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DIVISION II

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NO. 41371-0-II
COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

CONSOLIDATED CASES

JENNIFER HELGESON and ANDREW HELGESON,
Appellants,

v.

VIKING INSURANCE COMPANY OF WISCONSIN, a foreign
insurance corporation, d/b/a SENTRY INSURANCE d/b/a DAIRYLAND
INSURANCE,
Respondent.

VIKING INSURANCE COMPANY OF WISCONSIN, a foreign
corporation,
Respondent,

v.

JENNIFER HELGESON and JOHN DOE HELGESON and their marital
community, and ANDREW HELGESON,
Appellants.

BRIEF OF RESPONDENT

Patrick M. Paulich, WSBA #10951
Matthew Munson, WSBA #32019
Thorsrud Cane & Paulich
1325 Fourth Avenue, Suite 1300
Seattle, WA 98101
206.386.7755
Attorneys for Respondent Viking
Insurance Company of Wisconsin

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I. Introduction

This Court should affirm the dismissal of appellants' claim for breach of the insurance policy that Viking Insurance Company issued to appellant Jennifer Helgeson. Her son, Andrew Helgeson, filed an underinsured motorist ("UIM") claim with Viking after he was struck by an automobile. Viking correctly denied Andrew's¹ claim because he is not a named insured under the policy. Contrary to the Helgesons' arguments, Washington's UIM statute, RCW 48.22.030, permits an insurer and an insured to determine who is insured by a policy and does not require a UIM policy to cover a named insured's relatives. Cases prohibiting family-member exclusions are inapposite because Andrew, rather than being subject to a policy exclusion, was not insured in the first instance. The Court should also affirm the dismissal of appellants' claim under the Insurance Fair Conduct Act ("IFCA") because Viking correctly denied the claim and did not withhold any material information from the Helgesons.

II. Statement of the Issues

1. A motor-vehicle liability insurer must offer its insured UIM coverage that is coextensive with the liability coverage. The Viking policy provides liability coverage, and hence UIM coverage, only for the named insured, Mrs. Helgeson, while using her insured car. Andrew Helgeson

¹ For clarity, this brief uses Andrew Helgeson's first name. No disrespect is intended.

was not a named insured and was not using Mrs. Helgeson's insured car at the time of the accident. Does the policy provide UIM coverage for Andrew's claim?

2. Washington public policy prohibits a UIM exclusion for a family member who is a named insured, but does not require that insurers include family members within the initial grant of coverage. Viking denied coverage to Andrew Helgeson because he is not a named insured, and did not rely on any exclusion from coverage in denying his claim. Does Viking's denial violate Washington public policy?

3. RCW 48.22.030 requires automobile insurance policies to provide UIM coverage to "persons insured thereunder," and RCW 48.22.005 defines "insured" to include the named insured or a resident of the named insured's household. RCW 48.22.005 was enacted as part of a PIP statute, and no case has applied it in a UIM dispute. Does the definition of insured in RCW 48.22.005 modify RCW 48.22.030 such that UIM policies must cover residents of a named insured's household?

4. IFCA allows a first-party claimant to sue an insurer for unreasonably denying a claim or withholding information. An insurer's denial is reasonable if it is performed in good faith under an arguable interpretation of existing law. Viking's denial was based on undisputed facts, clear policy language, and a reasonable interpretation of Washington

law, and Viking withheld nothing material from the Helgesons. Should the Court affirm the dismissal of the Helgesons' IFCA claim?

III. Statement of the Case

Viking issued an automobile insurance policy to Jennifer Helgeson for the period October 5, 2008, to April 5, 2009.² The only person identified on the policy's declarations page as an insured is Jennifer Helgeson.³ Viking's records show that Mrs. Helgeson signed a form waiving UIM coverage, but Viking has not been able to locate it.⁴ For purposes of this appeal, Viking concedes that Mrs. Helgeson did not waive UIM coverage.

On February 3, 2009, Mrs. Helgeson's son, Andrew Helgeson, was a pedestrian in Kingston, Washington when he was struck and injured by a motor vehicle.⁵ Andrew recovered the limit of the at-fault driver's automobile insurance policy, \$50,000.⁶ Because he believed that his damages exceeded \$50,000, Andrew filed a UIM claim with Viking under

² See Helgesons' Complaint ¶ 3.1, CP 4.

³ CP 108.

⁴ Declaration of Teresa Killian ¶ 3, CP 106.

⁵ Helgesons' Complaint ¶ 3.2, CP 4.

