

NO. 63198-5-I

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

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EDWARD D. JOHNSON,

Appellant,

vs.

METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY, a  
Rhode Island Insurance Company,

Respondent.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Richard D. Eadie, Judge

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BRIEF OF RESPONDENT

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## **I. NATURE OF THE CASE**

The insurance policy issued to plaintiff's fiancée provided UIM coverage for "you" while driving a rental car. Plaintiff did not qualify as "you" because he was not identified as a named insured in the policy declarations, nor was he the named insured's spouse. Instead, as a listed driver, plaintiff qualified for UIM coverage only while occupying a covered car. Plaintiff was not occupying a covered car when he was injured. The trial court granted the UIM insurer summary judgment.

## **II. ISSUE PRESENTED**

Does plaintiff qualify as "you" under the terms of the policy, where he was not identified as a named insured on the declarations page and it is undisputed that he was not married to the named insured?

## **III. STATEMENT OF THE CASE**

### **A. STATEMENT OF RELEVANT FACTS.**

#### **1. The Accident.**

Plaintiff/appellant Edward Johnson rented a car for a few days from National. When he rented the car, he elected not to purchase personal accident insurance, as well as third-party bodily injury and property damage insurance. (CP 173-74)

While driving the rental car, plaintiff was injured in a motor vehicle collision. (CP 4, 23) He made a claim under the underinsured

motorist (UIM) coverage of a policy issued to Carol Collins, who is not a party to this suit. (CP 77-122) Plaintiff was Collins' fiancé and lived with her. (CP 72)

Collins' policy was issued by defendant/respondent Metropolitan Property & Casualty Insurance Co. (CP 77) MetLife denied coverage because plaintiff was neither a named insured nor a relative of Collins, so he had UIM coverage *only* when driving a covered automobile. The rental car plaintiff was driving was not a covered automobile. (CP 122-23)

## **2. The Policy.**

Collins' employer offered discounted auto insurance with MetLife. (CP 72) The policy in effect at the time of plaintiff's accident insured two vehicles, a 2002 Honda Accord and a 1975 Ford van. (CP 77)

The first page of the policy's declarations page identified Collins as the named insured. (CP 77) She and plaintiff were listed under a rating information section on the second page as "Household Drivers." (CP 78) Collins and plaintiff had decided to add plaintiff to Collins' policy rather than get a separate policy for him because it was cheaper. (CP 72)

The policy included both automobile liability and UIM coverages. (CP 77) Definitions applicable to both coverages included the following (CP 82, 83) (policy boldface in original):

“**RELATIVE**” means a person related to **you** by blood, marriage or adoption . . . and who resides in **your** household.

“**YOU**” and “**YOUR**” mean the person(s) named in the Declarations of this policy as named insured and the spouse of such person or persons if a resident of the same household.

**a. The Liability Coverage.**

Under the auto liability coverage, “insured” was defined to mean

(CP 83):

1. with respect to a **covered automobile**:
  - a. **you**;
  - b. any **relative**; or
  - c. any other person using it within the scope of **your** permission.
2. with respect to a **non-owned automobile**, **you** or any **relative**.

....

“Covered Automobile” was defined to mean (CP 83):

1. an **automobile** owned by **you** or hired under a written contract for one year or more, which is described in the Declarations, and for which a specific premium is charged.
2. an **automobile** newly acquired by **you**, if:
  - a. it replaces a vehicle described in the Declarations; or
  - b. it is an additional **automobile**, but only if:
    - i. **we** insure all other **automobiles** owned by **you** on the date of acquisition;
    - ii. **you** notify **us** within 30 days of acquisition of **your** election to make

this and no other policy issued by **us** applicable to the **automobile**; and

- iii. **you** pay any additional premium required by **us**.

“Non-owned automobile” was defined to mean (CP 84):

1. an **automobile** which is not owned by, furnished to, or made available for regular use to **you** or any resident in **your** household;

....

2. a commercially rented **automobile** used by **you** or a **relative** on a temporary basis.

**b. The UIM Coverage.**

The insuring agreement of the UIM coverage provided (CP 107):

**We** will pay damages for **bodily injury** sustained by:

- 1. **you** or a **relative**, caused by an accident arising out of the ownership, maintenance, or use of an **underinsured motor vehicle**, which **you** or a **relative** are legally entitled to collect from the owner or driver of an **underinsured motor vehicle**; or
- 2. any other person, caused by an accident while **occupying a covered automobile**, who is legally entitled to collect from the owner or driver of an **underinsured motor vehicle**.

....

For purposes of the UIM coverage, “covered automobile” was defined even more broadly than it was in the liability coverage to include (CP 106):

1. an **automobile** described in the Declarations to which the Automobile Liability coverage of this policy applies and for which a specific premium is charged.
2. an **automobile** newly acquired by **you**, if:
  - a. it replaces a vehicle described in the Declarations; or
  - b. it is an additional **automobile**, but only if:
    - i. **we** insure all other **automobiles** owned by **you** on the date of acquisition;
    - ii. **you** notify **us** within 30 days of acquisition of **your** election to make this and no other policy issued by **us** applicable to the **automobile**; and
    - iii. **you** pay any additional premium required by **us**.
- ....
4. a **motor vehicle**, while being operated by **you** or a **relative** with the owner's permission, which is not owned by, furnished to, or made available for the regular use to **you** or any **relative** in **your** household.
- ....

