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NO. 62979-4-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

NORMAN BLACK, JANIS WARNER,
CECELIA BLACK and LESTER BLACK,

Plaintiffs-Appellants,

vs.

NATIONAL MERIT INSURANCE COMPANY,
a domestic insurer and Washington corporation,

Defendant-Respondent;

and

TRACEY RADCLIFFE,

Defendant.

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STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I

BRIEF OF RESPONDENT

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I. INTRODUCTION

During a church youth group outing in 2005, Tracey Radcliffe was riding as a passenger in a vehicle that was driven by her friend Marissa Goodell and owned by Marissa Goodell's father. The Goodell vehicle collided with a vehicle driven by Norman Black, severely injuring Norman Black and his passengers, killing Marissa Goodell, and seriously injuring Tracey Radcliffe and the two other passengers in the Goodell vehicle.

As a result of the collision, Mr. Black and his passengers made liability claims against the church, the Goodell family, and the passengers of the Goodell vehicle, including Tracey Radcliffe. National Merit Insurance Company issued an auto policy to the family of Tracey Radcliffe. National Merit paid its underinsured motorist (UIM) and personal injury protection (PIP) limits to Ms. Radcliffe and offered to defend her against the liability claims made by the Blacks.

National Merit has no obligation under the liability provisions of its policy to indemnify the passenger Tracey Radcliffe for liability claims made against her. Under the National Merit policy, liability coverage applies to a "covered person" using a "covered auto." The Goodell vehicle in which Tracey Radcliffe was a passenger would qualify as a "covered auto" only if she "operated" it. Washington insurance case law

and Washington Motor Vehicle statutes define “operator” as one in “actual physical control” of the vehicle. The passenger Tracey Radcliffe had no actual physical control over the Goodell vehicle. Tracey Radcliffe was not operating the Goodell vehicle, and therefore the liability coverage of the policy does not apply. The trial court granted partial summary judgment that National Merit’s liability coverage did not apply to the passenger Tracey Radcliffe, and the trial court’s Order should be affirmed.

II. ISSUE

1. Liability coverage would apply to the passenger Tracy Radcliffe only if she exercised actual physical control of the Goodell vehicle. Tracey Radcliffe never touched the steering wheel or any other control. Did Tracey Radcliffe exercise actual physical control of the Goodell vehicle?

III. STATEMENT OF THE CASE

A. The Underlying Accident

On Sunday night, February 20, 2005, members of a church youth group started driving back to their church after playing laser tag at the Great Escapes in Port Orchard, Kitsap County. They were returning for a sleepover at the North Mason United Methodist Church in Belfair, southwest of Port Orchard. CP 19, 20, 24, 74, 81, 102.

The teenagers were traveling in several vehicles, including a truck driven by Kevin Wyble, with three passengers, and a following vehicle driven by 16-year old Marissa Goodell, also with three passengers. Owned by Dan Goodell, Marissa Goodell's father, the Goodell vehicle was a Mazda extended-cab pickup with two seats in the front and two jump seats in the back, facing each other and perpendicular to the front seats. Tracey Radcliffe, a high school junior at the time, sat in the right front passenger seat, and Megan Claycomb and Courtney Laureano sat in the jump seats. CP 15, 24, 55.

At some point, the occupants of the Goodell vehicle talked about overtaking the Wyble group and beating them back to the Church. CP 10, 24, 27, 75-77, 90-93. The vehicles entered Highway 3, passed through Gorst, continued south, and came to a point where Highway 3 had two southbound lanes and one northbound lane. The two southbound lanes, running uphill, were about to narrow to one lane, with arrows indicating that cars in the right lane should merge left. The Goodell truck gained on the Wyble truck, and while Wyble was traveling in the left southbound lane at about 60-65 miles per hour, Goodell passed him in the right southbound lane at a speed estimated at ranges above or below 75 m.p.h. CP 8-9, 12-13, 25-26, 29, 77, 103.

Wyble slowed to let Goodell enter the left lane in front of him. CP 13, 20. A few car lengths ahead of them both, a van in the right lane had reached the point where arrows indicated a merge to the left. The van's driver, Robert Calkins, signaled left and started moving into the left lane. Continuing at a high rate of speed and also moving into the left lane, Goodell tried to pass the Calkins van before the two southbound lanes merged into one. CP 77-81, 83-86.

The Washington State Patrol described what happened next, around 9:15 p.m.:

Goodell's truck was at a higher rate of speed than Calkins van. She avoided a collision with the Calkins van by crossing the center line. Goodell then swerved back across the center line to avoid oncoming traffic. By this time, her speed had carried her up to the left front of Calkins van. As she swerved back to the right, she made contact with her right rear tire and Calkins left front tire... As she was reentering the southbound lane, the truck steered right and then was over corrected to the left.

CP 20. Goodell lost control as her truck swerved left across the centerline into the northbound lane, where it was struck broadside by a northbound Toyota mini-van, driven by Norman Black. CP 8, 11, 19-20.

As a result of the collision, Marissa Goodell died at the scene. Her passengers, including Tracey Radcliffe, sustained extensive injuries. Mr. Black and his passengers, Cecilia and Lester Black and Janice Warner (all

collectively referred to as the Blacks), sustained severe injuries. No one in the Calkins van was injured. CP 8, 14, 82.

After an extensive investigation, the Washington State Patrol concluded that Ms. Goodell's "speeding and un-safe passing maneuver" caused the accident. CP 9. At least ten law enforcement officers took part in the response and investigation. Most of them wrote reports, based on observations, tests, and multiple witness interviews. CP 8-61. No witness has ever suggested that Tracey Radcliffe or any other passenger in the Goodell vehicle touched the wheel or touched any other control mechanism of the vehicle.

B. Tracey Radcliffe and National Merit Insurance Company

Tracey Radcliffe is the stepdaughter of Stryder Klusman and the daughter of Renee Klusman, of Shelton, Washington. CP 95. National Merit issued auto policy No. 1086926 to the Klusmans with five types of coverage, including bodily injury liability coverage with limits of \$100,000 per person and \$300,000 per accident. Only liability coverage is at issue here, because National Merit has already paid its \$100,000 UIM limits and \$10,000 PIP limits to Tracey Radcliffe. CP 63, 98, 137. (Attached to this Brief as Appendix B are key pages cited from the National Merit Insurance policy, with key language circled. Because

some of the Clerk's Papers are illegible, Appendix B substitutes legible copies of the pages that became CP 63-68.)

C. The Blacks Have Asserted Liability Claims

The Blacks made liability claims against the church, the Goodell family, and the passengers of the Goodell vehicle, including Tracey Radcliffe. The Blacks alleged that through supposed words or inactions (such as failure to object to speeding) of one or more passengers, all the passengers were acting in concert with the tortfeasor Marissa Goodell. CP 105. The Blacks based this allegation on statements made to the Washington State Patrol by passengers Courtney Laureano and Tracey Radcliffe. Ms. Laureano, for example, told Trooper Joi Haner: "... we decided well, it was kind of a spur of the moment thing that we were gonna try and get there [to the church] before Kevin [Wyble]." CP 90-93. Again, no one has ever suggested that Tracey Radcliffe exercised actual physical control of the Goodell vehicle.

The Blacks settled with the church and the Goodell family. They allege that they have also settled with Claycomb and Laureano, the other passengers of the Goodell vehicle, but the Blacks have never produced in discovery or placed in the record the insurance policies of those passengers. Farmers Insurance Company apparently issued two of those policies. Any settlement by Farmers was based on policy language that

differs drastically from that in National Merit's liability policy, and has no bearing on the question of liability coverage for the passenger Radcliffe under the National Merit policy.