⁶ *Id.*

his mother's policy.⁷ Viking denied the claim because Andrew was not an insured under that policy.⁸

The Viking policy issued to Mrs. Helgeson consists of the declarations page, a Personal Auto Policy, a Broad Form Named Driver Endorsement, and a Car Policy Amendatory Endorsement—Washington.⁹ Part I of the Personal Auto Policy sets forth the liability coverage.¹⁰ It reads in part as follows:

We will pay damages for which any insured person is legally liable because of bodily injury and/or property damage caused by a car accident arising out of the ownership, maintenance or use of a car or utility trailer. We will settle any claim or defend any lawsuit which is payable under the policy, as we deem appropriate.

...

Additional Definition Used in This Part Only

As used in this Part, “**insured person**” or “**insured persons**” means:

- (1) **You.**
- (2) Any person using **your insured car.**

⁷ Helgesons' Complaint ¶ 3.3, CP 5.

⁸ *Id.* ¶ 3.4.

⁹ CP 108–23.

¹⁰ CP 112–14. Words appearing in bold are defined by the policy.

(3) Any person or organization with respect only to legal liability for acts or omissions of:

(A) Any person covered under this Part while using **your insured car**; or

(B) You under this Part while using any **car** or **utility trailer** other than **your insured car** if the **car** or **utility trailer** is not owned or hired by that person or organization.¹¹

The Personal Auto Policy also sets forth definitions that are used throughout the policy:

(2) “**You**” and “**your**” mean the person shown as the named insured on the Declarations Page and that person’s spouse if residing in the same household. **You** and **your** also means any **relative** of that person if they reside in the same household, providing they or their spouse do not own a car.

(3) “**Relative**” means a person living in **your** household related to **you** by blood, marriage or adoption, including a ward or foster child.¹²

The Broad Form Named Driver Endorsement modifies certain definitions in the policy:

DEFINITIONS USED THROUGHOUT THIS POLICY

The following definitions are replaced in their entirety by the following:

“**You**” and “**your**” mean the person shown as the named insured on the Declarations Page.¹³

¹¹ CP 112.

¹² CP 111.

The Broad Form Named Driver Endorsement also makes changes to the liability coverage:

The Liability Coverage section of Part I of **your** policy is amended to read as follows:

...

We will pay damages for which **you** are legally liable because of **bodily injury** and/or **property damage** caused by a **car accident** arising out of **your** use of **your insured car**. **We** will settle any claims or defend any lawsuit which is payable under the policy, as **we** deem appropriate.

...

Additional Definitions Used in This Part Only

The following definition is replaced in its entirety by the following:

As used in this Part, “**insured person**” or “**insured persons**” means **you** while **you** are using **your insured car**.¹⁴

In sum, the Broad Form Named Driver Endorsement provides that Viking “will pay damages for which **you** are legally liable because of **bodily injury** and/or **property damage** caused by a **car accident**” and defines “**you**” and “**your**” to mean the person shown as the named insured on the declarations page, i.e., Jennifer Helgeson.

¹³ CP 121.

¹⁴ *Id.*

After Viking denied Andrew's UIM claim, the Helgesons filed a complaint for breach of contract and violation of IFCA.¹⁵ Around the same time, Viking filed a declaratory judgment action seeking a declaration that it had no duty to pay UIM benefits to Andrew because he is not insured under the policy.¹⁶ Those lawsuits were later consolidated.¹⁷

The parties each filed summary judgment motions. On October 18, 2010, the Kitsap County Superior Court granted Viking's motion and dismissed the Helgesons' claims.¹⁸ The Helgesons then filed a notice of appeal.¹⁹

IV. Argument

1. The policy does not cover Andrew Helgeson because he is not an insured person under the policy.

Determining whether coverage exists is a two-step process. In the first step, the insured must show the loss falls within the scope of the policy's insured losses. To avoid coverage, the insurer must then show the

¹⁵ CP 3–7.

¹⁶ CP 217–25.

¹⁷ CP 14–15.

¹⁸ CP 203–06.

¹⁹ CP 207–12.

loss is excluded by specific policy language.²⁰ It is the first step that is at issue here: the Helgesons must show that Andrew is an insured under the policy.