**B. STATEMENT OF PROCEDURE.**

Plaintiff sued MetLife for breach of contract, declaratory judgment, and damages. (CP 1-6) The complaint alleged that MetLife had breached the insurance contract, had waived or was estopped to deny coverage, and that its interpretation of the policy was contrary to the UIM statute, RCW 48.22.030, and thus contrary to public policy. (CP 5)

MetLife denied these allegations and counterclaimed for a declaration that plaintiff was not an insured for UIM coverage under the policy for the accident with the rental car. (CP 22-27)

The parties filed cross-motions for summary judgment. (CP 52-70) The trial court granted MetLife's motion and denied plaintiff's. (CP 202-04) The trial judge added the following handwritten note to the summary judgment order (CP 204):

The court has reviewed the cases cited by Plaintiff and while they may support a broad reading of uninsured motorist coverage they do not support the conclusion that Plaintiff argues, which would have the court disregard the plain meaning of the terms of the policy.

#### IV. ARGUMENT

It is important to keep in mind what is and is not in dispute. Plaintiff seeks UIM coverage under the terms of the policy issued to Collins. Contrary to the implication in the Brief of Appellant, plaintiff *is an insured* for UIM coverage, but only under certain circumstances. Plaintiff is insured for UIM coverage when he is—

the driver or a passenger in the 2002 Honda Accord or 1975 Ford van, the vehicles specifically insured by the policy (CP 106, 107);

a driver or a passenger of an automobile newly acquired by Collins if it replaces either the 2002 Accord or the 1975 Ford van or,

under certain circumstances, is in addition to those vehicles (CP 106, 107);

the driver or a passenger of any motor vehicle not owned by Collins or any resident of her household, which is used with the owner's permission to replace for a short time any of the previously mentioned vehicles that is out of use for service or repair or because of breakdown, loss, or destruction (CP 106, 107); and

a passenger in a motor vehicle operated by Collins with the owner's permission, which is not owned by, furnished to, or made available for the regular use of Collins. (CP 106, 107)

So it is simply not true that "Metlife says [plaintiff] has no coverage for UIM." (Brief of Appellant 12) Rather, what is in dispute in this case is whether, under the terms of the policy, plaintiff was insured for UIM coverage *while driving the rental car*. The trial court was correct in holding that he was not, as a matter of law.

**A. THE UIM COVERAGE BY ITS TERMS DOES NOT APPLY.**

**1. The Rules of Insurance Policy Construction.**

Plaintiff's first argument is that by the terms of the UIM policy's coverage, he is insured for UIM coverage while driving the rental car. Thus, he is asking this court to construe the policy language.

Insurance policies are contracts and are construed as such. *Washington Public Utility Districts' Utilities System v. Public Util. Dist. No. 1*, 112 Wn.2d 1, 10, 771 P.2d 701 (1989). "Courts interpret insurance contracts as an average insurance purchaser would understand them and give undefined terms in these contracts their 'plain, ordinary, and popular' meaning." *Kish v. Insurance Co. of North America*, 125 Wn.2d 164, 170, 883 P.2d 308 (1994).

The entire contract must be construed together to give force and effect to each clause. *Transcontinental Ins. Co. v. Washington Public Utilities Districts' Util. Sys.*, 111 Wn.2d 452, 456, 760 P.2d 337 (1988). "[A] clause or phrase cannot be considered in isolation, but should be considered in context, including the purpose of the provision." *Mercer Place Condominium Ass'n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 603, 17 P.3d 626 (2000), *rev. denied*, 143 Wn.2d 1023 (2001) (quoting *Riordan v. Commercial Travelers Mut. Ins. Co.*, 11 Wn. App. 707, 711, 525 P.2d 804 (1974)).

If the policy language is clear and unambiguous, the court must enforce it as written. *Washington Public Utility Districts' Utilities System v. Public Util. Dist. No. 1*, 112 Wn.2d 1, 10, 771 P.2d 701 (1989). An ambiguity exists only if the language in an insurance contract is fairly susceptible to two reasonable interpretations. *Smith v. Continental*

*Casualty Co.*, 128 Wn.2d 73, 81, 904 P.2d 749 (1995). The court will not create an ambiguity where none exists. *Transcontinental Ins. Co. v. Washington Public Utilities Districts' Util. Sys.*, 111 Wn.2d 452, 456, 760 P.2d 337 (1988). Nor will the court modify clear and unambiguous language under the guise of construing it. *Britton v. Safeco Ins. Co. of Am.*, 104 Wn.2d 518, 528, 707 P.2d 125 (1985).

Thus, if the plain language of the policy does not provide coverage, the court will not rewrite the policy to make it do so. *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 100, 776 P.2d 123 (1989). If the policy language is clear and unambiguous, the court must enforce it as written. *Washington Public Utility Districts' Utilities System v. Public Util. Dist. No. 1*, 112 Wn.2d 1, 10, 771 P.2d 701 (1989). Washington courts do not follow the reasonable expectations doctrine. *Findlay v. United Pacific Insurance Co.*, 129 Wn.2d 368, 378, 917 P.2d 116 (1996); *State Farm General Insurance Co. v. Emerson*, 102 Wn.2d 477, 687 P.2d 1139 (1984).

