

FILED
SUPREME COURT
STATE OF WASHINGTON
5/11/2020 2:40 PM
BY SUSAN L. CARLSON
CLERK

No. 97652-0

SUPREME COURT
OF THE STATE OF WASHINGTON

TODD MCLAUGHLIN, a Washington Resident,

Petitioner,

v.

TRAVELERS COMMERCIAL INSURANCE COMPANY,
a foreign corporation

Respondent.

TRAVELERS COMMERCIAL INSURANCE COMPANY'S ANSWER
TO BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS

Thomas Lether, WSBA #18089
Lether Law Group
1848 Westlake Ave N., Suite 100
Seattle, WA 98109
Telephone: (206) 467-5444
Facsimile: (206) 467-5544
tlether@letherlaw.com
*Attorney for Respondent Travelers
Commercial Insurance Company*

TABLE OF CONTENTS

Table of Authoritiesiii

I. Introduction 1

II. Statement of the Case.....2

III. Argument2

 A. Division I’s Holding Is Not Contrary to Washington Statutes or
 Public Policy.....2

 B. Division I Correctly Applied Established Washington
 Law.....8

IV. Conclusion12

TABLE OF AUTHORITIES

CASES

Washington Cases

<i>Allstate Ins. Co. v. Peasley</i> , 131 Wn.2d 420, 424, 932 P.2d 1244, 1246 (1997)	9
<i>Boeing Co. v. Aetna Cas. & Sur. Co.</i> , 113 Wn.2d 869, 877, 784 P.2d 507(1990)	9, 10
<i>Durant v. State Farm Mut. Auto. Ins. Co.</i> , 191 Wn.2d 1, 419 P.3d 400 (2018)	5, 9
<i>Farmers Ins. Co. of Wash v. Miller</i> , 87 Wn.2d 70, 73, 549 P.2d 9 (1976)	9
<i>In Re Forfeiture of One 1970 Chevrolet Chevelle</i> , 166 Wn.2d 843, 215 P.3d (2019)	7
<i>McLaughlin v. Travelers Commercial Ins. Co.</i> , 9 Wn. App. 2d 675, 679, 446 P.3d 654, 656 (2019)	10, 11
<i>Mut. of Enumclaw Ins. Co. v. Wiscomb</i> , 97 Wn.2d 203, 210, 643 P.2d 441, 445 (1982)	10
<i>Overton v. Consol. Ins. Co.</i> , 145 Wn.2d 417, 428, 38 P.3d 322, 327 (2002)	9
<i>Ramm v. Farmers Ins. Co. of Wash.</i> , 200 Wn. App. 1, 2, 401 P.3d 325, 325 (2017)	6
<i>Rodenbough v. Grange Ins. Assoc.</i> , 33 Wn. App. 137, 139, 652 P.2d 22, 23 (1982)	4
<i>Schab v. State Farm Mut. Auto. Ins. Co.</i> , 41 Wn. App. 418, 422, 704 P.2d 621, 624 (1985)	4, 10
<i>Sherry v. Fin. Indem. Co.</i> , 160 Wn.2d 611, 614, 160 P.3d 31, 33 (2007)	7
<i>State Farm Mut. Auto. Ins. Co.</i> , 41 Wn. App. 418, 421, 704 P.2d 621, 623 (1985)	4, 10
<i>State v. Van Wolvelaere</i> , __ Wn.2d __, __ P.3d __, No. 97283-4, 2020 Wash. LEXIS 280 (April 30, 2020)	7, 8
<i>Thiringer v. Am. Motors Ins. Co.</i> , 91 Wn.2d 215, 219, 588 P.2d 191, 193 (1978)	7
<i>Tyrrell v. Farmers Ins. Co.</i> , 140 Wn.2d 129, 994 P.2d 833 (2000)	4, 6

Other Jurisdictions

21st Century Ins. Co. v. Superior Court,
47 Cal 4th 511, 516 (2009)3
Nager v. Allstate Ins. Co.,
83 Cal. App. 4th 284, 289-290 (2000)3

STATUTES

Washington Statutes

RCW 46.04.400.....8
RCW 48.22.005.....3, 8
RCW 48.22.058(1)3
RCW 48.22.085-095.....3, 4
RCW 48.22.090.....6

Other Jurisdictions

Cal Ins. Code § 1-16032.....3
ORS 742.520-544.....4

I. INTRODUCTION

United Policyholder’s (“United”) Brief of Amicus Curiae fails to establish why this Court should depart from its longstanding jurisprudence regarding insurance policy interpretation. Instead, United revises and recites previously raised arguments. As a result, United’s brief fails to provide any new analysis or insight to the issue before the Court.

