED THROUGHOUT THIS POLICY,” the policy defines “you” and “your” as

the person shown as the 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**.

CP at 58. The policy defines “relative” in the paragraph directly below:

**“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.

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*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.*

CP at 58 (italics added). Patriot General's policy does not explicitly state that undisclosed relatives are not covered. The underinsured motorist endorsement lists exclusions from coverage, but does not specify whether household members above the age of 14, and not listed on the application or policy, are excluded from coverage.

Additional definitional language, on which we rely, is provided in the underinsured motorist endorsement. The language reads:

As used in this Part:

(1) **"Insured Person"** means:

(A) **You.**

(B) Any other person **occupying your insured car with your permission.**

(C) Any person for damages that person is entitled to recover because of **bodily injury to you** or another occupant of **your car.**

*No person shall be considered an **insured person** if that person uses a **motor vehicle** without permission of the owner.*

CP at 74 (italics added).

On January 9, 2011, Javier Gutierrez suffered serious injuries as a passenger in a single-car-rollover accident. Javier was 19 at the time of the accident and living with Jorge. The car's driver, Matthew Vincent Lanier, was uninsured. Javier tendered an uninsured motorist claim under the Patriot General Insurance Company policy, which claim Patriot General denied on May 22, 2012. Patriot General denied coverage because

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Javier was over the age of 14 years, living with Jorge, and not listed on Jorge's policy; and therefore did not qualify as "you."

#### PROCEDURE

Patriot General Insurance Company filed an action for declaratory judgment against Jorge and Javier Gutierrez, seeking a declaration that it had no duty to pay uninsured motorist benefits to Javier because he was not covered by Jorge's policy. Javier Gutierrez counterclaimed for coverage, breach of contract, bad faith, and violation of Washington's Consumer Protection Act, chapter 19.86 RCW.

Patriot General filed a motion for summary judgment on the issue of whether Javier Gutierrez was covered by his father's underinsured motorist (UIM) policy at the time of the accident. Javier and Jorge Gutierrez opposed the motion. The trial court granted the nonmoving parties Gutierrezes summary judgment because it found that the undisputed facts supported their position. Javier and Jorge Gutierrez were granted judgment "solely to the extent that the Court determines that there is UIM coverage for defendant Javier Gutierrez." CP at 163. The trial court determined that the definition of "insured" provided in Washington's casualty insurance statute should be read into the policy and replace the policy's definition of "insured person." The statute provides, in relevant part:

- (5) "Insured" means:
  - (a) The 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.

RCW 48.22.005.

#### LAW AND ANALYSIS

On appeal, Patriot General Insurance Company complains that Jorge Gutierrez failed to list his son Javier as a member of Jorge's household above the age of 14. Patriot General contends this omission precludes coverage for Javier Gutierrez. Jorge and Javier Gutierrez argue that the Patriot General policy affords coverage, despite the omission, because the policy does not expressly exclude from coverage any family member above the age of 14 not listed in the application. According to the Gutierrezes, Jorge's failure to disclose Javier to Patriot only amounts to a breach of a duty to disclose and does not preclude coverage under the plain language of Jorge's car insurance policy.

The Gutierrezes also contend the statutory definition of "insured," under RCW 48.22.005, should be read into Jorge's policy in order to afford Javier uninsured motorist coverage. Patriot General responds that RCW 48.22.005's definition of "insured" does not require car insurance policies to provide uninsured motorist coverage to a named insured's family members. Patriot General contends RCW 48.22.005 only applies to personal injury protection coverage. We agree with Jorge and Javier Gutierrez that the language of the insurance policy, without reference to any statute, affords Javier

underinsured motorist coverage. Therefore, we do not address the application of RCW 48.22.005.

We agree with the trial court that Jorge and Javier Gutierrez should be granted summary judgment. When, as here, the relevant facts are not in dispute, we may order entry of summary judgment in favor of the nonmoving party. *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992); *Leland v. Frogge*, 71 Wn.2d 197, 201, 427 P.2d 724 (1967); *Wash. Ass'n of Child Care Agencies v. Thompson*, 34 Wn. App. 225, 230, 660 P.2d 1124 (1983).

Familiar principles of insurance policy construction compel our ruling that Javier Gutierrez is covered under the Patriot General underinsured motorist endorsement. The interpretation of an insurance policy is a question of law, and summary judgment is appropriate if the contract has only one reasonable meaning when viewed in the light of the parties' objective manifestations. *Port of Seattle v. Lexington Ins. Co.*, 111 Wn. App. 901, 907, 48 P.3d 334 (2002). Insurance policies are to be construed as a whole, with force and effect given to each clause. *Am. Star Ins. Co. v. Grice*, 121 Wn.2d 869, 874, 854 P.2d 622 (1993). "An inclusionary clause in an insurance contract should be liberally construed to provide coverage whenever possible." *Mercer Place Condo. Ass'n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 602, 17 P.3d 626 (2000) (quoting *Riley v. Viking, Ins. Co.*, 46 Wn. App. 828, 829, 733 P.2d 556 (1987)). Insurance limitations require clear and unequivocal language. *Bordeaux, Inc. v. Am. Safety Ins.*

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*Co.*, 145 Wn. App. 687, 694, 186 P.3d 1188 (2008). If an insurer wants exclusions upheld, it has the burden of drafting them in “clear” and “unequivocal” terms. *Int’l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 288, 313 P.3d 395 (2013).

Patriot General argues that in order to be an “insured person” entitled to UIM coverage under the car insurance policy it sold to Jorge Gutierrez, a person must meet the definition of “you.” We agree. Patriot General further argues that a “relative” can be insured only if the relative is disclosed on the policy’s application or endorsement if that “relative” is over the age of 14 and living with the named insured. We disagree. The policy does not expressly state that an undisclosed relative is excluded from being an insured.

