No. 97652-0

SUPREME COURT
OF THE STATE OF WASHINGTON

TODD MCLAUGHLIN, A WASHINGTON RESIDENT,

Appellant,

v.

TRAVELERS COMMERCIAL INSURANCE COMPANY, A FOREIGN CORPORATION,

Respondent.

AMENDED BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

Amicus United Policyholders (UP) supports the Petition for Review. The Court should review and reverse the Court of Appeals' decision for two reasons. First, the Court of Appeals ignored the Personal Injury Protection (PIP) statute, which establishes minimum coverage, which is the public policy of the state, and which mandates coverage for McLaughlin—and does so regardless of his status as a "pedestrian." Bizarrely, the Court of Appeals claimed it needed to "harmonize" related statutes, but it ignored the statute regulating the coverage and every decision of this Court enforcing that statute. *McLaughlin v. Travelers Commercial Ins. Co.*, 446 P.3d 654, 657 (Wash. Ct. App. 2019).

Second, the Court of Appeals relied on a single dictionary definition to narrow insurance coverage. This departs from fundamental law and threatens insurance protection across all lines of coverage.

The Court of Appeals' failure to enforce the PIP statute and underlying public policy substantially weakens insurance protections. It conflicts with case law and justifies review under RAP 13.4(b)(1) and (4).

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

UP is a non-profit organization that serves as a voice and information resource for insurance consumers in all 50 states. UP is a tax-exempt § 501(c)(3) entity sustained by individual and corporate donations

and grants from foundations. Volunteers across the country donate thousands of hours each year to support the organization's work. UP promotes insurance and financial literacy, and helps individuals navigate the claim process and recover fair and timely settlements. In 2014, UP provided claim assistance to many victims of the Carlton Complex Fire in Pateros, Washington. UP also solves claims and coverage problems by working with officials, other non-profit and faith-based organizations, and a diverse range of other entities, including insurers and producers.

III. STATEMENT OF THE CASE

UP adopts the statement of Petitioner Todd McLaughlin.

IV. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. The Court of Appeals failed to enforce the public policy and minimum coverage requirements of the PIP statute.

McLaughlin was the named insured on his policy. The PIP statute mandates coverage for the medical expenses of the named insured arising from an auto accident *regardless* of the named insured's status. The Court of Appeals failed to enforce the statute and the public policy it effectuates.

Travelers acknowledges that the no-fault coverage referred to as "MedPay" in the California form is called "PIP coverage" in Washington. Br. of Resp't at 4. While Travelers seeks to distance itself from Washington law, both Travelers' Court of Appeals briefing and the Court of Appeals opinion rely exclusively on Washington law. As a result, the

opinion has erroneously eliminated coverage that was previously required, for McLaughlin and for *all* Washington policyholders.

In Washington, "UIM and PIP insurance are both creatures of public policy: coverages that every insurer writing automobile policies within the state must, by law, offer their insureds." *Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 620, 160 P.3d 31 (2007). As a result, Washington's "jurisprudence in this field is based largely on public policy." *Id.*

Policy language is void to the extent it would eliminate UIM and PIP coverage. *Durant v. State Farm Mut. Auto. Ins. Co.*, 191 Wn.2d 1, 14, 419 P.3d 400 (2018) (declaring illegal restrictions on PIP coverage inconsistent with regulatory requirements); *Kyrkos v. State Farm Mut. Auto. Ins. Co.*, 121 Wn.2d 669, 673, 852 P.2d 1078 (1993) ("When language in the policy explicitly conflicts with the statute, the offending language is stricken."). The UIM and PIP statutes and the courts' interpretation of them reflect the "public policy favoring full compensation of innocent automobile accident victims." *Brown v. Snohomish Cty. Physicians Corp.*, 120 Wn.2d 747, 756, 845 P.2d 334 (1993). Thus, a PIP carrier may recover in subrogation only "after the insured is fully compensated for his loss." *Thiringer v. Am. Motors Ins. Co.*, 91 Wn.2d 215, 219, 588 P.2d 191 (1978). This principle is not limited

to subrogation, but is further embodied in the UIM statute, *Brown*, 120 Wn.2d at 756, and in the PIP statute, *Sherry*, 160 Wn.2d at 620.