United argues that Washington Courts should interpret the term “pedestrian” in a California auto policy by incorporating a Washington statute into that policy. The Court of Appeals soundly—and correctly—rejected this premise. United further argues that Division I’s analysis is shortsighted. On the contrary, Division I systematically and methodically applied the correct principles of policy interpretation to come to the correct conclusion.

Similarly, United urges this Court to ignore firmly established and unambiguous rulings of this Court regarding the construction of insurance policies. This Court has long held that insurance policy contracts and undefined terms in a policy are given their plain and ordinary meaning as set forth in common dictionary definitions. Division I correctly applied that well-settled law in this case. United provides no cognizable basis for overturning this longstanding principle of Washington insurance law.

II. STATEMENT OF THE CASE

The facts that give rise to the present action have been extensively briefed by the parties. For this reason and in the interest of economy, Travelers will not fully reiterate the same.

To the extent that the Court requires a detailed recitation of facts, Travelers directs this Court to Travelers' Answer to McLaughlin's Petition for Review.

III. ARGUMENT

A. Division I's Holding Is Not Contrary to Washington Statutes or Public Policy

United primarily focuses on two arguments: (1) that Washington's statutory and case law mandate Personal Injury Protection ("PIP") coverage to all named insureds arising out of an automobile accident regardless of the insured's status as a pedestrian, bicyclists and/or occupant of a vehicle, and (2) that public policy mandates the same. In making these arguments, United is asking the court to overrule the policy language, depart from established jurisprudence, and expand coverage to those who are not contractually obligated to receive such coverage. This argument and United's subsequent analysis are fundamentally flawed and should be disregarded.

In making its arguments, United misconstrues Traveler's position

regarding PIP coverage. Travelers has never advanced the argument that the PIP statute is not mandatory under Washington law. Instead, Travelers, has and continues to, argues that under Washington law PIP coverage is not mandatory. Washington PIP statutes only require that insurers offer coverage for insureds. RCW 48.22.058(1) (“No new automobile liability insurance policy or renewal of such an existing policy may be issued unless personal injury protection coverage is offered as an optional coverage.”) This plainly does not mean that PIP coverage is mandatory in Washington, it only means that an insurer must offer PIP coverage to an insured when negotiating a Washington policy.

Furthermore, in arguing that the Court should incorporate a Washington statute into a California policy, United is equating the Washington PIP statute to the MedPay policy provision in the McLaughlin policy. This is improper. The two coverages are distinct¹. Furthermore, in its insistence that MedPay and PIP are the same coverage, United seems to ignore that the McLaughlin policy was negotiated, drafted, and issued in

¹ MedPay is similar but not the same as PIP coverage. In California, med-pay coverage is purely a matter of contract. “There is no statutory obligation to provide med-pay coverage.” *21st Century Ins. Co. v. Superior Court*, 47 Cal 4th 511, 516 (2009) (citing *Nager v. Allstate Ins. Co.*, 83 Cal.App.4th 284, 289–290 (2000)). Moreover, there is no statutory requirement that an insurer offer MedPay for an insured. *See generally* Cal Ins. Code § 1-16032 (of the twenty (20) times that the California Insurance Code mentions “medical payment(s),” not once does the Code state that an insurer is required to offer MedPay to insureds prior to contracting.) In contrast, Washington statutorily requires auto insurers issuing policies in Washington to offer PIP coverage subject to certain scope requirements. RCW 48.22.005; RCW 48.22.085 *et seq.*

California. This makes United's argument that this Court incorporate a Washington statute into a California MedPay policy illogical. However, in order to address United's arguments, Travelers must refer to Washington statutes regarding PIP coverage.

First, the Washington statutes addressing PIP coverage do not set forth a comprehensive mandatory PIP coverage scheme. *See, e.g.*, ORS 742.520-544. Instead, under Washington law, PIP coverage and the scope of PIP coverage is primarily a contractual construct. *See Schab v. State Farm Mut. Auto. Ins. Co.*, 41 Wn. App. 418, 422, 704 P.2d 621, 624 (1985) ("PIP coverage is not mandated by statute, it is a matter of contract."); *see also Tyrrell v. Farmers Ins. Co.*, 140 Wn.2d 129, 994 P.2d 833 (2000) (this Court solely analyzed the insured's policy to determine the scope of PIP coverage for the insured). Washington statutes do provide some basic requirements regarding an insurer's responsibility to offer PIP coverage, the amount of PIP coverage and type of benefits to be offered. *See RCW 48.22.085-095*. However, there is no Washington statute or other expression of law or public policy that mandates PIP coverage for all insureds struck by vehicles while they are pedestrians or bicyclists under their own policies.

