

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
12/3/2019 4:35 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.

---

CONSOLIDATED ANSWER OF MCLAUGHLIN TO  
AMICUS CURIAE BRIEFS OF CASCADE BICYCLE CLUB AND  
UNITED POLICYHOLDERS

---

Robert Levin, WSBA #18092  
Anderton Law Office –  
Washington Bike Law  
705 Second Avenue, Suite 1000  
Seattle, WA 98104-1758  
(206) 262-9290

Aaron P. Orheim, WSBA #47670  
Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Attorneys for Petitioner  
Todd McLaughlin

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	ii-iii
A. INTRODUCTION .....	1
B. ARGUMENT .....	1
(1) <u>UP Correctly Observes that Washington Law Governs This Dispute, as Travelers Admitted in Both Lower Courts</u> .....	1
(2) <u>Cascade’s Brief Confirms that Division I’s Published Decision Conflicts with Published Authorities and the Overwhelming Evidence that Bicyclists Are Pedestrians for Insurance Purposes</u> .....	3
(3) <u>UP and Cascade Both Highlight that Division I Failed to Consider the Purpose of PIP Coverage and Public Policy Arguments</u> .....	6
C. CONCLUSION.....	8

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

*Barriga Figueroa v. Prieto Mariscal*, 193 Wn.2d 404,  
441 P.3d 818 (2019).....4  
*Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747,  
845 P.2d 334 (1993).....4  
*Clements v. Travelers Indem. Co.*, 121 Wn.2d 243,  
850 P.2d 1298 (1993).....3  
*Durant v. State Farm Mut. Auto. Ins. Co.*, 191 Wn.2d 1,  
419 P.3d 400 (2018).....3  
*Jack v. Standard Marine Ins. Co., Ltd., of Liverpool, England*,  
33 Wn.2d 265, 205 P.2d 351 (1949).....3  
*Mattson on Behalf of Mattson v. Stone*, 32 Wn. App. 630,  
648 P.2d 929 (1982).....4  
*Mission Ins. Co. v. Guarantee Ins. Co.*, 37 Wn. App. 695,  
683 P.2d 215 (1984).....3  
*Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372,  
535 P.2d 816 (1975).....3  
*Ringstad v. Metro. Life Ins. Co.*, 182 Wash. 550,  
47 P.2d 1045 (1935).....3

Other Cases

*Tucker v. Fireman’s Fund Ins. Co.*, 517 A.2d 730 (Md. 1986).....5

Statutes

RCW 48.22.005(5)(b).....7  
RCW 48.22.005(11).....1, 7

Codes, Rules and Regulations

RAP 13.4.....1  
RAP 13.4(b).....8  
RAP 13.4(b)(1).....3, 6

RAP 13.4(b)(2) .....	3, 6
RAP 13.4(b)(4) .....	6, 7

A. INTRODUCTION

*Amici curiae* Cascade Bicycle Club (“Cascade”) and United Policyholders (“UP”) both raise significant points and helpful authorities in their *amici* briefs. Both show that Division I’s published opinion in this case is untenable, albeit for different reasons. Not only does it conflict with numerous published authorities, it implicates issues of broad public importance, including insurance coverage and bicyclist safety. The Court should grant review of this issue of first impression, whether a personal injury protection (“PIP”) policy that fails to define the term “pedestrian” covers a bicyclist who fits the definition of pedestrian *specifically found in the PIP section* of Title 48 RCW, the Insurance Code, as a person “not occupying a motor vehicle.” RCW 48.22.005(11). *Amici* highlight that review is necessary to untangle the web of conflicts created by the court’s decision below. RAP 13.4.

B. ARGUMENT

(1) UP Correctly Observes that Washington Law Governs This Dispute, as Travelers Admitted in Both Lower Courts

As UP correctly notes, Washington law governs this dispute. UP br. at 2-3, 7. Travelers hopes to scare this Court away from granting review by threatening that the Court will need to decide issues of California law. Travelers’ ans. at 5-8; Travelers’ objection to UP brief at

4-5. Not true. As UP correctly observes, this is nothing but an eleventh-hour tactic by Travelers to distance itself from Washington law. UP br. at 2-3, 7. Travelers cited Washington law when it initially denied McLaughlin's claim. UP br. at 7 n.1; CP 64. Travelers relied *exclusively* on Washington law in Division I; its appellate brief failed to cite a single California authority. Travelers conceded below that Washington law applied to the contractual claims at issue in this appeal, and "no conflicts-of-law analysis" was necessary. CP 70-71. In light of both parties' agreement that Washington law controlled this dispute, Division I relied exclusively on Washington law in its published decision.<sup>1</sup>

While the Court of Appeals correctly determined that this case is governed by Washington law, it erred in its analysis, creating conflicts with controlling authority of this Court regarding the proper method of interpreting insurance policies.