Although RCW 48.22.030, the UIM statute, governs UIM coverage, an “insurer may place limitations on certain policy provisions without violating a statute or public policy.” *Smith v. Continental Casualty Co.*, 128 Wn.2d 73, 83, 904 P.2d 749 (1995). This is particularly true as to the exact issue in this case—how an insurer defines who is an

insured for UIM coverage. “The statute ‘does not mandate any particular scope for the definition of who is an insured in a particular automobile insurance policy.’” *Id.* (quoting *Farmers Insurance Co. v. Miller*, 87 Wn.2d 70, 75, 549 P.2d 9 (1976)).

**2. Plaintiff Was Not Insured While Driving a Rental Car.**

A party claiming coverage under an insurance policy has the burden of proving it. *See, e.g., Dart Industries, Inc. v. Commercial Union Insurance Co.*, 28 Cal. 4th 1059, 52 P.3d 79, 87, 124 Cal. Rptr. 2d 142, 152 (2002); *State Farm Fire & Casualty Co. v. Caley*, 936 S.W.2d 250, 251 (Mo. App. 1997); *Brown v. Sandeen Agency, Inc.*, 762 N.W.2d 850, 853 (Wis. App. 2008). This is consistent with the Washington rule that—

The determination of whether coverage exists is a two-step process: first, the insured must show the policy covers his loss; second, to avoid coverage, the insurer must show specific policy language excludes the insured's loss.

*Wright v. Safeco Insurance Co. of America*, 124 Wn. App. 263, 271, 109 P.3d 1 (2004). Consequently, plaintiff must show that there is a genuine issue of material fact that *while he was driving the rental car*, he was an insured for UIM coverage under the policy.

The insuring agreement of Collins’ MetLife UIM coverage provided (CP 107):

**We will pay damages for bodily injury sustained by:**

1. **you** or a **relative**, caused by an accident arising out of the ownership, maintenance, or use of an **underinsured motor vehicle**, which **you** or a **relative** are legally entitled to collect from the owner or driver of an **underinsured motor vehicle**; or
2. any other person, caused by an accident while **occupying a covered automobile**, who is legally entitled to collect from the owner or driver of an **underinsured motor vehicle**.

Thus, to be entitled to UIM benefits under the policy while driving the rental car, plaintiff had to be (1) “you”, (2) a “relative”, or (3) occupying a “covered automobile.” Plaintiff does not claim he was a “relative” or occupying a “covered auto.” As will be discussed, plaintiff was not “you”.

**a. Plaintiff Was Not “You.”**

“You” is a defined term in the policy. The policy defines it to mean:

the person(s) named in the Declarations of this policy *as named insured* and the spouse of such person or persons if a resident of the same household.

(CP 83) (emphasis added). The first page of the Declarations of the policy contains the following (CP 77):

Policy Number: 5534567080 Policy Effective Date: 10-13-2005 Policy Expiration Date: 04-13-2006 At: 12:01 A.M.	Page 1 of 2  Duplicate Effective Date: 10-13-2005
Named Insured: CAROL S COLLINS 26037 20TH AVE S DES MOINES WA 98198	You have selected our Payroll Deduction Plan. Your premium deductions will be reflected on your payroll statement.

Insured Vehicle(s)							
Veh	Year	Make	Model	Body Type	Vehicle ID Number	Sym	Territory
1	1975	FORD	CARGO	VAN	E24HHX26333	3	30
2	2002	HONDA	ACCORD	4DR	1HGCG16512A003960	14	30

Coverage Description	Applicable Limits	Semi-Annual Premiums	
		1975 FORD	2002 HONDA
Personal Injury Protection	\$10,000 Medical Expense Per Person	50	34
<b>Liability</b>			
Bodily Injury	\$ 50,000 Per Person/ \$100,000 Per Occurrence	89	81
Property Damage	\$50,000 Per Occurrence	71	66
<b>Underinsured Motorists</b>			
Bodily Injury	\$50,000 Per Person/ Per Accident	37	37
Property Damage	\$50,000 Per Accident	8	
<b>Physical Damage</b>			
	1975 FORD		
	2002 HONDA		
Actual Cash Value(ACV) or Limit	ACV		
Collision less deductible	\$500		177
Comprehensive less deductible	\$500		65
Towing and Labor Limit	\$50		Incl
<b>Optional Coverages</b>			
Substitute Transportation	\$40 Day/\$1200 Occurrence		18
<b>Total Semi-Annual Premium: \$733.00</b>	<b>Vehicle Totals:</b>	<b>255</b>	<b>478</b>

000001

**Deductible Savings Benefit (DSB) \$0**

Deductible Savings reduces Collision or Comprehensive deductibles, excluding towing and glass claims, effective 10-13-2005 for claims occurring after this date. Your next anniversary date is 04-13-2006. See Important Notice for details.