Second, PIP coverage is contractual with regard to scope. *See Schab*, 41 Wn. App. at 422; *see also Rodenbough v. Grange Ins. Asso.*, 33

Wn. App. 137, 139, 652 P.2d 22, 23 (1982). Thus, the scope of PIP coverage to insureds is governed by the terms of the policy between the insured and the insurer and not under a statutory scheme, like United argues.

United also argues that Travelers is asking this Court to ignore Washington law. Travelers objects to United's characterization of Traveler's position. Travelers does not make this argument. Rather, Traveler's position is that Washington statutory language should not be applied to interpret an undefined term in a California MedPay policy. United does not make any attempt to give this Court concrete arguments to answer this central question. Instead, United makes blanket statements that Traveler's is cherry-picking restrictive definitions to avoid coverage. United Br. 11. This is simply untrue. Traveler's position is that the Washington statutes regarding PIP coverage do not apply to the MedPay coverage afforded under a California policy because it is evident that MedPay coverage and PIP are two distinct coverages. As such, because MedPay and PIP coverage are distinct coverages, the proper interpretation of the term "pedestrian" is to use the "plain, ordinary, and popular" meaning of the term and, not, as United argues, the incorporation of a definition from the Washington Insurance Code into the policy. *Durant v. State Farm Mut. Auto. Ins. Co.*, 191 Wn.2d 1, 12, 419 P.3d 400, 405

(2018).

Similarly, United argues that public policy mandates PIP coverage for the named insured under all circumstances. This is simply untrue. The PIP statutes clearly enumerate multiple exclusions and/or exceptions to PIP coverage. *See* RCW 48.22.090 (listing seven exclusions or exceptions to PIP coverage). Likewise, the courts have ruled that there are circumstances in which PIP coverage does not apply to insureds based on the terms of the policy contract. *Tyrrell*, 140 Wn.2d at 137 (this Court upheld the denial of PIP coverage for an insured who sustained injuries when he stepped out of a camper attached to a truck because the camper was not being used as a motor vehicle); *see also Ramm v. Farmers Ins. Co. of Wash.*, 200 Wn. App. 1, 2, 401 P.3d 325, 325, (2017) (Division III also upholding denial of PIP coverage to an insured who sustained injuries when feeling ill, pulled over and fell out of his parked, but still running, vehicle because the insured was not operating the vehicle at the time of the injury). These cases unequivocally confirm that PIP coverage is not owed to insureds in all circumstances. In both cases, the insured was in or near a vehicle when the injury occurred, yet the courts found that PIP coverage was not required based on the scope of the coverage afforded by the terms of the policy. The insured in this matter, like the insureds in *Tyrrell* and *Ramm*, does not qualify for coverage under the plain terms of his policy.

The inquiry in this case ends there.

United cites to several additional cases in an attempt to support its position. However, these arguments are without merit. Specifically, these cases do not support United's position, and do not address PIP coverage scope or the central issue in this matter, which is the interpretation of a California auto policy by determining the plain meaning of the term "pedestrian" in that policy. Instead, these cases analyze PIP reimbursement after PIP is paid. *See Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 614, 160 P.3d 31, 33 (2007); *see also Thiringer v. Am. Motors Ins. Co.*, (91 Wn.2d 215, 219, 588 P.2d 191, 193 (1978)). These cases, along with the others cited by United, do not discuss policy interpretation or the interpretation of undefined terms. *See In Re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 843, 215 P.3d (2019) (the Court discusses the method for interpretation of the term "knowledge" under the meaning of a criminal statute. The Court does not address or analyze policy interpretation). Consequently, United's argument is unrelated and should be disregarded.