The Farmers Insurance Company's standard auto liability policy, in use before and after the 2005 collision involved here, provides that Farmers will pay "damages for which any **insured person** is legally liable because of **bodily injury** to any person ... arising out of the ownership, maintenance or use of a **private passenger car, a utility car, or a utility trailer.**"¹ The Farmer's policy requires only that an insured person, including a passenger, be using a car, owned or not, as opposed to operating it. A passenger is using a non-owned car and therefore has

¹ Farmers has been using this language in its standard auto policies throughout the United States and in Washington from as early as 1988 through at least 2006. For Washington cases quoting this language, see Christal v. Farmers Ins. Co., 133 Wn. App. 186, 194, 135 P.3d 479 (2006); Farmers Insurance Co. v. Whitehead, 52 Wn. App 753, 754, 764 P.2d 244 (1988). See also Farmers Ins. Co., Inc. v. Pierrousakos, 255 F.3d 639, 641 (8th Cir. 2001); Swan v. Farmers Ins. Exch., 140 P.3d 261, 262 (Colo. 2006); Beerbohm v. State Farm Mut. Auto. Ins. Co., 235 Wis. 2d 182, 612 N.W.2d 338, 341 (2000) (quoting Farmers policy); Stonewall Surplus Lines Ins. Co. v. Farmers Ins. Co., 132 Idaho 318, 971 P.2d 1142, 1147 (1999); Farmers Ins. Co. v. Young, 195 Ariz. 22, 985 P.2d 507, 331 n.1 (1998); Farmers Ins. Exch. v. Dotson, 913 P.2d 27, 29 (Colo. 1996); Hill v. Farmers Ins. Exch., 888 P.2d 138, 141 (Utah 1994), cert. denied, 899 P.2d 1231 (1995); Hillegass v. Landwehr, 176 Wis.2d 76, 499 N.W.2d 652, 653 (1993); Herrig v. Herrig, 844 P.2d 487, 489 (Wyo. 1992); Farmers Ins. Exch. v. Young, 108 Nev. 328, 832 P.2d 376, 377(1992); Farmers Ins. Co. v. Till, 170 Ariz. 429, 825 P.2d 954, 955 (1991); Collins v. Farmers Ins. Co., 312 Or. 337, 822 P.2d 1146, 1147 (1991); Kemper Ins. Cos. v. Weber, 38 Kan. App. 2d 546, 168 P.3d 607, 611 (2007); Farmers Ins. Co. v. Jokan, 30 Kan. App. 2d 1213, 57 P.3d 24, 25 (2002); and Farmers Ins. Exch. v. Knopp, 50 Cal. App. 4th 1415, 1422, 58 Cal. Rptr. 2d 331 (1996).

liability coverage. The National Merit policy, in contrast, provides liability coverage to an insured family member in a non-owned auto only if that person is operating the auto. “Operate” is far narrower than “use.” As discussed below, the passenger Tracey Radcliffe was not operating the Goodell vehicle. Any alleged coverage under a Farmers policy has nothing to do with the National Merit policy.

D. The Blacks Have Agreed On a Covenant Judgment with Ms. Radcliffe

Alleging liability of the passenger Tracey Radcliffe, the Blacks demanded payment of the liability limits of the National Merit policy. CP 108. National Merit paid UIM and PIP limits to Tracey Radcliffe, and offered to defend her. CP 97-98, 116. National Merit, however, questioned liability coverage. The Blacks made a liability settlement offer of \$150,000, and National Merit made a counter-offer of \$75,000 in August, 2006. CP 97-99, 112-17, 119-20, 122-23.

Unknown to National Merit, Tracey Radcliffe then entered a settlement and assignment of rights to the Blacks in August 2006: “Ms. Radcliffe agrees to pay, through their insurers [sic], the full current offer to settle of \$75,000, in partial satisfaction....” She also assigned to the Blacks her alleged claims against insurers. Ms. Radcliffe and the Blacks agreed to a “partial judgment” of \$75,000, and agreed “to use good faith

efforts to reach a stipulated covenant judgment.” The Blacks agreed “not to execute the judgments against any of Ms. Radcliffe’s non-assigned assets,” leaving any judgment to be executed against National Merit, not against Ms. Radcliffe. CP 126-27.

The Blacks (Opening Brief at 6) asserts that after mediation in 2006, National Merit offered \$75,000, and “Ms. Radcliffe added her own assets (an assignment...).... National Merit then refused to pay what it agreed....” This assertion is irrelevant to the coverage issue here, contrary to the record, and contrary to the fundamental contract rules of offer and acceptance. Though National Merit offered \$75,000 on August 2, 2006, CP 119-20, the Blacks never communicated to National Merit any acceptance of this offer, and, in fact, they rejected it, as reflected in repeated efforts by National Merit over the next two years to get the Blacks to negotiate.² Though the Blacks reached their August 2006 settlement and assignment with Tracey Radcliffe, they did not tell National Merit about this until after National Merit asked, on October 4, 2006. CP 123. When the Blacks sent the Radcliffe settlement agreement to National Merit, they made no claim that their agreement with Radcliffe

² On October 12, 2006, National Merit wrote to the Blacks: “In the continued spirit with which National Merit has attempted to work with you thus far, National Merit remains open to binding arbitration or, if there is some amount between \$75,000 to \$150,000 which you would recommend to settle this matter, please let us know.” CP 98.

constituted acceptance of any offer by National Merit. Almost two years went by with the Blacks still not telling National Merit about any purported acceptance of its \$75,000 offer. On April 2, 2008, the Blacks made the new assertion that “National Merit has failed to pay the amount it offered and in which Ms. Radcliffe has stipulated to a judgment.” CP 129. On April 22, 2008, National Merit wrote to the Blacks that it had “attended mediation and negotiated in good faith, offering \$75,000 to settle your claims. By making a settlement offer, National Merit did not recognize that such an amount was reasonable or owing to your clients.” CP 116. Formation of an agreement requires communicated acceptance of an offer, and the Blacks have never accepted the \$75,000 offered by National Merit.

As assignee of Ms. Radcliffe, the Blacks alleged that National Merit was liable not only for liability coverage, but also for alleged bad faith in claims handling, investigation, defense, negotiation, and settlement. CP 129-30. National Merit’s motion for partial summary judgment raised only the issue of liability coverage. After that motion was granted, the Blacks dismissed the rest of their claims. CP 345-49.

IV. SUMMARY OF ARGUMENT

Tracey Radcliffe was a passenger in a vehicle owned by the Goodell family, not her family,. Under the applicable **non-owned auto**

clause of the National Merit policy, liability coverage would apply to the Goodell vehicle only if it satisfied certain negative conditions (not owned or available for regular use by the insureds) and certain positive connections (operated by Tracey Radcliffe, for example). Several court decisions have applied the dual structure of this non-owned auto clause, requiring both a negative condition and a positive connection.

The Goodell vehicle satisfied the negative condition because it was not owned by the Klusmans. But it did not satisfy the positive connection, because Tracey Radcliffe was not operating it. Under Washington case law and statutes, operation of a vehicle means actual physical control. The issue is not whether the passenger Tracey Radcliffe, by supposed words, was acting in concert with the driver Marissa Goodell. The question is whether Ms. Radcliffe exercised actual physical control over the Goodell vehicle, and the answer is that she did not.

The Blacks cannot contend that Tracey Radcliffe operated the Goodell vehicle, and they never address controlling Washington case law on this point. Instead, they try to rewrite the policy by (1) unreasonably misreading the **non-owned auto** clause, so that operation is not required and no positive connection of the auto to an insured is required, leading to liability coverage for every car in the country, an absurd result; and (2) discarding from the policy, when a family member is involved, the

entire **your covered auto** section with its **non-owned auto** clause, and looking instead to **any covered auto**, which they interpret as meaning any car covered by any insurance policy. Both results are contrary to a fair, sensible, and reasonable reading of the policy.

V. ARGUMENT

The interpretation of an insurance policy is a question of law, Quadrant Corp. v. American States Ins. Co., 154 Wn.2d 165, 171, 110 P.3d 733 (2005), and is a matter for summary judgment. Rones v. Safeco Ins. Co., 119 Wn.2d 650, 654, 835 P.2d 1036 (1992). “The insured must show that the loss falls within the scope of the policy’s insured losses.”³ The Blacks fail to meet their burden.

A. Liability Coverage Requires a Covered Person and Covered Auto

The policy provides liability coverage only for a “covered person” using a “covered auto,” terms defined in the policy. The policy’s Insuring Agreement for Liability Coverage provides: “**We will pay damages for bodily injury or property damage for which a covered person becomes legally responsible because of an **auto accident.**” (bold in original,**

³ Showing coverage is the insured’s burden, while exclusions (not involved here) are the insurer’s burden. McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 731, 837 P.2d 1000 (1992).

underlining added). Appendix at B-4; CP 66. The Liability Coverage defines **covered person**:

1. “**You** or any **family member** with respect to the ownership, maintenance, or use of **any covered auto** or **trailer.**”
2. Any person using **your covered auto**.

Appendix at B-5; CP 67. (bold in original, underlining added).