HG-MS-1

*Nowhere else in the Declarations is the phrase “named insured” used.*

(CP 77-78)

Consequently, “the person(s) named in the Declarations of this policy *as named insured*” was Collins. (CP 77, 83) Had she been married at the time of the accident, “the spouse of such person or persons if a resident of the same household” would have also qualified as a named insured. (CP 83)

But at the time of the accident, Collins was not married. She was engaged to plaintiff. (CP 72) Being married and being engaged are not the same. Plaintiff was not “the spouse” of Collins, even though he was a resident of her house. *See Menchaca v. Farmers Insurance Exchange*, 59 Cal. App. 3d 117, 130 Cal. Rptr. 607 (1976) (spouse is legal wife or husband); *Harleysville Mutual Casualty Insurance Co. v. Carroll*, 50 Del. 67, 123 A.2d 128, 131 (1956) (existing legal marriage essential element of being a “spouse”); *United States Fire Insurance Co. v. Cruz*, 35 Misc. 2d 272, 230 N.Y.S.2d 779 (1962), *aff’d*, 18 A.D.2d 1137 (N.Y.A.D. 1963). This is true even though plaintiff and Collins had a child together. *See United States Fire Insurance Co. v. Cruz*, 35 Misc.2d 272, 230 N.Y.S.2d 779 (1962). Thus, plaintiff was not “you.”

It is true that the second page of the declaration included the following (CP 78):

**Rating Information**

**Household Drivers:**

06/11/69      CAROL S COLLINS  
09/03/70      EDWARD DON JOHNSON

**IF YOU HAVE A DRIVER IN YOUR HOUSEHOLD WHO IS NOT LISTED ABOVE, PLEASE NOTIFY US IMMEDIATELY.**

It is not true, as plaintiff claims, that “[t]he ‘Household Drivers’ heading means little or nothing.” (Brief of Appellant 14) Courts have recognized that insurers list household drivers for underwriting or premium purposes. *See True v. Raines*, 99 S.W.3d 439, 444-45 (Ky. 2003); *Little v. Progressive Insurance*, 783 N.E.2d 307, 312 (Ind. App. 2003). Household drivers are also listed to eliminate potential disputes over whether such persons have the named insured’s permission to drive covered vehicles. Listing thereby eliminates any dispute over whether the household drivers qualify as insureds under the omnibus (*i.e.*, permissive user) clause.<sup>1</sup> *See True*, 99 S.W.3d at 444-45; *Kitmirides v. Middlesex*

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<sup>1</sup> Auto policies typically contain omnibus clauses, defining “insured” to include persons driving the named insured’s vehicle with the named insured’s permission. Over the years, the omnibus clause has provided a fruitful source of litigation. *See, e.g., Holland Am. Ins. Co. v. National Indem. Co.*, 75 Wn.2d 909, 454 P.2d 383 (1969); *Progressive N.W. Ins. Co. v. Haker*, 55 Wn. App. 828, 780 P.2d 919 (1989); *American States Ins. Co. v. Breesnee*, 49 Wn. App. 642, 745 P.2d 518 (1987); *Kidwell v. Chuck Olson Oldsmobile, Inc.*, 4 Wn. App. 471, 481 P.2d 908, *rev. denied*, 79 Wn.2d 1005 (1971).

*Mutual Assurance Co.*, 65 Conn. App. 729, 783 A.2d 1079, 1083 n.7 (2001), *aff'd*, 260 Conn. 336, 796 A.2d 1185 (2002).

But plaintiff's listing as a household driver does not mean he qualifies as "you." The policy defines "you" to mean "the person(s) named in the Declarations of this policy *as named insured* and the spouse of such person or persons if a resident of the same household." (CP 83) (emphasis added). Thus, it is insufficient to merely be "named in the Declarations." Rather, as plaintiff recognizes, to qualify as a named insured, one who is not a spouse must have been "named in the Declarations . . . *as named insured.*" (Brief of Appellant 12) (emphasis added). Only Collins was so named.

That Collins was listed as a named insured *as well as* a household driver further demonstrates that merely being named as a household driver does not mean one is a "named insured." *Eldridge v. Columbia Mutual Insurance Co.*, 270 S.W.3d 423, 427 (Mo. App. 2008). If being listed as a household driver somehow meant that the listed person was a named insured, there would be no reason to have listed Collins separately as a named insured. Insurance policies must be read to give each provision meaning so that none is superfluous or meaningless. *See Wolstein v. Yorkshire Insurance Co.*, 97 Wn. App. 201, 215, 985 P.2d 400 (1999).

*Holthe v. Iskowitz*, 31 Wn.2d 533, 197 P.2d 999 (1948), provides a helpful comparison. There a mother, Bessie, owned a car on which she purchased insurance. She did not drive, however. Her daughter, Betty, drove her where she wanted to go.

An endorsement in the policy provided:

NAMES OF INDIVIDUALS, OTHER THAN AFORESAID HUSBAND AND WIFE, WHO ARE RELATIVES OF AND RESIDENTS IN THE HOUSEHOLD OF THE NAMED INSURED AND WHO ARE TO BE COVERED HEREUNDER AS INSURED:

1. Betty Lou Uhlman College Student Daughter

*Id.* at 538. The issue was whether the daughter, Betty, qualified as a *named* insured. The court ruled that she did not.