Insurance policies are contracts, and rules of contract interpretation apply.²¹ If policy language is clear, a court must enforce it as written and may not create an ambiguity where none exists.²² Endorsements to an insurance policy become part of the policy and generally control over inconsistent terms or conditions in the policy.²³

Washington's UIM statute, RCW 48.22.030, provides that an auto policy must provide UIM coverage "for the protection of persons insured thereunder" in the same amount as the insured's third-party liability coverage unless the insured rejects the coverage in writing.²⁴ Unless the insured waives UIM coverage, the definition of insured for purposes of

²⁰ *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000 (1992).

²¹ *Hall v. State Farm Mut. Auto. Ins. Co.*, 133 Wn. App. 394, 399, 135 P.3d 941 (2006).

²² *Transcon. Ins. Co. v. Wash. Pub. Utils. Dists.' Util. Sys.*, 111 Wn.2d 452, 456, 760 P.2d 337 (1988).

²³ *Id.* at 462.

²⁴ RCW 48.22.030(2)–(4); *see also Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 250, 850 P.2d 1298 (1993).

UIM coverage must be coextensive with the definition of insured for liability coverage.²⁵

Andrew Helgeson is not entitled to UIM coverage because he does not come within the definition of an insured person under the policy. Although the policy does not set forth a specific UIM provision, by operation of law the UIM coverage is considered to be coextensive with the policy's liability coverage, and the liability coverage does not extend to Andrew. The liability coverage of the Broad Form Named Driver Endorsement ("Endorsement") states in pertinent part that Viking "will pay damages for which **you** are legally liable because of **bodily injury** and/or **property damage** caused by a **car accident** arising out of **your** use of **your insured car**."²⁶ The Endorsement defines "you" and "your" to mean "the person shown as the named insured on the Declarations Page."²⁷ The only named insured on the declarations page is Jennifer Helgeson.²⁸ Moreover, Andrew was not using an insured car or any other

²⁵ See *Butzberger v. Foster*, 151 Wn.2d 396, 401–02, 89 P.3d 689 (2004) (plurality opinion).

²⁶ CP 121.

²⁷ *Id.*

²⁸ CP 108.

car when the accident took place; he was a pedestrian.²⁹ Andrew Helgeson was not an insured person under the policy and is therefore not entitled to liability coverage or UIM coverage. Viking properly denied his UIM claim.

2. The insurance contract does not violate the public policy expressed in the UIM statute.

The Helgesons argue that the insurance policy violates the public policy expressed in the UIM statute because it does not provide coverage to Andrew as a relative of the named insured, Mrs. Helgeson. That argument blurs the critical distinction between a grant of coverage and an exclusion from coverage. The Helgesons cite cases invalidating family-member exclusions, but neglect case law stating that the UIM statute and public policy do not mandate any particular scope for the definition of who is an insured. Under the latter cases, the policy is valid because Andrew, rather than being subject to an exclusion, is not an insured in the first instance.

A. The UIM statute prohibits certain exclusions from coverage, but does not mandate a definition of insured that includes a named insured's relatives.

Washington courts have long held that the UIM statute “does not mandate any particular scope for the definition of who is an insured in a

²⁹ Helgesons' Complaint ¶ 3.2, CP 4.

particular automobile insurance policy.”³⁰ As the Supreme Court has explained,

“The policy of RCW 48.22.030 requires that insurers make available uninsured motorist coverage to a class of ‘insureds’ that is at least as broad as the class in the primary liability sections of the policy. It does not preclude the parties from reaching agreement as to the scope of the class in the first instance.”³¹

The distinction between grants of coverage and exclusions is not merely semantic; Washington courts treat the two very differently. For instance, an insured has the initial burden of showing that the loss falls within the scope of the policy’s insured losses. If that burden is met, the insurer then has the burden to show that the loss is excluded by specific

³⁰ *Smith v. Cont’l Cas. Co.*, 128 Wn.2d 73, 83, 904 P.2d 749 (1995); *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 75, 549 P.2d 9 (1976); *see also Wheeler v. Rocky Mountain Fire & Cas. Co.*, 124 Wn. App. 868, 874–75, 103 P.3d 240 (2004), *review denied*, 155 Wn.2d 1002, 122 P.3d 186 (2005); *Fin. Indem. Co. v. Keomaneethong*, 85 Wn. App. 350, 353, 931 P.2d 168 (1997) (“Although it is true . . . that our Supreme Court has stated that the legislative purpose of the Washington UIM statute . . . is not to be eroded by legal niceties arising from exclusionary clauses, that same court has also said that when the question revolves around the initial extension of coverage, that is, the definition of who is and is not an insured, public policy is not violated so long as insured persons are defined the same in the primary liability and UIM sections of the policy.”); *Dairyland Ins. Co. v. Uhls*, 41 Wn. App. 49, 53, 702 P.2d 1214 (1985) (“[T]he parties may agree to a narrow definition of insured so long as that definition is applied consistently throughout the policy[.]”) (quoting *Federated Am. Ins. Co. v. Raynes*, 88 Wn.2d 439, 444, 563 P.2d 815 (1977), *abrogated in other part by statute as stated in Vadheim v. Cont’l Ins. Co.*, 107 Wn.2d 836, 844, 734 P.2d 17 (1987)).