Though typed in bold within this section, **any covered auto** appears nowhere else in the policy and is never defined. Though not typed in bold within this section, **your covered auto** is a defined term that appears in bold where it is defined and in at least 27 other places in the policy. CP 330-43. Definitions in an insurance policy must be applied. Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 427, 38 P.3d 322 (2002). Tracey Radcliffe was a passenger in a car she did not own, a **non-owned auto**. The only provision in the policy concerning a **non-owned auto** is found within the definition of **your covered auto**, and that provision applies. CP 223, 225, 272-75, 284-85. Getz v. Progressive Specialty Ins. Co., 106 Wn. App. 184, 188-90, 22 P.3d 835 (2001), applied an insurer’s definition, even though the typeface in the policy did not indicate a defined term.⁴

⁴ Appellants’ Opening Brief (at 16) asserts that an insurer cannot avoid the consequences if its own definition fails to address a proposition adequately, citing Harris, Washington Insurance Law, § 6.10 at 6-26, who is supposedly

Under the above definitions, liability coverage applies only to a covered person for the ownership, maintenance, or use of a covered auto. Under the above definition of a “covered person,” “use” relates only to whether a person was using a covered auto. “Use” is irrelevant to whether an auto was a covered auto in the first place. The Goodell vehicle was not a covered auto. “Use” might be relevant to liability coverage for a passenger under a Farmers policy, but not to liability coverage for a **non-owned auto** under this National Merit policy. Appendix at B-4, 5: CP 66-67, 222, 289-90.

The general definitions, applicable to all five coverages of the National Merit policy, define **Your covered auto**:

1. Any vehicles you own shown on the Declarations Page.
2. Any of the following types of vehicles on the date you become the owner, whether operational or not:
 - a. a private passenger **auto**;
 - b. a pick-up, van or panel **truck**:
 - (1) that is not used as a commercial vehicle for the delivery or transportation of good or materials unless such use is:
 - (a) incidental to **your business** of installing, maintaining, or repairing furnishings or equipment; or

quoting from Getz. But the words supposedly quoted by Harris appear nowhere in Getz.

(b) for farming or ranching;

c. a **motorhome** or **trailer**.

If the vehicle **you** acquire:

- a. replaces one shown on the Declarations Page, it will have the same coverage as the vehicle it replaced; or
- b. is in addition to any shown on the Declarations Page, it will have the broadest coverage **we** now provide for any vehicle shown on the Declarations Page.

This provision applies only if **you** ask **us** to insure it within **30 days** after you become the owner.

3. Any **trailer you own**.
4. Any **temporary substitute auto** which is an **auto** or **trailer** you do not own while used as a temporary substitute for any other vehicle described in definitions 1, 2, or 3 above which is out of normal use because of its breakdown, repair, servicing, loss or destruction.
5. Any **non-owned auto** which is a private passenger **auto**, a pick-up, van or panel **truck, motorhome, or trailer** not owned by **you** or any **family member** or furnished or available for regular use while in **your custody, possession, or being operated by you or any family member**.

Appendix at B-4; CP 66. (bold in original, underlining added). Owned by Dan Goodell and driven by Marissa Goodell, the Goodell vehicle satisfies none of these provisions, and was not a covered auto.

B. The Goodell Vehicle Was Not a Covered Auto

1. The First Four Categories

An insurance policy must be given a reasonable interpretation, and its provisions must be read in the context of other provisions. Matthews v. Penn-America Ins. Co., 106 Wn. App. 745, 26 P.3d 451 (2001), *rev. denied*, 145 Wn.2d 1019, 41 P.3d 485 (2002). Consideration of the five categories under **your covered auto** reveals a reasonable scheme requiring that the insurer be told about significant risks with a frequent or close connection to the insured. An insurer needs to know about those risks to rate them.⁵ There is no requirement to tell the insurer about vehicles that are insignificant or that lack a frequent or close connection to the insured.⁶ But liability coverage still requires at least some positive

⁵ State Farm Mut. Auto. Ins. Co. v. LaRoque, 486 N.W.2d 235, 241 (N.D. 1992) (“The purpose of a ‘non-owned car’ clause is to prevent an insured from purchasing an automobile liability insurance policy for only one designated vehicle at a premium charged for one vehicle and thereafter claiming coverage under that policy for the regular use of other vehicles without paying an additional premium for the added risk.”). Cf. Westhaver v. Hawaiian Ins. & Guar. Co., Ltd., 15 Wn. App. 406, 408, 549 P.2d 507 (1976) (a non-owned auto clause requiring that the vehicle not be owned by the insured or available for his regular use “is directed against an increase in the quantum of use which enhances the risk without a corresponding addition to the premium” collected by the insurer). See, e.g., Dairyland Ins. Co. v. Ward, 83 Wn.2d 353, 359, 517 P.2d 966 (1974) (one purpose of a non-owned auto clause or “use of other” auto clause is “to prevent the insured from receiving coverage on all household cars or another uninsured car of the insured by merely purchasing a single policy”).

⁶ See, e.g., Robinson v. Pemco Ins. Co., 71 Wn. App. 746, 862 P.2d 614 (1993) (“The nonowned vehicle clause is intended to protect the insured on those

connection between the vehicle and the insured, otherwise every car in the United States and Canada would be covered. CP 189. The Blacks unreasonably misread this language to cover every car in the country.

The first category, “Any vehicles **you** own shown on the Declarations Page,” requires the insured to identify owned autos, giving the insurer information bearing on the risk, so it can be rated. Appendix at B-4; CP 66.

The second category covers a variety of “vehicles on the date **you** become the owner ... only if **you** ask **us** to insure it within **30 days** after you become the owner.” Appendix at B-4; CP 66. The insurer will cover newly owned vehicles not yet known to it only if insurance is requested within 30 days. Again, the insurer rationally seeks to limit its unknown and therefore unratable risks.

The third category, an owned trailer, is incapable of doing damage under its own power. So the risk is of less concern, and need not be made known to the insurer.

The first three categories would apply only if “**you**” (Strider and Renee Klusman) owned the Goodell vehicle, and they did not. Dan Goodell did. The policy defines “You” and “Your” as, “the person named infrequent occasions when he is driving other people’s vehicles which might not be insured.”) (emphasis added).

on the Declarations Page and the spouse if a resident of the same household.” The Declarations Page names Strider and Renee Klusman. Appendix at B-1, 3; CP 63, 65. Hence the term “you” applies to them, but not to Tracey Radcliffe. The Declarations Page lists three owned vehicles, and the Goodell vehicle is not one of them. Appendix at B-1, 2; CP 63-64, 167-68.

The fourth category, **temporary substitute auto**, applies to a substitute for a Klusman vehicle that was out of normal use because of breakdown, repair, or loss. Appendix at B-4; CP 66. Under this section, the insurer covers a risk not declared only because it is by definition temporary, of short duration. This provision does not apply here, because during the church youth outing, Tracey Radcliffe was a passenger in the Goodell vehicle, which was not being used as a temporary substitute for a Klusman vehicle that was not running.

2. The Fifth Category, Non-Owned Auto

The fifth category, **non-owned auto**, covers

Any **non-owned auto** which is a private passenger **auto**, a pick-up, van or panel **truck**, **motorhome**, or **trailer**, not owned by **you** or any **family member** or furnished or available for regular use while in **your** custody, possession, or being operated by **you** or any **family member**.

Appendix at B-4; CP 66. Under the dual structure of this clause, a non-owned auto must satisfy two types of requirements:

(1) a negative condition (not owned or furnished or available for regular use ...)

(2) a positive connection to an insured (while in your custody or possession or being operated by you or any family member)

The Goodell auto met the negative condition because it was not owned or furnished for regular use by an insured.

Under the dual structure, however, the Goodell auto failed to satisfy the required positive connection, because it was not in the custody or possession of **you** (Strider or Renee Klusman) or being operated by a family member.⁷

Operation of the Goodell vehicle by the passenger Tracey Radcliffe would have satisfied the required positive connection. The policy defines “family member” as, “a person related to **you** by blood, marriage or adoption who is a resident of **your** household...” Appendix at B-3; CP 65. Though “you” does not apply to Tracey Radcliffe, she meets the definition of a family member. Operation of a non-owned auto (the Goodell vehicle) by a family member (Tracey Radcliffe) would have

⁷ Because “custody” or “possession” relate only to **you**, Strider and Renee Klusman, those terms are irrelevant; the Goodell vehicle was plainly not in their custody or possession. Nor were they operating it.

satisfied the positive connection required for liability coverage. But the passenger Tracey Radcliffe was not operating the Goodell vehicle, under Washington case law discussed below.