Several courts in other jurisdictions have also refused to characterize as “named insureds” persons expressly named in motor vehicle insurance policies as drivers. For example, in *Carlson v. Allstate Insurance Co.*, 749 N.W.2d 41 (Minn. 2008), the insured father leased a car for his son. The son was the primary driver.

While a pedestrian, the son was injured by an uninsured motorist. He sought coverage under his father’s insurance policy. The policy listed the father and mother as named insureds and listed the father, mother, son, and son’s brother as drivers. The UIM coverage applied to “insured

persons”, defined to include “you.” “You” was defined to mean “the policyholder named on the Policy Declarations.” *Id.* at 43.

The son argued that since he was named as a driver on the declarations page, which did not use the term “policyholder”, a reasonable person would conclude that all listed drivers were “policyholders named on the Policy Declarations”. The court disagreed, explaining:

Other than the fact that the drivers as well as the named insureds appear on the declarations page, the Carlsons offer no basis for the conclusion that a reasonable person would read “policyholders” to include “drivers.” We conclude that a reasonable person, even one unversed in the law or insurance, would understand that “policyholder” referred to the policy’s owner.

*Id.* at 45-46.

*Georgia Farm Bureau Mutual Insurance Co. v. Wilkerson*, 250 Ga. App. 100, 549 S.E.2d 740 (2001), also is illustrative. There, a 19-year-old son was driving his father’s car when he was injured by an underinsured motorist. He sought UIM coverage under his mother’s insurance policy.

His mother’s UIM policy insured “you”. “You” was defined to mean “the named insured shown in the Declarations.” Each page of the declarations showed the mother’s name and address under the words “Named Insured and Address”. The declarations also listed the son as driver “01” and the mother as driver “02.” Noting that nothing in the policy explained the significance of being listed as a driver on the

declarations page, *id.* at 102, 549 S.E.2d at 742, the court ruled that the son was not “you”:

The policy states that “you” refers to the “named insured” on the declaration page. A definition for “named insured” is not required. One simply need look at the declaration page to see who is listed as the named insured. All three declaration pages list the named insured as McDowell. One page also lists drivers, but by definition, “you” does not refer to drivers but only to the “named insured.” And, the simple fact that this list of drivers appears on a declaration page does not render ambiguous the otherwise clear reference to McDowell as the named insured. . . . There is no ambiguity.

*Id.* at 101, 549 S.E.2d at 742. Many other courts have reached similar conclusions.<sup>2</sup>

In sum, contrary to plaintiff’s position, a person like plaintiff who is an insured under the policy is not necessarily a named insured. (Brief of Appellant 13) Since plaintiff was listed only under the declarations’ “Household Drivers” heading, not its “Named Insured” heading, he was not a named insured.

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<sup>2</sup> See *Lester v. Nationwide Mut. Ins. Co.*, 586 F. Supp. 2d 559 (D. S.C. 2008); *True v. Raines*, 99 S.W.3d 439 (Ky. 2003); *Waller v. Rocky Mountain Fire & Cas. Co.*, 272 Or. 69, 535 P.2d 530 (1975); *Kitmirides v. Middlesex Mut. Assur. Co.*, 65 Conn. App. 729, 783 A.2d 1079 (2001), *aff’d*, 260 Conn. 336, 796 A.2d 1185 (2002); *United States Fid. & Guar. Co. v. Williams*, 375 So.2d 328, 329 (Fla. Dist. App. 1979), *cert. denied*, 386 So.2d 642 (1980); *Puryear v. Progressive Northern Ins. Co.*, 790 N.E.2d 138 (Ind. App. 2003); *Little v. Progressive Ins.*, 783 N.E.2d 307 (Ind. App. 2003); *Lemoine v. Illinois Nat’l Ins. Co.*, 868 So.2d 304, 309-10 (La. App. 2004), *writ denied*, 876 So.2d 86, 876 So.2d 87 (La. 2004); *Eldridge v. Columbia Mut. Ins. Co.*, 270 S.W.3d 423 (Mo. App. 2008); *Caron v. Reliance Ins. Co.*, 703 A.2d 63 (Pa. Super. 1997), *appeal denied*, 727 A.2d 126 (Pa. 1998); *Ex Parte: United Servs. Auto. Ass’n*, 365 S.C. 50, 614 S.E.2d 652 (2005).

**b. RCW 48.22.005(9) Does Not Compel a Different Result.**

It is true that RCW 48.22.005(9) defines “named insured” to mean “the individual named in the declarations of the policy and includes his or her spouse if a resident of the same household.” But nowhere in the statute is there any requirement that insurers cannot specify that of those persons identified in the declarations, “named insureds” are only those named *as such* in the declarations. There is no statute or regulation prohibiting the insurer from using the declarations to list persons other than the named insured(s).

Here plaintiff was identified in the declarations as a “household driver”. (CP 78) King County was identified in the declarations as a lien/loss payee. (CP 78) Only Collins was named in the declarations as a “named insured.” (CP 77)

Plaintiff claims that the declarations identify Collins under the heading “Named Insured” rather than “named insured” and that the capitalization of the term in the declarations but not in the text of the policy is somehow significant. This is frivolous. The declarations capitalize virtually every heading or subheading—for example, “Policy Number”, “Policy Effective Date”, “Insured Vehicle”, “Coverage Description”. (CP 77) “Named Insured” in the declarations is a heading

for anyone listed thereunder. The capitalization has no effect on coverage. Plaintiff has not cited any legal authority that it does.