³¹ *Raynes*, 88 Wn.2d at 443 (quoting *Touchette v. Nw. Mut. Ins. Co.*, 80 Wn.2d 327, 337, 494 P.2d 479 (1972)).

policy language.³² Washington courts also construe exclusions most strongly against the insurer.³³

The cases on which the Helgesons rely struck down exclusions, and did not mandate a particular definition of “insured.” For instance, in *Tissell v. Liberty Mutual Insurance Co.* the Washington Supreme Court invalidated a UIM provision that excluded coverage for a family member who was a named insured.³⁴ The policy in that case included the named insured’s family as a “covered person,” but excluded UIM coverage for a vehicle owned by a family member. The insurer denied UIM coverage to Tissell, a named insured, because she was injured while riding in the family car. *Tissell* invalidated this so-called “family member exclusion” as against public policy because it was directed at a class of victims, rather than conduct that affected the insurer’s risk.³⁵ Using analogous reasoning, the other cases the Helgesons cite struck down similar exclusions.³⁶

³² *McDonald*, 119 Wn.2d at 731.

³³ *Greer v. Nw. Nat’l Ins. Co.*, 109 Wn.2d 191, 201, 743 P.2d 1244 (1987).

³⁴ 115 Wn.2d 107, 112–14, 795 P.2d 126 (1990).

³⁵ *Id.* at 112–13, 121–23.

³⁶ See *Mendoza v. Rivera-Chavez*, 140 Wn.2d 659, 662, 999 P.2d 29 (2000) (“[W]e hold the Leader [National Insurance Co.] felony exclusion to be void as against public policy[.]”); *Mut. of Enumclaw Ins. Co. v. Wiscomb*, 97 Wn.2d 203, 205, 643 P.2d 441 (1982) (“*Wiscomb IF*”) (“[W]e are again called upon to determine the validity and effect of family or household exclusion clauses in automobile insurance policies.”); *Safeco*

The distinction between the extension or grant of coverage and exclusions from coverage is made clear in several Washington cases, one of which is *Farmers Insurance Co. v. Miller*.³⁷ In that case, Lane Miller obtained an auto policy, which included uninsured motorist coverage, from Farmers. Miller's son was later killed while riding as a passenger in an uninsured vehicle. Farmers rejected Miller's uninsured motorist claim because his son was not an insured. The policy stated that Farmers would provide uninsured motorist coverage to "the insured," which the policy defined to include a relative of the named insured who was a resident of the same household and who did not own a motor vehicle. Miller's son owned a car, so he did not come within the definition of insured. The trial court granted summary judgment to Farmers. On appeal, Miller argued that the public policy expressed in RCW 48.22.030 prohibited this type of clause. The court rejected this argument because the statute "does not mandate any particular scope for the definition of who is an insured in a

Ins. Co. v. Auto. Club Ins. Co., 108 Wn. App. 468, 476, 31 P.3d 52 (2001) ("[W]e conclude that the household member exclusion in Safeco of America's umbrella policy . . . as applied to recovery for injuries due to vehicular accidents, is void as against public policy."); *Dairyland*, 41 Wn. App. at 53 (stating that policy language "exclud[ing] coverage when the insured is injured in a certain situation" was impermissible); *see also Greengo v. Pub. Emps. Mut. Ins. Co.*, 135 Wn.2d 799, 810–11, 959 P.2d 657 (1998) (holding that anti-stacking provision did not violate UIM statute or public policy; not addressing family-member exclusion except to say that *Tissell* involved exclusion).

³⁷ 87 Wn.2d 70, 75–76, 549 P.2d 9 (1976).