Like the other four categories, the non-owned auto provision reflects a reasonable concern for limiting risks that are not known and therefore not rated. A non-owned auto clause adds coverage, but “that coverage is not unlimited.” Harris, Washington Insurance Law, § 25.3 at 25-13. Because a non-owned auto is neither shown on the Declarations Page nor otherwise reported to the insurer, the clause limits its scope by requiring not only the negative condition but also the positive connection discussed above, the dual structure. The reason for the negative condition -- not owned or furnished or available for regular use -- is to preclude coverage of an unknown car with a close or frequent connection to the insured. An auto with a close or frequent connection to the insured must be declared to qualify for coverage, because the insurer must be able to rate close or frequent risks. But autos not owned or regularly used by the insured include every car in the country. To prevent the unreasonable result of extending liability coverage to every car in the country, the clause requires some positive connection to the insured: in custody, possession or operated by an insured. Only if the insured has some connection -- not too close or frequent -- will the insurer cover the unreported non-owned

auto. A reasonable reading of the clause reflects the self-evident reason behind its dual structure.

C. Courts Apply the Dual Structure

Applying almost identical language in summary judgment decisions, courts have recognized the dual structure of the **non-owned auto** clause, holding that both the negative condition and the positive connection must be satisfied, with failure to satisfy one of them making the provision inapplicable. In Progressive Am. Ins. Co. v. State Farm, 184 N.C. App. 688, 647 S.E.2d 111, 116 (2007), an accident involved a car owned by a mother, given to a son (without change of title), and driven by his girlfriend, who was a named insured under the son's insurance policy. 647 S.E.2d at 113. The mother's insurance policy and the son's insurance policy each had a non-owned auto clause like the one in the National Merit policy. 647 S.E.2d at 116. The court found the non-owned auto clause of each policy inapplicable solely because of failure to satisfy the negative condition. The car was not a non-owned auto under the mother's policy, because she owned it. Nor was it a non-owned vehicle under the son's policy, because it was furnished for regular use by him, a named insured. Failure to satisfy the negative condition (not furnished for regular use of you) made the non-owned auto clause inapplicable under the son's policy, even though the positive connection was satisfied (the car was

being operated by the son's girlfriend, a named insured). 647 S.E.2d at 116.

Enterprise Leasing Co. v. Williams, 177 N.C. App. 64, 627 S.E.2d 495, 500 (2006), held that a non-owned car rented by the insured but driven by her sister-in-law was not covered as a non-owned auto. The negative condition was satisfied, because the insured did not own the rented car. But the required positive connection was lacking, because the car was not in the custody of the insured. 627 S.E.2d at 500. Similarly, Snappy Car Rental v. Tomko, No. 75998, 2000 WL 680374 (Ohio Ct. App. 2000), at *3-4, held that a non-owned car rented by the insured but loaned to an associate was not covered as a non-owned auto. Though the negative condition (not owned) was satisfied, the positive connection was lacking because the car was not in the custody of the insured. Again, under the dual structure of the non-owned auto clause, both the negative condition and the positive connection must be satisfied.

Citing certain cases for nothing more than general interpretation of **non-owned auto** clauses, the Blacks avoid discussing cases that actually apply the language of the **non-owned auto** clause at issue here, with its dual structure. But Progressive American, Enterprise Leasing, and Snappy applied that language and structure, and they are the most pertinent authority here. Ellis Court Apts. Ltd. v. State Farm Fire and Cas. Co., 117

Wn. App. 807, 72 P.3d 1086 (2003), treated general interpretation guidelines as merely secondary to cases on point in Washington and other jurisdictions on the particular substantive insurance issue involved, in that case, trigger of coverage:

Washington has not recognized the manifestation doctrine in prior ... cases, and we decline to adopt it here. Rather, our ... interpretation of policy contract language aligns with Kief's [Farmer's Co-op. v. Farmland Mut. Ins. Co., 534 N.W.2d 28 (N.D. 1995)] refecction of the manifestation trigger.

117 Wn. App. at 814. Interpreting policy language in light of substantive case law, Ellis Court declined to adopt a doctrine recognized by no Washington court. The Blacks, in contrast, want to interpret policy language in a vacuum, oblivious to substantive case law, to extend liability coverage to every car in the country.

D. Tracey Radcliffe Exercised No Actual Physical Control

The dual structure of the non-owned auto clause requires a positive connection between an insured and the auto, but that connection was not satisfied here, because Tracey Radcliffe was not operating the Goodell vehicle. Under Washington case law and statutes, only one who is in actual physical control of a vehicle is its operator. Tracey Radcliffe had no physical control of the Goodell vehicle, and was not its operator; its operator was the driver, Marissa Goodell.

Applying Washington law to an auto insurance policy, the United States Court of Appeals for the Ninth Circuit held that operation of a vehicle means actual physical control. Orth v. Universal Underwriters Ins. Co., 284 F.2d 857 (9th Cir. 1961), involved an automobile dealer in West Seattle who let a prospective purchaser test drive a car. The purchaser ended up in a collision. The dealer's liability policy applied to a covered automobile "only while such automobile is operated by the named insured...or employee..." The issue was whether the automobile driven by the purchaser was being "operated" by the named insured, West Seattle Motors. 284 F.2d at 858-59, 861. Affirming summary judgment, the Court held that the car was being operated by the prospective purchaser, who was driving:

If 'operated' means 'driven' the automobile was not being operated by West Seattle Motors, but by [the prospective purchaser]. But [prospective purchaser and spouse] argue that 'operated' is not used ...in the limited sense of 'driven,' but includes the concept of direction and control. It is argued from this that a question of fact is presented as to whether [the prospective purchaser] drove the automobile subject to the direction and control of West Seattle Motors.

The word 'operate' has varying meanings and may include the concept of direction and control through an agent, or may be limited to actual physical control.

284 F.2d at 859 (emphasis added). The Court considered Washington Motor Vehicle statutes:

In [the insurance policy] the word ‘operated’ is employed to describe a relationship between an individual and an automobile. When used in this context the word ‘operate’ means ‘drive.’ Thus, in the Washington Motor Vehicle Act the words ‘operate any vehicle,’ ‘operator of any motor vehicle,’ ‘operating a vehicle,’ ‘operator of a motor vehicle,’ and ‘operator of a vehicle’ consistently refer to the actual physical control of an automobile.

284 F.2d at 859-60 (emphasis added). Under the standard of “actual physical control” as applied to our case, the driver Marissa Goodell was the operator of the Goodell vehicle.

Like the court in Orth, the Washington Supreme Court in North Pacific Ins. Co. v. Christensen, 143 Wn.2d 43, 17 P.3d 596 (2001), considered insurance policy language and the Washington Motor Vehicle Code, and concluded that operation of a vehicle meant actual physical control. Christensen involved a teenage passenger who grabbed the steering wheel and caused an accident. The driver’s automobile insurance policy contained UIM provisions applying to damages the insured driver was entitled to recover from the operator of an underinsured motor vehicle. The issue was whether the passenger who grabbed the wheel thereby became the operator of the vehicle.

The court consulted the dictionary:

‘Operator’ is defined as ‘one that produces a physical effect or engages himself in the mechanical aspect of any process or activity as ... [a] driver.’ A driver is ‘a person in actual

physical control of a vehicle, ‘and control means the ‘power or authority to guide or manage.’

143 Wn.2d at 49 (emphasis added). The Court also consulted the Washington Motor Vehicle Code:

This construction of the term ‘operator’ corresponds with the definition found in the Motor Vehicle Code, Title 46 RCW: ‘Operator or driver means every person who drives or is in actual physical control of a vehicle.’ RCW 46.04.370.

143 Wn.2d at 50 (emphasis added). Applying these dictionary and statutory definitions, the court held that an operator “is not solely the person occupying the driver’s seat, but rather is anyone who is ‘in actual physical control of a vehicle,’ having the ‘power to guide’ it.” 143 Wn.2d at 49 (emphasis added). The court found that the passenger took actual physical control by grabbing the wheel:

While the passenger ... did not have sole and continuous control of all the car’s functions, he was in ‘actual physical control’ of the steering mechanism long enough to cause a collision and resulting injuries. Therefore, [the passenger] is an ‘operator’ of [the insured driver’s] vehicle for purpose of [the insurer’s] UIM policy provisions.