"Minimum" PIP coverage must include "[m]edical and hospital benefits." RCW 48.22.095(1)(a). Benefits must cover "all reasonable and necessary expenses incurred by or on behalf of *the insured* for injuries sustained as a result of an automobile accident." RCW 48.22.005(7) (emphasis added). The benefits must be provided to an "insured," defined in the statute as follows:

> (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; *or*
>
> (b) A person who sustains bodily injury caused by accident while: (i) Occupying or using the insured automobile with the permission of the named insured; or (ii) a pedestrian accidentally struck by the insured automobile.

RCW 48.22.005(5) (emphases added). Thus, the "named insured" on the policy is always an "insured," regardless of that person's status on the roadway as a pedestrian, motorist, or otherwise.

McLaughlin is the named insured on the policy. CP 17. As a result, he is covered under the PIP statute. This is enough to end the analysis in a finding of coverage. But even where exclusionary language does not explicitly violate a statute, it is still void if it violates the statute's

"declared public policy." *Kyrkos*, 121 Wn.2d at 674. The Court has explained the public policy of the statutory scheme for nearly 50 years:

> [The uninsured motorist statute] is but one of many regulatory measures designed to protect the public from the ravages of the negligent and reckless driver.... Recognizing the inevitable drain upon the public treasury through accidents caused by insolvent motor vehicle drivers who will not or cannot provide financial recompense for those whom they have negligently injured, and contemplating the correlated financial distress following in the wake of automobile accidents and the financial loss suffered personally by the people of this state, the legislature for many sound reasons and in the exercise of the police power took this action to increase and broaden generally the public's protection against automobile accidents.

Id. at 675 (quoting *Mut. of Enumclaw Ins. Co. v. Wiscomb*, 97 Wn.2d 203, 208, 643 P.2d 441 (1982) (quoting *Touchette v. Northwestern Mut. Ins. Co.*, 80 Wn.2d 327, 332, 494 P.2d 479 (1972))) (italics omitted). "The no-fault insurance system and [PIP] benefits are intended to provide victims of motor vehicle accidents adequate and prompt reparation for certain economic losses at the lowest cost to both the individual and the no-fault insurance system." *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 62, 322 P.3d 6 (2014) (quoting 12 *Couch on Insurance* 3d § 171:45, at 171–46 (2006)).

The Court of Appeals ignored *entirely* the PIP statute and cases enforcing it, despite McLaughlin's reliance on that statute's definition of "pedestrian" as "a natural person not occupying a motor vehicle," RCW

48.22.005(11). McLaughlin is entitled to PIP benefits because he is the named insured, without further analysis of his status.

Ignoring the mandate of the PIP statute, the Court of Appeals sows great confusion by re-writing the definition of "pedestrian" in RCW 48.22.005. Because this definition incorporates a definition of "motor vehicle" from Title 46, the Court of Appeals elected to "harmonize" the PIP statute and Title 46 by equating two different definitions of "pedestrian" in a manner that narrows the available insurance coverage.

This is wrong as a matter of insurance law. It is also wrong as a matter of statutory interpretation. Statutes that serve different purposes do not conflict and are not appropriately harmonized. *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 842, 215 P.3d 166 (2009). Nothing suggests that the definition of "pedestrian" in the motor vehicle code narrows the PIP statute. Under the Court of Appeals' opinion, the PIP statute apparently no longer includes a bicyclist as an "insured" for PIP purposes when "struck by the insured automobile." RCW 48.22.005(5)(b)(ii). This unwarranted narrowing of the statutory PIP coverage is more troubling given that McLaughlin also is covered as the "named insured" under RCW 48.22.005(b)(i).

The Court of Appeals has undermined and narrowed statutory PIP coverage *without discussion* of the statute and the decisions of this Court adopting it as the state's public policy. This alone warrants review.

Travelers suggests the Court should ignore the Court of Appeals' oversight because the policy was originally a California policy. But the Court of Appeals portrayed its holding as a Washington PIP holding, and unless review is granted, it will continue as a Washington PIP holding.

Moreover, Travelers *chose* to argue Washington law. "[T]here must be an actual conflict between the laws or interests of Washington and the laws or interests of another state before Washington courts will engage in a conflict of laws analysis." *Seizer v. Sessions*, 132 Wn.2d 642, 648, 940 P.2d 261 (1997). If there is no conflict in the laws of the concerned states, "the presumptive local law is applied." *Id.* Both parties have argued there was no conflict and relied on Washington law. CP 86, 221.