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

Miller makes clear that RCW 48.22.030 and the public policy it expresses do not place any restrictions on the scope of an extension of UIM coverage, other than that the grant be coextensive with the liability policy. While that decision dates from 1976, the courts have reaffirmed its holding in more recent decisions.³⁸

One of the cases that reaffirmed *Miller* by distinguishing between grants of coverage and exclusions is the 2004 case *Wheeler v. Rocky*

³⁸ See *Raynes*, 88 Wn.2d at 444 (“*Miller* stand[s] for the proposition that the parties may agree to a narrow definition of insured so long as that definition is applied consistently throughout the policy, but once it is determined that a person is an insured under the policy, that person is entitled to uninsured motorist coverage.”), *abrogated in other part by statute as stated in Vadheim v. Cont’l Ins. Co.*, 107 Wn.2d 836, 844, 734 P.2d 17 (1987); *Keomaneethong*, 85 Wn. App. at 353 (“Although it is true . . . that our Supreme Court has stated that the legislative purpose of the Washington UIM statute . . . is not to be eroded by legal niceties arising from exclusionary clauses, that same court has also said that when the question revolves around the initial extension of coverage, that is, the definition of who is and is not an insured, public policy is not violated so long as insured persons are defined the same in the primary liability and UIM sections of the policy.”) (citing *Miller*).

*Mountain Fire and Casualty Co.*³⁹ There, Wheeler, a foster child, moved in with the Taylor family at the age of 16. The Taylors had an automobile insurance policy that provided coverage for “family members” including a “ward or foster child.” Just after turning 18, Wheeler was injured in a car accident while traveling as a passenger in a friend’s car, and she sought compensation through the Taylors’ uninsured coverage. The insurer denied coverage because Wheeler, having turned 18, was no longer a foster child under state law. On appeal from an order dismissing her claims, Wheeler argued that public policy militated toward coverage because in *Tissell* the Supreme Court had invalidated “family member exclusions.” The court distinguished *Tissell* by noting that an insurer may choose not to include certain persons in the definition of “insured.”⁴⁰

The Helgesons also argue that the public policy favoring full compensation for accident victims supports coverage for Andrew. While that public policy may override an exclusion, it does not require an insurer to cover someone who is not an insured at all. Neither the case law nor public policy requires an insurer to indemnify a stranger to the policy.

³⁹ 124 Wn. App. 868, 103 P.3d 240 (2004), *review denied*, 155 Wn.2d 1002, 122 P.3d 186 (2005).

⁴⁰ *Id.* at 874–75.

B. The critical language in the Endorsement is part of the coverage grant, rather than an exclusion.

The policy language relevant to this dispute is part of the grant of coverage, and not an exclusion. “The coverage section of an insurance policy defines both the entities who are insured and the scope of the coverage provided by the policy.”⁴¹ The critical language includes the sentence in the Liability Coverage section of the Endorsement that reads, “**We** will pay damages for which **you** are legally liable because of **bodily injury** and/or **property damage** caused by a **car accident** arising out of **your** use of **your insured car**”; the Endorsement’s definition of “you” as “the person shown as the named insured on the Declarations Page”; and the declaration page, which identifies Jennifer Helgeson as the named insured.⁴² Taken together, those provisions describe the group of people who are covered by the policy—a group that does not include Andrew Helgeson. An exclusion, by contrast, does not grant coverage; rather, it subtracts from it.⁴³ Moreover, the key wording does not appear in the

⁴¹ Thomas V. Harris, *Washington Insurance Law* § 6.9, at 6-23 (3d ed. 2010).

⁴² CP 108, 121.

⁴³ *Nat’l Union Fire Ins. Co. v. Nw. Youth Servs.*, 97 Wn. App. 226, 231, 983 P.2d 1144 (1999).

section of the policy titled “Exclusions.”⁴⁴ The language at issue defines who is insured for purposes of the grant of coverage, rather than subtracting from or carving out an exception to that definition. The UIM statute and public policy do not require Viking to include Andrew within the coverage grant.

3. RCW 4.22.005 does not require automobile insurance policies to provide UIM coverage to a named insured’s family members.

The Helgesons argue that the Endorsement is invalid because it conflicts with RCW 48.22.005. Specifically, they argue that RCW 48.22.005 defines “insured” as all residents of the named insured’s household, and that this definition is incorporated into the UIM statute, RCW 48.22.030. From these premises, they reason that the Viking policy violates these statutes because its definition of insured does not include residents of Jennifer Helgeson’s household. The trial court correctly rejected this argument because both premises on which it rests are unsupported by the statutes, the legislative history, the case law, and the commentary the Helgesons cite.

⁴⁴ CP 113, 121.