143 Wn.2d at 53 (emphasis added). In our case, however, the passenger Tracey Radcliffe neither touched the steering wheel nor exercised any other form of actual physical control over the Goodell vehicle.

Still another Washington decision found that in an auto insurance policy, operation of a vehicle meant personal, physical management of it.

Oregon Mut. Ins. Co. v. Fonzo, 2 Wn. App. 304, 469 P.2d 989, *review denied*, 78 Wn.2d 993 (1970), involved a minor son who left a vehicle parked with the motor running while he went into a post office. The driverless vehicle then struck a person in the parking area. The family's auto liability insurance policy contained an exclusion for "any claim arising from accidents which occur while any automobile is being operated by [the minor son]". 2 Wn. App. at 305. Affirming summary judgment and holding that the son was not operating the driverless vehicle, the court agreed with

highly respectable authority, both in dictionary and in court decisions, to the effect that operation means the actual handling of the machinery...

Many cases have interpreted the words 'operate' and 'being operated by'. . . They do lead us to the conclusion that the better rule is stated in 7 Appleman, Insurance Law and Practice § 4314 (1962):

The term 'operation' ... runs throughout the arterial structure of automobile insurance law. The better definition of the expression is that it involves personal, physical management of the automobile by the person in question.

2 Wn. App. at 308 (emphasis added). Under this standard, the passenger Tracey Radcliffe was not engaged in personal, physical management of the Goodell vehicle, and was therefore not its operator.

E. The Blacks' Arguments

Because Tracey Radcliffe was plainly not operating the Goodell vehicle, the Blacks try to rewrite the policy by (1) unreasonably misreading the **non-owned auto** clause, so that operation is not required and no positive connection of the auto to an insured is required, leading to liability coverage for every car in the country; and (2) discarding from the policy, when a family member is involved, the entire **your covered auto** section with its **non-owned auto** clause, and looking instead to **any covered auto**, which they interpret as meaning any car covered by any insurance policy. Both results are contrary to a fair, sensible, and reasonable reading of the policy.

1. The Blacks' Argument: Liability Coverage for Every Non-Owned Auto in the Country

The Blacks give the **non-owned auto** clause a strained and forced interpretation that leads to unreasonable results. They selectively cite certain guidelines of interpretation while ignoring the most fundamental ones. An insurance policy “should not be given a strained or forced construction which could lead to an extension or restriction of the policy beyond what is fairly within its terms, or which would lead to an absurd conclusion, or render the policy nonsensical or ineffective.” E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co., 106 Wn.2d 901, 907, 726 P.2d 439 (1986). An insurance policy must be given a “fair, reasonable and

sensible construction.... [W]e may not modify it or create ambiguity where none exists.” Quadrant Corp. v. American States Ins. Co., 154 Wn.2d 165, 171, 110 P.3d 133 (2005).

Instead of a reasonable reading of the **non-owned auto** clause, the Blacks give it an unreasonable misreading that destroys its dual structure, rearranges the words, reverses the positive connection into a negative one, and mangles standard usage.

Starting with the false premise that “or” is disjunctive regardless of usage and context, the Blacks misread the clause as a list of “alternative meanings of non-owned auto which would trigger liability coverage Thus . . . ‘your covered auto’ is an auto that meets any one of the above descriptions” (emphasis in original) Opening Brief at 21-22. Their text offers several alternatives, their Footnote 6 lists more, and their summary judgment briefing conjures up still more. CP 315-16. Under their misreading, any one of these and several others would trigger liability coverage:

1. an auto not owned by an insured;
2. an auto not furnished or available for regular use by an insured;
3. an auto “furnished or available for a family member’s (Tracey Radcliffe’s) regular use, as long as that auto is not

being used by her ‘while in your [her parents’] custody, possession.’” Appellants’ Brief at 22;

4. an auto not in **your** custody or possession;
5. an auto not being operated by **you** or any **family member**.

Because liability coverage applies to “any person using **your covered auto**,” and **your covered auto** includes a **non-owned auto**, the Blacks’ misreading leads to the unreasonable result that liability coverage applies to every car not owned by the insureds, every car not available for their regular use, every car not in their custody or possession, and every car not operated by them. Any one of these alternatives takes in every car in the country except the three declared cars that the Klusmans own, which are already covered.

Several misreadings lead to this unreasonable result.⁸ The Blacks’ generalizations about a disjunctive “or” ignore usage and context, a fallacy that clouds their deposition questions. The Blacks protest that “National

⁸ In addition, a verbal sleight-of-hand permeates the Blacks’ entire argument about the non-owned auto clause. They repeatedly assert that Tracey Radcliffe’s “use” of the Goodell vehicle qualifies it as a covered **non-owned auto** under the covered auto section. But nothing in the **non-owned auto** clause qualifies a family member’s use of such an auto for liability coverage. “Use” appears only in the negative condition, “not ... furnished or available for regular use” Again, liability coverage applies to a covered person using a covered auto. If the Goodell vehicle were a covered auto, Tracey Radcliffe would have been using it. But whether or not she was using it has nothing to do with whether it was a covered auto in the first place. Appendix at B-4, 5; CP 66-67, 222, 289-90.

Merit's argument also requires its 'non-owned auto' clause to be rewritten from the disjunctive 'or' to the conjunctive 'and' ..." CP 316. But the Blacks have it backwards. "A or B" might be disjunctive, but "Not A or B" is a conjunctive negative. "I would not do it for love or money" means "I would not do it for love and I would not do it for money." If liability coverage extended to "A or B," then A or B alternatively would qualify for coverage. But if, as here, liability coverage extends to "Not A or B," then neither A nor B qualifies for coverage. Bryan Garner, Editor of Black's Law Dictionary, points out the obvious in his A Dictionary of Modern American Usage (1998) at 453-54, attached to this Brief as Appendix B. "Not A or B" means "Not A nor B," the same as "Neither A nor B." "Not A or B" means that neither A nor B qualifies for coverage, and therefore both negative conditions must be avoided. They are not disjunctive alternatives for coverage, but conjunctive disqualifications for coverage.

Like their briefs, the Blacks' deposition questions focused over and over on supposed "alternatives" in isolation, while ignoring the totality of the **non-owned auto** clause and the rest of the policy. See, for example, CP 229-32, 235, 238-47, 251, 287. An objection from National Merit defense counsel summed up both depositions: "He's told you many times he's gone through that paragraph and all its ors, and you keep coming

back and trying to get him to admit he only looked at one. He's told you many times he looked at all of it." CP 251. The National Merit deponents repeatedly testified that they looked at "the totality," "everything." CP 236, 239, 251. When counsel for the Blacks argued that one negative condition (not owned by you) was enough for coverage, the National Merit witnesses replied that a positive connection (operated) was also required. CP 232, 245-46, 283. Having considered all information available, the deponents found no coverage under all pertinent policy provisions because Tracey Radcliffe was not operating the Goodell vehicle. CP 213-14, 227-31, 250. One deponent testified: "The language of the non-owned auto [clause]... is fairly plain. The facts as we understood them were fairly plain. I was fairly comfortable with my interpretation subject to coverage counsel agreeing or disagreeing with my interpretation." CP 221. Coverage counsel agreed. CP 218, 224.

The Blacks' next misreading is to delete the required positive connection. The Goodell auto did not have the required positive connection to an insured, because the passenger Tracey Radcliffe was not operating it. Again, the obvious purpose of requiring some positive connection to an insured is to avoid the unreasonable result of extending liability coverage to every non-owned car in the country.

Because that unreasonable result is the one the Blacks want, they discard the required positive connection in at least two different ways, without being overly clear about what they are doing. First, starting from the false premise that “Not A or B” sets up alternatives for coverage, they conclude that any car not owned by the insureds is covered, without more, and therefore it makes no difference whether it was or was not operated by an insured. Second, adding belt to suspenders, they insist that they can rearrange “not” anywhere they want in the non-owned auto clause: “[I]t is unclear what words or phrases in the ‘non-owned auto’ definition are modified by the word ‘not,’ but a construction in favor of the insured would provide even more alternatives to coverage.” Appellants’ Brief at 22 n.6. So they can move “not” around to create coverage, and they do, moving it to modify “operated.” The Goodell vehicle was not being operated by Tracey Radcliffe, and under their misreading, this “alternative” is enough for liability coverage. Under the Blacks’ multiple misreadings, the **non-owned auto** clause means anything and means nothing at the same time. Their argument is hard to follow because it is so unreasonable.