Plaintiff also claims that exclusionary or limiting clauses are to be strictly construed. Plaintiff is correct that Washington court construe exclusions strictly. *Aetna Casualty & Surety Co. v. M&S Industries, Inc.*, 64 Wn. App. 916, 923, 827 P.2d 321 (1992). But that rule of construction does not help plaintiff because “you” and the phrase “as named insured” are part of the coverage grant, not an exclusion.

**c. Extrinsic Evidence Is Irrelevant.**

Plaintiff claims that extrinsic evidence of the dealings Collins had with an unidentified MetLife representative are pertinent to interpreting the policy. But only if the policy language is ambiguous will this court look to extrinsic evidence of the intent of the parties. *See Quadrant Corp. v. American States Insurance Co.*, 154 Wn.2d 165, 171-72, 110 P.3d 733 (2005). Plaintiff concedes this, saying:

“If a clause is ambiguous, we may look to extrinsic evidence to determine the parties’ intent and resolve the ambiguity. . . . And the insured’s expectations do not override the contract’s plain language.”

(Brief of Appellants 14-15) (quoting *Hall v. State Farm Mutual Automobile Insurance Co.*, 133 Wn. App. 394, 399, 135 P.3d 941 (2006)).

Insurance policy language is ambiguous only if the language is fairly susceptible of two *reasonable* interpretations. *Smith v. Continental*

*Casualty Co.*, 128 Wn.2d 73, 81, 904 P.2d 749 (1995). Plaintiff claims that the policy is ambiguous because—

Metlife said in the denial letter that Mr. Johnson was a listed driver rather than a named insured. CP 122. *Denial Letter*. Listed and named, however, are obvious synonyms. Any ambiguity is resolved in favor of coverage. If Mr. Johnson was listed, he was named. If he was a listed insured, he was a named insured.

(Brief of Appellant 17) But the denial letter is not the insurance policy. Only if there is ambiguity in the insurance policy language will this court look at extrinsic evidence. The word “listed” is not used in the policy in any relevant provision.

Numerous courts have ruled that policies such as MetLife’s are not ambiguous. *See, e.g., True v. Raines*, 99 S.W.3d 439, 443-45 (Ky. 2003); *Kitmirides v. Middlesex Mutual Assurance Co.*, 65 Conn. App. 729, 783 A.2d 1079, 734 (2001); *Puryear v. Progressive Northern Insurance Co.*, 790 N.E.2d 138, 140-41 (Ind. 2003).

### **3. Erroneous PIP Payments Do Not Make Plaintiff an Insured for UIM.**

MetLife erroneously paid plaintiff personal injury protection (PIP) benefits. (CP 124) The payments were erroneous because “insured” under the PIP coverage means (CP 116):

1. 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

2. a person who sustains **bodily injury** caused by accident while:
  - a. **occupying** or using the **insured automobile** with the permission of the **named insured**; or
  - b. a **pedestrian** accidentally struck by the **insured automobile**.

“**Insured automobile**” is defined to mean “an **automobile** described on the Declarations Page of this policy.” (CP 116)

Plaintiff is not a “named insured”, a household resident related by blood, marriage or adoption, the named insured’s ward, foster child, stepchild, a pedestrian struck by the “insured automobile”, or someone who was occupying or using the “insured automobile”. Thus, MetLife was mistaken in paying PIP benefits to plaintiff.<sup>3</sup> Plaintiff has not cited any authority why MetLife’s mistake on the PIP coverage means he is an insured under the terms of the UIM coverage.

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<sup>3</sup> An insurer that makes payment under a policy because of an erroneous belief induced by a mistake of fact that such payment was required may be entitled to restitution. *Mid-Century Ins. Co. v. Brown*, 33 Wn. App. 291, 654 P.2d 716 (1982), *rev. denied*, 99 Wn.2d 1008 (1983). MetLife is not seeking restitution.

**B. THE UIM STATUTE DOES NOT MANDATE COVERAGE.**

Plaintiff claims that because neither he nor Collins rejected UIM coverage in writing, he must have coverage. Indeed, plaintiff claims that “full UIM coverage is required by statute, unless it is rejected in writing by the insured” that the coverage “must be *offered* to ‘persons insured thereunder’”, and that “Metlife must provide UIM coverage to Mr. Johnson, unless the coverage was rejected in writing.” (Brief of Appellant 19, 21-22) (emphasis added). None of these claims is true.

RCW 48.22.030(2) provides:

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

Thus, auto insurers must offer UIM coverage to their *policyholders*.

Contrary to plaintiff’s claim, they need not offer it to everyone who might *conceivably be an insured* under the auto policy. *See, e.g., Koop v.*

*Safeway Stores, Inc.*, 66 Wn. App. 149, 155, 831 P.2d 777 (1992) (UIM insurer not required to offer UIM coverage to employee insured under employer's policy), *rev. denied*, 120 Wn.2d 1022 (1993).