A. The definition of “insured” in RCW 48.22.005 does not include the insured’s relatives.

The Helgesons argue that the definition of “insured” in RCW 48.22.005 includes all the named insured’s family members. The statute defines “insured” and “named insured” as follows:

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

....

(5) “Insured” means:

(a) The named insured or a person who is a resident of the named insured’s household and is either related to the named insured by blood, marriage, or adoption, or is the named insured’s ward, foster child, or stepchild; or

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

....

(9) “Named insured” means the individual named in the declarations of the policy and includes his or her spouse if a resident of the same household.

The word “or” throughout the definition of “insured” in subsection (5) indicates that the term has more than one meaning. “Insured” may mean “[1] [t]he named insured *or* [2] a person who is a resident of the named insured’s household . . . *or* [3] A person who sustains bodily injury caused

by accident . . .”⁴⁵ By using the disjunctive “or”,⁴⁶ the statute does not mandate that the insured always include residents of the named insured’s household; instead, the term may refer to the named insured only, as with the Viking policy.

The disjunctive nature of the definition of “insured” becomes even more apparent when compared to the statutory definition of “named insured.” RCW 48.22.005(9) defines “named insured” as “the individual named in the declarations of the policy *and includes* his or her spouse if a resident of the same household.”⁴⁷ By using the conjunctive phrase “and includes,” the statute clearly indicates that “named insured” also encompasses a named insured’s spouse if living in the same household. If the legislature had intended to define “insured” in the same manner—that is, conjunctively—then it would have used “and”; instead, it used “or.”

⁴⁵ RCW 48.22.005(5)(a) (emphasis added).

⁴⁶ *Tesoro Ref. & Mktg. Co. v. Dep’t of Revenue*, 164 Wn.2d 310, 319, 190 P.3d 28 (2008) (“[T]he word ‘or’ does not mean ‘and’ unless legislative intent clearly indicates to the contrary.”); *Finney v. Farmers Ins. Co.*, 92 Wn.2d 748, 752, 600 P.2d 1272 (1979) (“The use of the word ‘or’ is disjunctive.”).

⁴⁷ RCW 48.22.005(9) (emphasis added).

Because the legislature used different terms in the same statute, we must assume the legislature intended to convey different meanings.⁴⁸

B. RCW 48.22.005's definition of "insured" is not incorporated into the UIM statute.

Even if the definition of "insured" in RCW 48.22.005(5) were not disjunctive, that definition would not modify RCW 48.22.030 because the latter statute does not use the term "insured" standing alone. Rather, the critical subsection of RCW 48.22.030, subsection (2), uses the terms "person insured thereunder" and "named insured":

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

⁴⁸ *Whatcom Cnty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.").

policies, or other policies which apply only as excess to the insurance directly applicable to the vehicle insured.⁴⁹

If the legislature had intended “the insured” in RCW 48.22.005(5) and “persons insured thereunder” in RCW 48.22.030(2) to mean the same thing, it would have used the same term in both statutes.⁵⁰ And while other subsections of RCW 48.22.030, such as (3) and (8), do use the term “the insured,” it is likely that those sections are referring to the term “persons insured thereunder” in subsection (2), and not “the insured” as defined in a separate section, RCW 48.22.005.

The legislative history of RCW 48.22.005 also makes it clear that that statute applies only to personal injury protection (PIP) coverage, and not UIM coverage. To the extent the statutory language is ambiguous, that legislative history is relevant.⁵¹ The bill passed in 1993 that was later codified in part as RCW 48.22.005 was entitled “Motor Vehicle Insurance—Personal Injury Protection Benefits.”⁵² That bill makes many

⁴⁹ RCW 48.22.030(2) (emphasis added).

⁵⁰ *Whatcom Cnty.*, 128 Wn.2d at 546.

⁵¹ *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228, 232 (2007) (“If the statutory language is susceptible to more than one reasonable interpretation, then a court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.”).

⁵² See Laws of 1993, ch. 242, CP 162–67.

references to PIP, but does not once mention “underinsured” or “UIM.”⁵³ Moreover, the House Bill Report describes the bill as one “[r]egulating the mandatory offering of personal injury protection insurance.”⁵⁴ The Report also makes no mention of UIM. A 2003 amendment to RCW 48.22.005 also pertained exclusively to PIP coverage.⁵⁵

A review of case law also shows that the definition of “insured” in RCW 48.22.005 is not incorporated into the UIM statute. Not one of the scores of cases interpreting the UIM statute relies on RCW 48.22.005 to define “insured” or any similar term in the UIM statute. Instead, cases interpreting the UIM statute state that it “does not mandate any particular scope for the definition of who is an insured in a particular automobile insurance policy.”⁵⁶ Indeed, only four published Washington cases even

⁵³ *Id.*

⁵⁴ House Bill Report for Engrossed Substitute House Bill 1233 (1993), CP 169–70.