Similarly, in an apparent attempt to bolster its arguments that this Court should apply Washington statutory definitions to a California MedPay policy, McLaughlin has submitted to this Court as additional authority the ruling from *State v. Van Wolvelaere*, __ Wn.2d __, __ P.3d

___, No. 97283-4, 2020 Wash. LEXIS 280 (April 30, 2020). However, McLaughlin fails to note why analysis of Washington criminal statutes regarding “motor vehicle” should have any bearing on the analysis of policy interpretation or override the common law interpretation of an undefined term. In *State v. Van Wolvelaere*, this Court used the statutory definitions in the criminal code to conclude that a snowmobile was considered a motor vehicle under the criminal statute for the crime of theft of a motor vehicle. *Id.* at *11. *State v. Van Wolvelaere* does not discuss or analyze a policy or discuss policy interpretation at all. The statutory definitions in a Washington criminal code and the analysis thereof are completely unrelated to this present matter. Thus, like the cases cited by United, this case is not instructive on this matter and should be rejected.

B. Division I Correctly Applied Established Washington Law

Division I’s analysis of the Travelers’ policy and its interpretation of the term “pedestrian” was proper here. United continuously argues that the court used one dictionary definition, to the exclusion of other authority, in making its decision. This is incorrect. Division I systematically set forth its analysis starting with the correct policy interpretation standard (“courts construe insurance policies are contracts”), moved through the interpretation of an undefined term (“[u]ndefined terms in an insurance contract must be given their ‘plain, ordinary, and popular’

meaning”), and ended by properly harmonizing RCW 48.22.005 with RCW 46.04.400.

After going through its analysis, Division I applied the ‘plain, ordinary, and popular’ meaning of the term “pedestrian” to correctly hold that McLaughlin was not a pedestrian under the policy. This is the correct analysis because, under Washington law, the plain meaning of a term controls the interpretation of an insured’s policy. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244, 1246 (1997) (“if ... the language of in an insurance policy is clear and unambiguous, the court must enforce it as written and cannot modify the contract or create ambiguity where none exists.”) In fact, this Court has consistently reaffirmed that, when interpreting an undefined term in a policy, the Court must look at the term’s plain meaning per the term’s standard dictionary definition. *Durant*, 191 Wn.2d at 12, 419 P.3d at 405 (“undefined terms in insurance contracts ‘must’ be given their plain, ordinary, and popular meaning, and courts may look to standard English language dictionaries to determine common meaning”); *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 428, 38 P.3d 322, 327 (2002) (“Undefined terms in an insurance contract are given ‘plain, ordinary, and popular meaning’ as set forth in standard English language dictionaries.”). *See also Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507, 511 (1990).

Applying *Boeing*, the Court of Appeals stated, “Undefined terms in an insurance contract must be given their ‘plain, ordinary, and popular’ meaning.” [*Id.*] (quoting *Farmers Ins. Co. of Wash v. Miller*, 87 Wn.2d 70, 73, 549 P.2d 9 (1976)). To determine the ordinary meaning of an undefined term, our courts look to standard English language dictionaries. *Boeing*, 113 Wn.2d at 877.” *McLaughlin v. Travelers Commercial Ins. Co.*, 9 Wn. App. 2d 675, 679, 446 P.3d 654, 656 (2019). In interpreting the term “pedestrian,” Division I correctly followed this Court’s longstanding and established legal analysis and decisions. In doing so, Division I soundly rejected the argument that the term “pedestrian” was ambiguous, consequently affirming the denial of coverage.

Likewise, Division I followed the proper statutory analysis to come to the correct result. Under Washington law, statutory definitions of words do not control the interpretation of a policy. Rather, the plain meaning of a contract controls unless it is “prohibited by statute, condemned by judicial decision, or contrary to ... public policy.” *Schab*, 41 Wn. App. at 418. This Court has consistently upheld that where the language of a policy limitation is clear, the court will give effect to that language unless it is contrary to public policy. *See State Farm Mut. Auto. Ins. Co.*, 41 Wn. App. 418, 421, 704 P.2d 621, 623 (1985); *see also Mut. of Enumclaw Ins. Co. v. Wiscomb*, 97 Wn.2d 203, 210, 643 P.2d 441, 445 (1982) (“the

insurer is ordinarily permitted to limit its liability unless inconsistent with public policy or some statutory provision.”).

Here, after a careful examination of the cited authority, Division I followed this Court’s longstanding analysis, writing:

[N]one of the authority cited by McLaughlin mandates that the plain meaning of an undefined term in an insurance policy be displaced if there is a definition of the same term in an insurance statute. Rather, they stand for the proposition that insurance policies cannot violate applicable statute.

McLaughlin, 9 Wn. App. 2d at 680. Importantly, as Division I also pointed out, United has not provided the court with authority which shows that a definition in the Washington Insurance Code supersedes the plain meaning of a definition and is incorporated into a policy. *Id.* Furthermore, United has not shown how the Traveler’s policy violates Washington statutes. Ultimately, United has not provided the court with grounds for a departure from this Court’s longstanding and well-established precedent regarding interpretation of an insurance policy.