2. **The Blacks' Argument: Liability Coverage for Any Car Insured By Anybody**

Because there is no liability coverage for the Goodell vehicle under any reasonable reading of the **non-owned auto** clause in the **your covered auto** definition, the Blacks try to discard those provisions from the policy whenever an insured is involved, and instead make the most of the undefined phrase **any covered auto**. Though **any covered auto** appears as one definition of **Covered Person** in the Liability Coverage Part, it appears nowhere else in the policy and is never defined. CP 330-43.

Even if **any covered auto** applied, there would still be no coverage. "Any" modifies "auto"; "any" does not modify "covered" or coverage. **Any covered auto** means any auto covered by this insurance policy. The Blacks rewrite **any covered auto** to mean any auto covered by any insurance policy. But most cars in the country are covered by some insurance. The Blacks cite no case law applying their forced interpretation, which violates the fundamental interpretation guideline that the insurance policy is the context that gives meaning to its terms.

"Covered" in an insurance policy refers to coverage by that insurance policy. Interpreting a term in the context of an auto policy, the court in Matthews v. Penn-America Ins. Co., 106 Wn. App. 745, 26 P.3d 451 (2001), *review denied*, 145 Wn.2d 1019, 41 P.3d 485 (2002), held that

the term “family” was limited to blood relations and did not include a non-blood relation residing in the household. 106 Wn. App. at 750.

And, with dictionary in hand, it is easy for the dissent to conclude that “family” has a variety of reasonable meanings and that Penn America’s “family,” construed in favor of coverage, is broad enough to include the adult son of the insured’s girlfriend.

The flaw in this argument is the misuse of “context.” If “context” means all the possible dictionary definitions, it is meaningless. To be meaningful, context must refer to the context of Penn-America’s policy. Thus, we consider all appropriate dictionary meanings of “family” and then look to the words and phrases surrounding “family” in Penn-America’s policy to guide us to the meaning of “family” in that context. ... Moreover, by using “context” to include all possible dictionary definitions, the dissent fails to heed the Supreme Court’s warning against simply surveying dictionary definitions. Mains Farm Homeowners Ass’n v. Worthington, 121 Wash.2d 810, 854 P.2d 1072. ...

The same is true here. The general context here is insurance coverage. The specific context is the language of Penn-America’s policy.

Matthews, 106 Wn. App. at 750-51 (emphasis added).⁹

So too here, the general context is insurance coverage, and the specific context is coverage by National Merit’s policy, not coverage by any policy. Within the context of the National Merit policy, **covered**

⁹ “[W]e look to the words and phrases in the [auto] policy surrounding the undefined terms to guide us to their meaning.” Wheeler v. Rocky Mtn. Fire & Cas. Co., 124 Wn. App. 868, 872, 103 P.3d 240 (2004), *review denied*, 155 Wn.2d 1002 (2005). See also Panorama Village Condominium Owners Ass’n v. Allstate Ins. Co., 144 Wn.2d 130, 159, 26 P.3d 910 (2001) (the term “hidden” “does not have more than one reasonable meaning in the context of this insurance policy”).

means covered by that policy. **Covered, coverage, Liability Coverage, covered person, any covered auto, your covered auto,** and similar terms appear throughout the policy. Whether defined or undefined, they mean covered by the National Merit insurance policy.

A dictionary might be useful for many terms in a policy, such as “auto” or “family member.” But no dictionary tells what “covered” means in an insurance policy, and looking up “covered” in a dictionary is a circular exercise. “Covered” and “coverage” are core terms of the policy, and no dictionary defines the core functioning of the policy itself. One determines what is covered by considering the entire policy in context, not by looking up “covered” in a dictionary. Similarly, one determines one’s Federal income tax obligations by consulting all pertinent provisions of the I.R.S. Code, not by looking up “taxable” in Webster’s Third New International Dictionary.

Both parts of the Covered Person definition focus on autos as well as persons. CP 171. Both require a covered auto. There is a reason to connect persons covered under the National Merit policy to autos covered under the National Merit policy. But there is no reason to connect persons covered under the policy to autos covered under any policy. National Merit knows what categories of autos are covered under its policy, but it has no idea what categories are covered under any policy of other insurers.

An insurer will not create coverage on the basis of what other unknown policies might cover. Such a leap in the dark would be capricious and contrary to common sense. Washington courts resolve insurance issues by “a common sense approach.” Blackburn v. Safeco Ins. Co., 115 Wash.2d 82, 92, 794 P.2d 1259 (1990).

Only in certain limited situations would one policy provide coverage because another one does. For example, an excess insurance policy provides coverage in excess of underlying policy limits because the underlying policy provides coverage up to those limits. But there is no reason why a primary auto liability policy would cover an auto merely because any other primary policy covers that auto.¹⁰

An insurer wants to be told about significant risks closely or frequently connected to the insured, a reasonable concern that is apparent throughout the National Merit policy terms discussed above. See in particular footnote 5, above. Nothing could be more contrary to this concern and more irrational than to extend liability coverage to any car not reported by the insured, merely because it is covered under any other policy.

¹⁰ Courts are “to give the wording of the policy its natural meaning and not attribute ‘unlikely meaning to the terms employed without some basis in the policy for doing so.’” Ristine ex rel. Ristine v. Hartford Ins. Co. of Midwest, 195 Or. App. 226, 233, 97 P.3d 1206 (2004).

The Blacks reach for the Other Insurance clause (CP 173) to shore up their argument concerning **any covered auto**:

OTHER INSURANCE

If there is other applicable liability insurance we will pay only our share. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle **you** do not own shall be excess over any other collectible insurance. Excess means the other limits must be paid before this coverage is available.

The Blacks argue that any auto that is covered by any other policy must also be covered by the National Merit policy, because this Other Insurance clause makes the National Merit policy excess over that other policy for a vehicle **you** do not own.

The argument ignores reality. An “Other Insurance” clause is almost universal in insurance policies of any kind. Its standard catchall provisions are boilerplate written blindly to meet unknown possibilities, and to sort out priorities when unknown multiple policies might apply. It has nothing to do with creating coverage merely because another policy might or might not apply. Such a boilerplate clause is not tailored to complement any other specific policy provision.

The Other insurance clause cited by the Blacks is not meant to complement **any covered auto** in the Liability Coverage part. Not only are boilerplate Other Insurance clauses found in all kinds of insurance, but

five Other Insurance clauses appear in the National Merit policy itself, only one of them relating to Liability Coverage, where **any covered auto** appears. These five Other Insurance clauses are all substantially the same boilerplate, not tailored to anything as singular as **any covered auto**.

The policy begins with definitions (including **your covered auto**) applicable to all Parts (CP 169-70), followed by five separate coverage parts, four of them with their own definition of **Covered Person**, and all five of them with their own Other insurance provision.¹¹ The definition of **Covered Person** in the Liability Coverage is the only one to use the phrase “any covered auto.” (CP 171). Yet the Other Insurance clause in the Liability Coverage (CP 173) shares the same structure as the Other Insurance clauses in the other four Coverage parts (CP 175, 178, 180-81, and 184). All five provide that National Merit’s share is its proportion of total applicable limits, that this policy is excess over other insurance for a vehicle rented or not owned, and that excess means the other limits must be paid before this coverage is available. (CP 173, 175, 178, 180-81,

¹¹ Part I, Liability Coverage (CP 170-73), with its own **Covered Person** definition (CP 171) and its own Other Insurance clause (CP 173); Part 2, Personal Injury Protection Coverage (CP 173-76), with its own **Covered Person** definition (CP 173) and Other Insurance clause (CP 175); Part 3, UIM Bodily Injury Coverage (CP 176-78), with its own **Covered Person** definition (CP 176) and Other Insurance clause (CP 178); Part 4, UIM Property Damage Coverage (CP 179-81), with its own **Covered Person** definition (CP 179) and Other Insurance clause (CP 180-81); and Part 5, Damage to Your Auto Coverage (CP 181-85), with its own Other Insurance clause (CP 184).

181). Again, any argument that this standard boilerplate is tailored to the singular term **any covered auto** is contrary to the record.

VI. CONCLUSION

Liability coverage would apply to the passenger Tracey Radcliffe only if she exercised actual physical control of the Goodell vehicle. Any supposed words or inactions did not constitute actual physical control by Tracy Radcliffe, who never touched the steering wheel or any other controlling mechanism of the Goodell vehicle. The driver Marissa Goodell, not the passenger Tracey Radcliffe, had actual physical control of the Goodell vehicle and was its operator.