⁵⁵ See Laws of 2003, ch. 115, CP 172–75; House Bill Report for House Bill 1084 (2003), CP 177–79 (stating in summary that bill “[m]akes technical amendments to the insurance code involving the clarification of existing statutory language pertinent to personal injury protection coverage”).

⁵⁶ *Smith v. Cont’l Cas. Co.*, 128 Wn.2d 73, 83, 904 P.2d 749 (1995) (quoting *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 75, 549 P.2d 9 (1976)).

cite RCW 48.22.005, and only one of those cases refers to that statute's definition of "insured."⁵⁷

Finally, the commentary on which the Helgesons rely does not actually support their position. They cite § 5.3 of the *Washington Motor Vehicle Accident Insurance Deskbook* (2d ed. & supp. 2009) ("Deskbook") to support their claim that by enacting RCW 48.22.005 the legislature has "mandated that PIP coverage and UIM coverage extend to at least to the named insured and the family members who reside with the named insured."⁵⁸ The Deskbook says nothing of the sort. Chapter 5 does not even address UIM; it is titled "First-Party Insurance Coverage (Other than UIM),"⁵⁹ and the first section says in part, "This Chapter does not discuss underinsured motorist (UIM) claims, which are covered in Chapter 6."⁶⁰ Moreover, section 5.3 expressly limits its discussion to PIP claims.⁶¹

⁵⁷ *Am. States Ins. Co. v. Bolin*, 122 Wn. App. 717, 721 n.6, 94 P.3d 1010 (2004) (citing RCW 48.22.005(1)(b) for definition of "automobile"); *Boag v. Farmers Ins. Co.*, 117 Wn. App. 116, 122 n.4, 69 P.3d 370 (2003) (referring, in PIP case, to definition of "income continuation benefits" in RCW 48.22.005(3)); *Daley v. Allstate Ins. Co.*, 86 Wn. App. 346, 355, 936 P.2d 1185 (1997) (citing definition of "bodily injury" in RCW 48.22.005(2)), *rev'd*, 135 Wn.2d 777, 958 P.2d 990 (1998); *Cherry v. Truck Ins. Exch.*, 77 Wn. App. 557, 563 n.3, 892 P.2d 768 (1995) (citing, in dicta, definition of insured and named insured).

⁵⁸ Appellants' Opening Brief at 10.

⁵⁹ Deskbook § 5.1, at 5-1.

⁶⁰ *Id.* § 5.1, at 5-2.

And the Deskbook cites RCW 48.22.005 only in Chapter 5, and not at all in the UIM chapter or in any other chapter.⁶² Finally, even if the Deskbook were on point, it would not be persuasive, as only one published Washington case cites the Deskbook, and then only as a secondary authority.⁶³

In sum, not a single legal authority—not the text or legislative history of the statute, not the case law, and not the commentary—supports the Helgesons’ position regarding RCW 48.22.005.

4. The trial court properly dismissed the Helgesons’ IFCA claim.

IFCA authorizes a first-party claimant to sue an insurer for unreasonably denying a claim or for failing to disclose insurance benefits.⁶⁴ The Helgesons maintain that Viking is liable under IFCA for failing to disclose the UIM benefits to which they believe Andrew was entitled. The trial court properly dismissed this claim, for two reasons.

The first reason is that, as a matter of law, Viking acted reasonably in denying Andrew’s UIM claim. In actions for bad faith and for violation of the Consumer Protection Act, which are analogous to IFCA actions, a

⁶¹ *Id.* § 5.3 (titled “Who Qualifies as an Insured Under PIP Coverage?”).

⁶² See Deskbook Table of Statutes at TS-3 to TS-4.

⁶³ See *Benham v. Wright*, 94 Wn. App. 875, 879, 973 P.2d 1088 (1999).

⁶⁴ RCW 48.30.015(1), (5); WAC 284-30-350.

denial is reasonable if it is performed in good faith under an arguable interpretation of existing law.⁶⁵ An insurer is entitled to summary judgment on a policyholder's bad faith claim if there are no disputed material facts pertaining to the reasonableness of the insurer's conduct, or the insurance company is entitled to prevail as a matter of law on the facts construed most favorably to the nonmoving party.⁶⁶ Here, the undisputed facts and the policy's clear language point to only one conclusion: Andrew Helgeson is not an insured and not entitled to UIM coverage.