Because the Court of Appeals failed to apply the PIP statute and this Court's decisions, review should be granted.[1]

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[1] No party asked the trial court to engage in a choice-of-law analysis, but even so this is not a situation where a California citizen had a transient accident in Washington. The uncontroverted evidence is that McLaughlin had moved to Washington with intent to permanently reside here. CP 199. Even before asking the court to apply Washington law, Travelers addressed its claim denial to McLaughlin in Washington and relied on Washington law in its coverage analysis. CP 64. The injury occurred in Washington to a Washington citizen. CP 198. Washington, its public institutions, and its healthcare providers would bear the consequences of diminished financial resources to cover McLaughlin's injuries. Accordingly, Washington's public policy regarding compensation of innocent accident victims is controlling. Under general principles of

B. The Court of Appeals departed from—and weakened—Washington law on the interpretation of insurance policies.

McLaughlin's policy covered medical expenses sustained by an "insured," and defined "insured" in relevant part as "a pedestrian when struck by" a motor vehicle. *McLaughlin*, 446 P.3d at 655. Because the policy did not define the term "pedestrian," the Court of Appeals viewed coverage as turning on whether "pedestrian" included McLaughlin while he was riding a bicycle. As discussed above, the Court of Appeals erred, because McLaughlin's medical expenses fell within the coverage required by the PIP statute. The Court of Appeals compounded its error by a fundamentally flawed analysis of the undefined term: the court looked to a single dictionary definition and concluded he lacked coverage. *Id.* at 656.

To determine the meaning of undefined terms, a court *may* look to standard dictionaries. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990). In *Boeing*, the Court reviewed three dictionary definitions—among a host of other authorities—in determining that insurers covering liability for "damages" could not exclude coverage for liability for pollution clean-up costs. *Id.* But the Court has always emphasized that turning to dictionaries is permissive, and only one

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conflicts of laws, a forum will not apply foreign law that conflicts with its own "fundamental public policy." *McKee v. AT & T Corp.*, 164 Wn.2d 372, 384, 191 P.3d 845 (2008).

component of interpreting an insurance policy. The meaning of an undefined term "*may* be ascertained by reference to standard English dictionaries." *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 77, 882 P.2d 703 (1994) (emphasis added). It has never been law that a single adverse dictionary definition defeats coverage.

Interpreting an undefined term in a policy is broader than looking up a word in one dictionary. Insurance contracts are broadly construed to provide coverage when possible: "The courts liberally construe insurance policies to provide coverage wherever possible." *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 694, 186 P.3d 1188 (2008).

A term in an insurance contract may be subject to multiple, reasonable definitions drawn from many different sources. In *Holden v. Farmers Ins. Co. of Wash.*, this Court found an undefined term was subject to more than one definition because the insurer had *applied* it differently in different claims. 169 Wn.2d 750, 756–57, 239 P.3d 344 (2010). Undefined terms also are subject to different interpretations by looking to statutes. *See N. Pac. Ins. Co. v. Christensen*, 143 Wn.2d 43, 50 n.5, 17 P.3d 596 (2001).

Finally, in interpreting insurance policies, courts also look to the state's public policy. Thus, in *Christensen*, the Court noted its broad interpretation of an undefined term was "also consistent with public

policy: 'RCW 48.22.030 [the UIM statute] is to be liberally construed in order to provide broad protection against financially irresponsible motorists.'" *Id.* (quoting *Finney v. Farmers Ins. Co.*, 92 Wn.2d 748, 751, 600 P.2d 1272 (1979)). The Court of Appeals erred by disregarding Washington's public policy entirely. Indeed, through a tortured re-write of a statutory definition of "pedestrian," the Court of Appeals side-stepped the public policy referenced in *Christensen*, *Finney*, *Durant* and *Kyrkos*.

V. CONCLUSION

This Court should review the Court of Appeals opinion because it substantially narrows the rights of insurance consumers in ways inconsistent with this Court's decisions and the state's public policy.

RESPECTFULLY SUBMITTED this 12th day of November, 2019.

KELLER ROHRBACK L.L.P.

By _____

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CERTIFICATE OF SERVICE

I, _____, declare under penalty of perjury under the laws of the State of Washington that at all times hereinafter mentioned, I am a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date below, I caused a copy of the foregoing document to be served on the individuals identified below via email and ABC Legal Messenger:

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Dated this 12 day of November 2019.

Chris Jarman, Legal Assistant

4820-3581-3036, v. 2

KELLER ROHRBACK L.L.P.

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