In fact, RCW 48.22.030(4) provides that it is the “[a] named insured or spouse [who] may reject, in writing, underinsured coverage . . . .”<sup>4</sup> Absent such a rejection, UIM coverage will be included in the policy by operation of law. *Clements v. Travelers Indemnity Co.*, 121 Wn.2d 243, 255, 850 P.2d 1298 (1993).

MetLife agrees that there is no written rejection of UIM in this case. But that is irrelevant because the policy here contains UIM coverage. Even though that coverage does not apply to plaintiff *while he was driving a rental car*, that does not mean that the coverage violates RCW 48.22.030. Indeed, although plaintiff implies otherwise, the UIM statute does not require coverage for plaintiff while driving a rental car.

The very language of RCW 48.22.030 demonstrates why. Section 2 of that statute provides:

(2) No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury . . . suffered by any person arising out

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<sup>4</sup> The statute by its terms does not permit any insured to reject UIM coverage, only a named insured or spouse. RCW 48.22.030(4). Furthermore, the statute does not require an insurer to *offer* UIM coverage to all “persons insured thereunder.” Rather, the coverage offered must protect all “persons insured thereunder.”

of the ownership, maintenance, or use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto **for the protection of persons insured thereunder** who are legally entitled to recover damages from owners or operators of underinsured motor vehicles . . . .

(Emphasis added.) The “statute does not mandate any particular scope for the definition of who is an insured in a particular automobile insurance policy.” *Farmers Insurance Co. v. Miller*, 87 Wn.2d 70, 75, 549 P.2d 9 (1976). The scope of the definition of who is insured is precisely the issue in this case.

That is not to say, however, that there are no restrictions whatsoever on how an insurer defines who is an “insured” for UIM coverage. More than 30 years ago, Justice Neill set forth the rule that is still valid today. Justice Neill explained:

The policy of RCW 48.22.030 requires that insurers make available uninsured motorist coverage to a class of “insureds” that is at least as broad as the class in the primary liability sections of the policy.

*Touchette v. Northwestern Mutual Insurance Co.*, 80 Wn.2d 327, 337, 494 P.2d 479 (1972) (concurrency). Although Justice Neill was then in the concurrence, it is his approach that has become the law. Just a few years ago, the Washington Supreme Court reaffirmed this approach:

The statutory policy of Washington's UIM statute “vitiates any attempt to make the meaning of insured for purposes of

uninsured motorist coverage narrower than the meaning of that term under the primary liability section of the policy.”

*Butzberger v. Foster*, 151 Wn.2d 396, 401-02, 89 P.3d 689 (2004) (quoting *Rau v. Liberty Mut. Ins. Co.*, 21 Wn. App. 326, 328-29, 585 P.2d 157 (1978)).

The rule that the definition of “insured” for UIM purposes must be at least as broad as the definition of “insured” for liability purposes does not, however, assist plaintiff. The liability coverage portion of the policy defines “insured” to mean (CP 83):

1. with respect to a **covered automobile**:
  - a. **you**;
  - b. any **relative**; or
  - c. any other person using it within the scope of **your** permission.
2. with respect to a **non-owned automobile, you** or any **relative**.

“You”, and “relative” are defined as they are in the UIM coverage. (CP 82, 83) Rental cars such as plaintiff’s are not included in the liability coverage’s definition of “covered automobile.” (CP 83)

Thus, contrary to plaintiff’s representation, it is not true that plaintiff “is ‘YOU’ in the liability coverage, but . . . not ‘YOU’ in the UIM coverage.” Nor is it true that plaintiff is “covered for liability, but not for UIM”. (Brief of Appellant 23) Plaintiff—while driving a rental

vehicle—would not have been an insured under the liability coverage either. Consequently, the policy does not conflict with the UIM statute.

Plaintiff is also wrong when he claims that he must receive UIM coverage unless (1) the UIM coverage was rejected in writing, or (2) he was excluded as allowed by statute. As discussed *supra*, the UIM “statute does not mandate any particular scope for the definition of who is an insured in a particular automobile insurance policy.” *Farmers Insurance Co. v. Miller*, 87 Wn.2d 70, 75, 549 P.2d 9 (1976).

Furthermore, a UIM insurer may distinguish between the named insureds (including family members) and others. In *Blackburn v. Safeco Insurance Co.*, 115 Wn.2d 82, 794 P.2d 1259 (1990), the Washington Supreme Court explained:

The underinsured motorist policy affords those “named insureds” under class 1 [named insured and family members] with *first-party* coverage that applies at all times, whatever may be the insured’s activity at the time of the accident. Persons, covered under class 2, occupying a covered vehicle (“other insureds”), however, are covered only while occupying a covered motor vehicle. “Other insureds” have the option of contracting with an insurance company for their own UIM coverage under a policy which provides them with UIM coverage that applies at all times as a “named insured.” Thus, insureds have the option to contract with an insurance company and pay a premium for UIM insurance that applies at all times, regardless of their status in a particular vehicle.