Second, the Helgesons' assertion that Viking concealed information—which is the only basis they identify for their IFCA claim—is unfounded. Viking explained the basis for its denial of Andrew's claim in letters dated December 22, 2009, and April 7, 2010.⁶⁷ The Helgesons have never identified anything that Viking failed to disclose, nor have they shown why a claim denial is tantamount to non-disclosure. The trial court properly dismissed their IFCA claim.

⁶⁵ See *Shields v. Enter. Leasing Co.*, 139 Wn. App. 664, 676, 161 P.3d 1068 (2007).

⁶⁶ See *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 486, 78 P.3d 1274 (2003).

⁶⁷ CP 83–84, 88–90.

5. The Helgesons are not entitled to attorneys' fees.

The Helgesons cannot recover attorneys' fees under *Olympic Steamship* or RCW 4.84 because they are not entitled to coverage.⁶⁸ Similarly, they cannot recover fees under IFCA because as a matter of law Viking did not violate that statute.⁶⁹

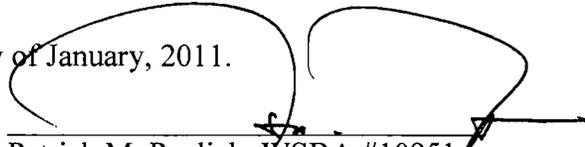
V. Conclusion

This Court should affirm the trial court's order granting summary judgment to Viking and dismissing the Helgesons' claims. Andrew Helgeson is not entitled to UIM coverage because he is not included within the definition of "insured" in the Broad Form Named Driver Endorsement. That definition is not an impermissible family-member exclusion nor does it contravene RCW 48.22.005. The Helgesons' IFCA claim should be dismissed because it is beyond dispute that Viking acted reasonably in denying their UIM claim and that it concealed no material information from them.

⁶⁸ See *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 53–54, 811 P.2d 673 (1991) (authorizing award of fees to insured who successfully sues to obtain benefit of insurance contract); RCW 4.84.010 (authorizing award of certain costs to prevailing party).

⁶⁹ RCW 48.30.015(1) (authorizing fee award if insurer unreasonably denied claim).

Respectfully submitted this 19th day of January, 2011.



Patrick M. Paulich, WSBA #10951
Matthew Munson, WSBA #32019
Thorsrud Cane & Paulich
1325 Fourth Avenue, Suite 1300
Seattle, WA 98101
206.386.7755
Attorneys for Respondent Viking
Insurance Company of Wisconsin

COURT OF APPEALS
DIVISION II

NO. 41371-01

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COURT OF APPEALS, DIVISION II OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON
BY _____
DEPUTY

CONSOLIDATED CASES

JENNIFER HELGESON and ANDREW HELGESON,
Appellants,

v.

VIKING INSURANCE COMPANY OF WISCONSIN, a foreign
insurance corporation, dba SENTRY INSURANCE dba DAIRYLAND
INSURANCE,
Respondent.

VIKING INSURANCE COMPANY OF WISCONSIN, a foreign
corporation,
Respondent,

v.

JENNIFER HELGESON and JOHN DOE HELGESON and their marital
community, and ANDREW HELGESON,
Appellants.

DECLARATION OF SERVICE

Patrick M. Paulich WSBA #10951
H. Matthew Munson WSBA #32019
Thorsrud Cane & Paulich
1325 Fourth Avenue, Suite 1300
Seattle, WA 98101
206.386.7755

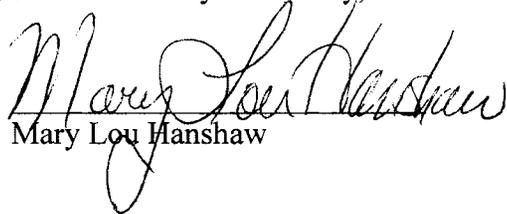
Attorneys for Respondent

I declare under penalty of perjury under the laws of the United States that I caused to be served on the date stated below Brief of Respondent and this Declaration of Service on the following counsel in the manner described below:

Gerald A. Kearney
Natalie K. Rasmussen
Law Offices of Gerald A. Kearney, PLLC
P.O. Box 1314
Kingston, WA 98346

VIA U.S. Mail

Executed at Seattle, Washington this 19th day of January, 2011.


Mary Lou Hanshaw