Patriot General argues that the sentence, “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,” should be read as defining who is insured under the policy. CP at 58. We agree that the sentence could be read in this light, but the Gutierrezes’ contention that the sentence only imposes a duty to cooperate and does not act as an exclusion is equally plausible.

Patriot General further argues that the relevant sentence is not an exclusion, but rather a permissible limitation on the definition of “insured.” Patriot General does not explain the practical difference between a limitation on coverage and an exclusion from coverage.

When reading the Patriot General insurance policy as a whole, we side with Javier and Jorge Gutierrez. The Patriot General underinsured motorist endorsement lists nine exclusions from coverage. The list could have, but did not, exclude from coverage injury to a household member above the age of 14 who was not listed on the application.

An important comparison of insurance policy language must be mentioned. In the underinsured motorist endorsement's additional definitions, the policy reads: "No person shall be considered an **insured person** if that person uses a **motor vehicle** without permission of the owner." CP at 74. If Patriot General wished to limit the definition of "insured" to achieve the meaning it advances on appeal, it could and should have drafted language that reads: "No **relative** shall be considered an **insured person** if that person is age fourteen (14) or older and not listed on the application or policy endorsement." It did not.

In addition, the first page of the Patriot General Insurance Company auto policy provides, in part: "This policy is issued by **us** in reliance upon the statements which **you** made in **your** application for insurance. If **you** have made any false statement in **your** application, this policy *may* not provide any coverage." CP at 57 (italics added). Significantly, the language does not read: "If **you** made any false statement in **your** application, this policy *shall* not provide any coverage." The policy does not tell the insured under what circumstances a false statement may lead to loss of coverage.

Finally, Jorge Gutierrez's application read, in part:

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I hereby apply to the Company for a policy of insurance as set forth in this application on the basis of statements contained herein. . . . I understand and agree that such policy shall be cancelled and the benefits available under such policy may be denied if such information is known to be false and would affect acceptance of the risk or would in any way affect the rating of the risk by the Company.

CP at 84.

Patriot General forwarded no evidence before the trial court that Jorge Gutierrez knew of any false statement. Nor did it provide evidence that Jorge's risk rating would change based on the fact that his two teenage children resided with him.

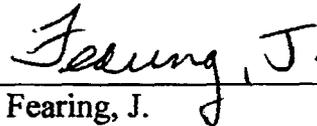
In short, Patriot General controlled the language in its auto policy. The Gutierrezes played no role in drafting the language. If Patriot General wished to exclude underinsured motorist coverage to a household member, above the age of 14, who was not disclosed in the application for insurance, Patriot General could have expressly so stated in the policy. We will not assist Patriot General in rewriting the policy.

Both Javier and Jorge Gutierrez seek recovery of reasonable attorney fees and costs on appeal against Patriot General Insurance Company. We agree they are entitled to this recovery under *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991) since they were required to litigate to gain coverage under the Patriot General insurance policy.

No. 32109-6-III  
*Patriot Gen. Ins. v. Gutierrez*

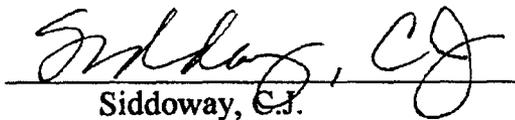
CONCLUSION

We affirm the trial court's declaration of coverage for Javier Gutierrez under the Patriot General insurance policy. We direct that this court's commissioner review Javier and Jorge Gutierrez's applications for fees and costs and to award a reasonable sum to both. We thereafter remand to the superior court for further proceedings.

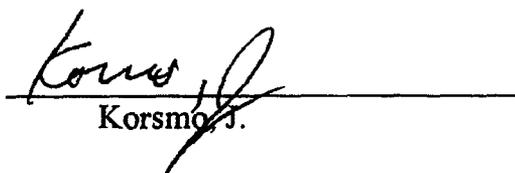
  
\_\_\_\_\_

Fearing, J.

WE CONCUR:

  
\_\_\_\_\_

Siddoway, C.J.

  
\_\_\_\_\_

Korsmo, J.

**THORSRUD CANE & PAULICH**

**April 13, 2015 - 10:20 AM**

**Transmittal Letter**

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**Apr 13, 2015**  
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Document Uploaded: 321096-Amended Petition for Review.pdf  
Case Name: Patriot General Insurance Company v. Jorge Gutierrez et al.  
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**Comments:**

Patriot General Ins. Co.'s Amended Petition for Review

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**BETTS PATTERSON & MINES P.S.**

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**Comments:**

Amended Appendix for Petition for Review

Sender Name: Patrick M Paulich - Email: [ppaulich@bpmlaw.com](mailto:ppaulich@bpmlaw.com)

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**Apr 13, 2015**  
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Division III  
State of Washington

No. 91510-5

(Court of Appeals No. 321096 –III)

SUPREME COURT OF THE STATE OF WASHINGTON

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PATRIOT GENERAL INSURANCE COMPANY, a foreign corporation,  
Petitioner

v.

JORGE GUTIERREZ and JANE DOE GUTIERREZ, and their marital  
community, and JAVIER GUTIERREZ,  
Respondents,

---

**DECLARATION OF SERVICE**

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Attorneys for Petitioner  
Patriot General Insurance Company

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. Patriot General Insurance Company's Amended Petition for Review;
2. Amended Appendix; and
3. Declaration of Service.

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Executed at Seattle, Washington this 12<sup>th</sup> day of April, 2015.



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**THORSRUD CANE & PAULICH**

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State of Washington

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**Comments:**

No Comments were entered.

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