*Id.* at 89 (emphasis in original; citation omitted). Here, not only did plaintiff decline the opportunity offered him to purchase insurance on the rental car (CP 173), he had the opportunity to purchase his own policy, separate from Collins' policy (CP 72). He and Collins decided not to do so because it would have been more expensive. (CP 72)

In short, well-established Washington law makes clear that the UIM statute (1) requires only that the definition of "insured" under the UIM coverage be at least as broad as the definition under the liability coverage, and (2) permits differentiating between named insureds and their family members and other insureds. The MetLife policy complies with (1) and is consistent with (2). The UIM statute does not help plaintiff here.

**C. THE POLICY DOES NOT VIOLATE RCW 48.30.300.**

Plaintiff claims that the MetLife UIM policy discriminates on the basis of marital status in violation of RCW 48.30.300. There is no such violation.

RCW 48.30.300 provides:

Notwithstanding any provision contained in Title 48 RCW to the contrary:

A person or entity engaged in the business of insurance in this state may not refuse to issue any contract of insurance or cancel or decline to renew such contract because of the sex, marital status, or sexual orientation as defined in RCW

49.60.040, or the presence of any sensory, mental, or physical handicap of the insured or prospective insured. *The amount of benefits payable, or any term, rate, condition, or type of coverage may not be restricted, modified, excluded, increased, or reduced on the basis of the sex, marital status, or sexual orientation, or be restricted, modified, excluded, or reduced on the basis of the presence of any sensory, mental, or physical handicap of the insured or prospective insured. This subsection does not prohibit fair discrimination on the basis of sex, or marital status, or the presence of any sensory, mental, or physical handicap when bona fide statistical differences in risk or exposure have been substantiated.*

(Emphasis added.) Although the statute is broadly worded, it is not unlimited. *See Edwards v. Farmers Insurance Co.*, 111 Wn.2d 710, 718-19, 763 P.2d 1226 (1988).

For example, in *State Farm General Insurance Co. v. Emerson*, 102 Wn.2d 477, 687 P.2d 1139 (1984), the insured wife sued the insured husband for the death of her son. The insured husband counterclaimed against his wife for bodily injury arising out of the same incident.

The insureds' homeowners policy contained a household exclusion, which excluded bodily injury to any "insured." "Insured" was defined to mean "[t]he Named Insured stated in the Declarations of this policy" and "if residents of the Named Insured's household, his spouse, [and] the relatives of either."

The insured husband claimed the exclusion discriminated on the basis of marital status as prohibited by RCW 48.30.300. The Washington

Supreme Court ruled that it did not. Reaffirming this holding a few years later, the court explained:

Despite the presence of “spouse” in the definition [of “insured”], the court treated the clause not as a marital exclusion but as an exclusion of all family members. Thus, ***even though a distinction along family lines also serves to classify married couples differently than unmarried couples, the court held that there was no discrimination on the basis of marital status.***

*Edwards*, 111 Wn.2d at 719 (emphasis added) (citation omitted).

Who is insured under the MetLife UIM coverage is similar to who was insured in the policy in *Emerson*. The MetLife policy insures resident family for UIM coverage while driving rental cars:

1. “you” (the named insured and resident spouse);
2. “relatives” (residents of the named insured’s household who are related to the named insured by blood, marriage, or adoption).

Just as in *Emerson*, “even though [the] distinction along family lines also serves to classify married couples differently than unmarried couples”, there is no discrimination on the basis of marital status. *Edwards*, 111 Wn.2d at 719. What the policy does is make a distinction between—on the one hand—family members who are residents of the named insured’s household (spouse, children, parents, siblings, etc.) and—on the other hand—unrelated residents of the named insured’s household and anyone

not a resident of that household. That distinction does not violate RCW 48.30.300.

The only case plaintiff cites, *Edwards v. Farmers Insurance Co.*, 111 Wn.2d 710, 763 P.2d 1226 (1988), does not support his position. In *Edwards*, the insurance policy purported to prohibit recovery under more than one policy if the second policy was issued to the named insured or the named insured's spouse if residing in the same household. Unlike in *Emerson*, the policy provision was "made to turn specifically on marriage" rather than "along family lines". *Id.* at 719-20. Consequently, it violated RCW 48.30.300, whereas the family-based policy provision in *Emerson* did not.

The UIM coverage for persons driving rental cars here is based "along family lines", not simply marital status. Thus, it does not violate RCW 48.30.300.

**D. PLAINTIFF IS NOT ENTITLED TO *OLYMPIC STEAMSHIP FEES*.**

Plaintiff claims attorney fees and costs in the trial court and on appeal under *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). But as discussed *supra*, plaintiff is not entitled to UIM coverage. A party who does not establish that he or she is entitled to coverage is not entitled to *Olympic Steamship* fees or costs. *See*

*Stouffer & Knight v. Continental Casualty Co.*, 96 Wn. App. 741, 756, 982 P.2d 105 (1999), *rev. denied*, 139 Wn.2d 1018 (2000).

**V. CONCLUSION**

Plaintiff seeks coverage under the terms of the policy that was issued to his fiancé. The trial court said it could not “disregard the plain meaning of the terms of the policy.” Those terms indicate that plaintiff did not qualify as “you” under the policy and thus was not insured while driving the rental car.

The trial court properly granted summary judgment. This court should affirm.

DATED this 6<sup>th</sup> day of July, 2009.

**REED McCLURE**

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