The Blacks' effort to rewrite the non-owned auto clause would lead to liability coverage for every car in the country. No policy language, no guideline of interpretation, no rationale, and no court decision can lead to such an unreasonable result. The Blacks' effort to extend liability coverage to any car covered by any policy ignores the context of the National Merit policy and leads to a result that would be capricious and unreasonable.

This Court should affirm the trial court ruling that the National Merit auto policy provides no liability coverage for the passenger Tracey Radcliffe for the collision involving the Goodell vehicle.

RESPECTFULLY SUBMITTED this 3rd day of September,
2009.

FORSBERG & UMLAUF, P.S.

By: 

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CERTIFICATE OF SERVICE

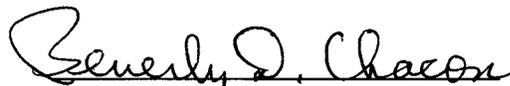
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing BRIEF OF RESPONDENTS on the following individuals in the manner indicated:

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SIGNED this 3rd day of September, 2009.


Beverly D. Chacon

2009 SEP - 3 PM 4: 16
STATE OF WASHINGTON
SUPERIOR COURT

APPENDIX

A-1 to 2: Bryan Garner, Dictionary of Modern American Usage

B-1 to 6: Pertinent pages From National Merit Insurance Policy

A, DICTIONARY OF
MODERN
AMERICAN
USAGE

Bryan A. Garner

New York Oxford
OXFORD UNIVERSITY PRESS
1998

A-1

normality; normalcy. The first has long been considered superior to the second. Born in the mid-19th century and later popularized by President Warren G. Harding, *normalcy* has never been accepted as standard by the best writing authorities. It still occurs less frequently than *normality*, and it ought to be treated as a NEEDLESS VARIANT. Careful editors continue to prefer *normality*—e.g.: “Set to emerge officially from the University of Chicago next week, the landmark study, called the ‘National Health and Social Life Survey,’ shatters many preconceptions in its attempts to define *normality*.” Peter Gerner, “Sex Study Shatters Kinky Assumptions,” *Chicago Trib.*, 6 Oct. 1994, § 1, at 1.

north; northward(s); northerly. See DIRECTIONAL WORDS.

nostrum /nos-trəm/, meaning either “a quack medicine” or “a panacea,” forms the plural *nostrums*—e.g.: “If it wants to move into the global economy, [India] must give up many of the *nostrums*, such as the need to preserve small businesses, [that] are deeply enshrined in its social policy.” Peter Montagnon, “Old Protectionism Restricts Progress,” *Fin. Times*, 19 Nov. 1996, at 4. See PLURALS (B). Cf. *rostrum*.

nosy (= unduly inquisitive; prying) is the standard spelling. *Nosey* is a variant form.

not. A. Placement of. When used in a construction with *all* or *every*, *not* is usually best placed just before that word. E.g.: “But *every* team *does not* expect more. Kansas does.” Jonathan Feigen, “College Basketball Preview,” *Houston Chron.*, 10 Nov. 1996, at 21. (A possible revision: *But not every team expects more. Kansas does.*) “While *every* letter *cannot* be answered, your stories may be used in future columns.” Eileen Ogintz, “Children Connect on a Caribbean Cruise,” *News & Observer* (Raleigh), 31 Aug. 1997, at H7. (A possible revision: *While not every letter can be answered. . . .*) See all (B).

B. *Not . . . nor.* This construction should usually (when short clauses are involved) be *not . . . or*. E.g.: “As parents, we need to encourage our children to focus on our inner character, *not* on our superficial traits, *not* on marketing-driven peer expectations.” Ellen J. Dewey, “Dispelling a Myth,” *Lancaster New Era*, 17 Aug. 1997, at P3. (A possible revision: *As parents, we need to encourage our children to focus on our inner character, *not* on our superficial traits, *or* on marketing-driven peer expectations.*) “The Ramona trial . . . did *not* re-

unite the Ramonas, *nor* did it convince Steph Ramona that she may have been wrong.” Ann Rule, “Recalling an Elusive Past,” *Wash. Post*, 7 Sept. 1997, Book World §, at 6. (A possible revision: *The Ramona trial did *not* reunite the Ramonas, *or* even convince Steph Ramona that she might have been wrong.*) See **nor** (B).

C. In Typos. *Not* is a ready source of trouble. Sometimes it becomes *now*, and sometimes it drops completely from the sentence. This tendency helps explain why some newspapers use CONTRACTIONS such as *shouldn't* and *wouldn't*: the negative is unlikely to get dropped. See **not guilty** (A).

D. *Not [this] but [that].* This construction sometimes leads to MISCUES if the negative isn't well placed—e.g.: “The dungeon is the center of a debate over *not* the effectiveness of pedagogic hard labor *but* the race of the punished and the race of the punishers.” Jon D. Hull, “Do Teachers Punish According to Race?” *Time*, 4 Apr. 1994, at 30. (A possible revision: *The dungeon is the center of a debate not over the effectiveness of pedagogic hard labor but over the race of the punished and the race of the punishers.*)

E. *Not only . . . but also.* See **not only . . . but also**.

notable. See **noticeable**.

not all. See **all** (B).

notarize, originally an Americanism dating from the 1930s, is now commonplace in AmE—e.g.: “Patrick Henry Talbert, a minister who *notarizes* some Greater Ministries documents, has been sued twice in the past three years by people claiming he bilked them of their investments.” Michael Fechter, “IRS Probes Ministry's Gift Program,” *Tampa Trib.*, 25 Aug. 1997, at 1. In BrE, the word is still in some quarters considered an atrocity; Britons tend to say *notarially validated* instead of *notarized*.

notary public. Pl. *notaries public*—not *notary publics*. E.g.: “County Clerk Mary Jo Brogotto said *notary publics* [read *notaries public*] should call the office at 881-1626 before picking up their commissions in Independence.” “Metro Digest: Independence,” *Kansas City Star*, 28 July 1997, at B2. See PLURALS (F) & POSTPOSITIVE ADJECTIVES.

not . . . because. See **because** (B).

not . . . either. See **either** (D).

noteworthy. See **noticeable**.

National Merit Insurance Company

A Member of the Response Insurance Group
 15805 NE 24th Street
 Bellevue, WA 98008-2409
 Tel. (800) 562-6551 Fax (877) 511-8901



National Merit
Insurance Company
 FEB 15 2005
 10:39 AM

**STRIDER S KLUSMAN
 RENEE M KLUSMAN
 128 E BARNACLE BLVD
 SHELTON, WA 98584-0000**

Interim Renewal Declarations For Policy Number 1086926

This policy covers the listed automobile(s) from
 12:01AM February 15, 2005 through
 12:01AM August 15, 2005 (local time)

2000	1988	2004
HYUNDAI	GMC	CHEVROLET
TIBURON	JIMMY S-15	TAHOE LS/L
KMHLG35F4Y4169906	1GKCT18R6J8523661	1GNEK13Z14J319818

Rating Information

Rated Operator	MF 35	MF 35	MM 51
Usage	Pleasure	Commute	Commute
Rated Location	WA31	WA31	WA31

Type of Coverage

Coverage Limits

Bodily Injury Liability						
\$100,000/\$300,000 Per Person/Accident				\$42.00	\$48.00	\$54.00
Property Damage Liability						
\$50,000 Per Accident				\$32.00	\$37.00	\$42.00
Personal Injury Protection						
\$10,000 Each Person				\$22.00	\$36.00	\$29.00
Underinsured Motorists Bodily Injury						
\$100,000/\$300,000 Per Person/Per Accident				\$31.00	\$31.00	\$31.00
Underinsured Motorists Property Damage						
\$50,000/\$300 Per Person/Deductible				\$10.00	\$10.00	\$10.00
Comprehensive	Veh1	Veh2	Veh3			
Deductible	\$500	\$500	\$250	\$65.00	\$18.00	\$74.00
Collision						
Deductible	\$250	\$500	\$250	\$152.00	\$43.00	\$168.00
Towing and Labor Costs						
Per Disablement	\$75	\$75		\$2.00	\$2.00	
Premium Per Vehicle				\$356.00	\$225.00	\$408.00
				Total Premium		\$989.00

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Discounts And Credits

	2000	1988	2004
	HYUNDAI TIBURON KMHJG35F4Y4169906	GMC JIMMY S-15 1GKCT18R6J8523581	CHEVROLET TAHOE LS/L 1GNEK13Z14J319818
Airbag	\$9.51		\$12.36
Multi Car	\$118.80	\$75.39	\$136.16
Affinity Discount	\$30.86	\$19.54	\$35.52

Contracts and Amendments

517FANM-0794 Automobile Policy
600FANM-0704 Amendatory Endorsement
NMPJA-0501 Additional Notice
557-0399 Excluded Driver LEIFE RKLUSMAN
335FANM-0399 Loss Payable Endorsement

Your Premium has not changed since the previous policy period.