In order to reverse Division I’s decision, United would have this Court rewrite its established jurisprudence. United has not, however, set forth grounds for such a drastic departure from Washington law and the doctrine of Stare Decisis. Division I correctly applied the law in its decision and this Court should disregard United’s arguments.

IV. CONCLUSION

Based on the foregoing, Travelers respectfully requests that this Court discard United's amicus brief in its entirety.

DATED this 11th day of May, 2020.

LEATHER LAW GROUP

/s/ Thomas Lether
Thomas Lether, WSBA #18089
Lether Law Group
1848 Westlake Ave N., Suite 100
Seattle, WA 98109
Telephone: (206) 467-5444
Facsimile: (206) 467-5544
tlether@letherlaw.com
*Attorney for Respondent Travelers
Commercial Insurance Company*

CERTIFICATE OF SERVICE

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing on the party mentioned below as indicated:

<p><i>Counsel for Appellant Todd McLaughlin</i> Philip A. Talmadge Talmadge/Fitzpatrick/Tride 2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126 phil@tal-fitzlaw.com</p>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight <input checked="" type="checkbox"/> E-mail
<p><i>Counsel for Appellant Todd McLaughlin</i> Robert Levin Anderton Law Office-Washington Bike Law 705 Second Avenue, Suite 1000 Seattle, WA 98104 rob@washingtonbikelaw.com</p>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight <input checked="" type="checkbox"/> E-mail
<p><i>Counsel for Amicus Curiae United Policyholders</i> Ian S. Birk Gabriel E. Verdugo Keller Rohrback L.L.P. 1201 Third Avenue, Suite 3200 Seattle, WA 98101 ibirk@kellerrohrback.com gverdugo@kellerrohrback.com</p>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight <input checked="" type="checkbox"/> E-mail
<p><i>Counsel for Amicus Curiae Cascade Bicycle Club</i> Stephanie Taplin Newbry Law Office 623 Dwight Street Port Orchard, WA 98366 stephanie@newbrylaw.com</p>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight <input checked="" type="checkbox"/> E-mail

<p><i>Counsel for Amicus Curiae Washington State Association for Justice Foundation</i></p> <p>Daniel E. Huntington 422 W. Riverside Suite 1300 Spokane, WA 99201 danhuntington@richter-wimberley.com</p> <p>Valerie D. McOmie 4549 NW Aspen Street Camas, WA 98607 valeriemcomie@gmail.com</p>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight <input checked="" type="checkbox"/> E-mail
--	--

DATED this 11th day of May, 2020.

s/ Tami Grende _____
Tami Grende, Legal Assistant

LEATHER AND ASSOCIATES, PLLC

May 11, 2020 - 2:40 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97652-0
Appellate Court Case Title: Todd McLaughlin v. Travelers Commercial Insurance Company

The following documents have been uploaded:

- 976520_Answer_Reply_20200511143706SC282544_2683.pdf
This File Contains:
Answer/Reply - Other
The Original File Name was 200511 Answer to United Policyholders Amicus.pdf

A copy of the uploaded files will be sent to:

- Aaron@tal-fitzlaw.com
- aarceneaux@letherlaw.com
- cpilat@letherlaw.com
- danhuntington@richter-wimberley.com
- ekruh@letherlaw.com
- eneal@letherlaw.com
- gverdugo@kellerrohrback.com
- ibirk@kellerrohrback.com
- matt@tal-fitzlaw.com
- phil@tal-fitzlaw.com
- rob@washingtonbikelaw.com
- scolito@letherlaw.com
- stephanie@newbrylaw.com
- tgrende@letherlaw.com
- valeriemcomie@gmail.com

Comments:

TRAVELERS COMMERCIAL INSURANCE COMPANY ♦S ANSWER TO BRIEF OF AMICUS CURIAE
UNITED POLICYHOLDERS

Sender Name: Lindsay Hartt - Email: lhartt@letherlaw.com

Filing on Behalf of: Thomas Lether - Email: tlether@letherlaw.com (Alternate Email: lhartt@letherlaw.com)

Address:
1848 Westlake Ave. N.
Suite 100
SEATTLE, WA, 98109
Phone: (206) 467-5444 EXT 126

Note: The Filing Id is 20200511143706SC282544