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Automobile Policy

Agreement

In return for payment of the premium and in reliance upon the statements in **your** application, and subject to all terms of this policy, **we** agree with **you** as follows:

Definitions

Throughout this policy **"you"** and **"your"** refer to the person named on the Declarations Page and the spouse if a resident of the same household.

"We," "us" and "our" refer to the company providing this insurance.

For purposes of this policy, a private passenger type **auto** leased under a written agreement to any person for a continuous period of at least six months shall be considered owned by that person. Other words and phrases are defined. They are boldfaced when used.

"Accident" means an unexpected and unintended event that causes **bodily injury** or **property damage** and arises out of the ownership, maintenance or use of **your covered auto**.

"Auto" means a private passenger vehicle having four wheels on the road.

"Bodily injury" means bodily harm, sickness or disease, including death that results.

"Business" means a trade, profession, or occupation

"Family member" means a person related to **you** by blood, marriage or adoption who is a resident of **your** household. It also means a ward or foster child who is a resident of **your** household.

"Motorhome" means a private passenger **auto** that is a self-propelled mobile home equipped as living quarters including its equipment. It must be licensed for use on public roads.

"Occupying" means in, upon, or getting in, out, on, or off.

"Property damage" means physical injury to, destruction of or loss of use of tangible property.

"Punitive damages" means damages which are awarded to punish or deter wrongful conduct, to set an example, to fine, penalize or impose a statutory penalty, and damages which are awarded for any purpose other than as compensatory damages for **bodily injury** or **property damage**.

"Trailer" means a vehicle designed to be pulled by a private passenger **auto** **motorhome**, pick-up, van or panel **truck**. It also means a recreational camping vehicle, a boat trailer, a farm wagon or farm implement while towed by a private passenger **auto**, **motorhome**, pick-up, van or panel **truck**.

"Truck" means a private passenger **auto** with a gross vehicle weight of less than 10,000 lbs. and a capacity of 1 ton or less.

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Your covered auto" means:

1. Any vehicles **you own** shown on the Declarations Page.
2. Any of the following types of vehicles on the date **you** become the owner, whether operational or not:
 - a. a private passenger **auto**;
 - b. a pick-up, van or panel **truck**:
 - (1) that is not used as a commercial vehicle for the delivery or transportation of goods or materials unless such use is:
 - (a) incidental to **your business** of installing, maintaining, or repairing furnishings or equipment; or
 - (b) for farming or ranching;
 - c. a **motorhome** or **trailer**.

If the vehicle **you** acquire:

- a. replaces one shown on the Declarations Page, it will have the same coverage as the vehicle it replaced; or
- b. is in addition to any shown on the Declarations Page, it will have the broadest coverage **we** now provide for any vehicle shown on the Declarations Page.

This provision applies only if **you** ask **us** to insure it within **30 days** after you become the owner.

3. Any **trailer you own**.
4. Any **temporary substitute auto** which is an **auto** or **trailer you do not own** while used as a temporary substitute for any other vehicle described in definitions 1, 2, or 3 above which is out of normal use because of its breakdown, repair, servicing, loss or destruction.
5. Any **non-owned auto** which is a private passenger **auto**, a pick-up, van or panel **truck**, **motorhome**, or **trailer** not owned by **you** or any **family member** or furnished or available for regular use while in **your** custody, possession, or being operated by **you** or any **family member**.

Part 1. Liability Coverage

Coverage A- Bodily Injury
Coverage B- Property Damage

You have this coverage if a premium charge
is shown on the Declarations Page

INSURING AGREEMENT

We will pay damages for bodily injury or property damage for which a covered person becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted. We have no duty to defend any suit for bodily injury or property damage not covered under this policy.

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DEFINITIONS

"Covered person" as used in this Part means:

1. You or any family member with respect to the ownership, maintenance or use of any covered auto or trailer.
2. Any person using your covered auto.

SUPPLEMENTARY PAYMENTS

In addition to our limit of liability, we will pay on behalf of a covered person:

1. Up to \$500 for the cost of bail bonds required because of an accident, including related traffic law violations, which results in bodily injury or property damage covered under this policy. We are not obligated to apply for or furnish such bonds.
2. Premiums on appeal bonds and bonds to release attachments in any suit we defend.
3. Interest accruing after a judgement is entered in any suit we defend. Our duty to pay interest ends when we offer to pay that part of the judgement which does not exceed our limit of liability for this coverage.
4. Up to \$75 a day for loss of earnings, but not other income, because of attendance at hearings or trials at our request.

EXCLUSIONS

We do not provide Liability Coverage:

1. For any person who intentionally causes bodily injury or property damage.
2. For property damage to property:
 - a. owned or transported by a covered person; or
 - b. rented to, used by, or in the care of a covered person;

This exclusion does not apply to property damage to a residence or private garage.

3. For any person for bodily injury to an employee of that person during the course of employment except a domestic employee for whom workers' compensation benefits are not required or available.
4. For any person's liability arising out of the ownership or operation of a vehicle while it is being used to carry persons or property for a fee. This exclusion does not apply to a share the expense car pool.
5. For any person's liability arising out of the rental to others of your covered auto.
6. For any person while employed or otherwise engaged in the business or occupation of selling. Repairing, servicing, storing, or parking of vehicles designed for use mainly on public highways, including road testing and delivery. This exclusion does not apply to the ownership, maintenance or use of your covered auto by you, any family member, or any partner, agent or employee of you or any family member.

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- 7. For any person maintaining or using any vehicle while that person is employed or otherwise engaged in any **business** or occupation not described in exclusion 6. This exclusion does not apply to the maintenance or use of a:
 - a. private passenger **auto** that you own;
 - b. pick-up, van or panel **truck** that you own;
 - c. **motorhome** that you own; or
 - d. **trailer** used with a vehicle described in a, b, or c above.
- 8. For the ownership, maintenance, or use of any motorized vehicle having less than four wheels.
- 9. For the ownership maintenance, or use of any vehicle, other than **your covered auto**, which is owned by, rented to, or furnished or available for your regular use.
- 10. For the ownership, maintenance, or use of any vehicle, other than **your covered auto**, which is owned by, rented to, or furnished or available for the regular use of any **family member**.
- 11. For any person for **bodily injury** or **property damage** for which that person is an insured under a nuclear energy liability policy or would be an insured but for its termination upon exhaustion of its limit of liability. A nuclear energy liability policy is a policy issued by American Nuclear Insurers, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada, or any of their successors.
- 12. For **punitive damages** awarded against a **covered person**.
- 13. For any person using a motor vehicle without a reasonable belief that the person has permission to do so.
- 14. For any person while participating in or practicing for any prearranged or organized racing or speed contest.

LIMIT OF LIABILITY

The limit of liability stated on the Declarations Page for "each person" for **Bodily Injury liability Coverage** is our maximum limit of liability for all damages, including damages for care and loss of services, for **bodily injury** sustained by any one person in any one **auto accident**. Subject to this limit for "each person," the limit of liability stated on the Declarations Page for "each accident" for **Bodily Injury Liability Coverage** is our maximum limit of liability for all damages, including damages for care and loss of services, for all **bodily injury** resulting from any one auto accident. The limit of liability stated on the Declarations Page for "each accident" for **Property Damage Liability Coverage** is our maximum limit of liability for all damages to all property resulting from any one accident. The limits of liability under these coverages are the maximum limits of liability for all damages resulting from any one accident regardless of the number of covered persons, claims made, vehicles, premiums shown on the Declarations Page, premiums paid, or vehicles involved in an accident.

FINANCIAL RESPONSIBILITY REQUIRED

If we certify this policy as proof of financial responsibility for the future under any financial responsibility law, this policy shall comply with the provisions of the law to the extent of the coverage required.

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