This Court simply cannot allow Division I's published opinion to stand for the correct method for resolving insurance disputes in Washington. UP is correct that "[i]t has never been the law that single adverse dictionary definition defeats coverage," as Division I held. UP br.

---

<sup>1</sup> UP also saliently points out that Washington law must govern this dispute where McLaughlin has permanently relocated to Washington, and this state's "public institutions, and its healthcare providers...bear the consequences of diminished financial resources to cover McLaughlin's injuries." UP br. at 7 n.1. Regardless of California's law, our state's strong policy in favor of providing coverage to insureds, specifically when it comes to motor vehicle collisions, must govern this dispute.

at 8. Rather, courts must consider terms in the insurance context, including statutory definitions of operative terms under the long-recognized rule that applicable “insurance regulatory statutes become part of insurance policies.” *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 254, 850 P.2d 1298 (1993); *Durant v. State Farm Mut. Auto. Ins. Co.*, 191 Wn.2d 1, 419 P.3d 400 (2018); *Ringstad v. Metro. Life Ins. Co.*, 182 Wash. 550, 553, 47 P.2d 1045 (1935).

Additionally, this Court must confirm that insurance disputes in Washington are not resolved in a vacuum, devoid of public policy considerations as Division I determined. Rather, courts must follow this Court’s clear direction that insurance policies are “simply unlike traditional contracts” because “they are not purely private affairs.” *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 376-77, 535 P.2d 816 (1975).<sup>2</sup> This Court must correct the conflicts among authorities created by Division I’s outlier published decision below. RAP 13.4(b)(1), (2).

(2) Cascade’s Brief Confirms that Division I’s Published Decision Conflicts with Published Authorities and the Overwhelming Evidence that Bicyclists Are Pedestrians for Insurance Purposes

---

<sup>2</sup> See also, *Mission Ins. Co. v. Guarantee Ins. Co.*, 37 Wn. App. 695, 699, 683 P.2d 215 (1984) (“[U]nlike other types of contracts, insurance policies must be interpreted in light of important public policy and statutory considerations.”); *Jack v. Standard Marine Ins. Co., Ltd., of Liverpool, England*, 33 Wn.2d 265, 205 P.2d 351 (1949) (holding that dictionary definitions “are not controlling” in insurance disputes because courts must consider policy arguments and the “purpose” of insurance contracts as a whole).

Cascade's *amicus* brief provides helpful insight into the *predominant* practice in the insurance industry to treat bicyclists as pedestrians for PIP purposes. Cascade br. at 6-9. In its answer to McLaughlin's petition for review, Travelers argued that "McLaughlin has not provided any evidence of how the insurance industry customarily treats bicyclists or pedestrian." Travelers' ans. at 10. That is blatantly false at the outset; McLaughlin provided *numerous* examples of the customary treatment of bicyclists as pedestrians.

McLaughlin provided several Washington policies from multiple, major insurers that include the broad statutory definition of "pedestrian" as any person "not occupying a motor vehicle. McLaughlin pet. at 7 (citing CP 179-95; App. 15-31). He also cited numerous Washington cases where bicyclists received PIP coverage and courts, like this Court, referred to them as pedestrians throughout their opinions. *Id.* at 8 (citing *Barriga Figueroa v. Prieto Mariscal*, 193 Wn.2d 404, 441 P.3d 818 (2019); *Mattson on Behalf of Mattson v. Stone*, 32 Wn. App. 630, 632, 648 P.2d 929 (1982); *see also, Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 845 P.2d 334 (1993)). McLaughlin also cited cases from around the country (representing caselaw from approximately 30 states) where courts use expansive definitions of "pedestrian" for insurance

purposes, including bicyclists. *Id.* (citing, e.g., *Tucker v. Fireman's Fund Ins. Co.*, 517 A.2d 730, 733-35 (Md. 1986)).

In addition to the overwhelming evidence McLaughlin provided, Cascade's *amicus* brief reinforces the notion that insureds customarily treat bicyclists as pedestrians for insurance purposes. For example, Cascade provides publications from major insurers like Progressive and Esurance, informing customers like McLaughlin that their PIP policies will provide coverage if they are struck by a car "while walking or cycling." Cascade br. at 6-7 (citing, e.g., Esurance, *Medical Payments Coverage*, <https://www.esurance.com/info/car/medical-payments-coverage> (last visited October 25, 2019)). Cascade notes that its 17,000 members rely such publications, in addition to the caselaw and statutory authority cited *supra*, when purchasing insurance. Cascade br. at 7-8. Bicyclists like Cascade's members are "acutely aware" of the dangers posed by motor vehicles, and therefore they rely on PIP coverage, which must be offered by insurers as directed by statute, to compensate *all victims* of motor vehicle collisions. *Id.* at 8.

Cascade correctly observes that if the Court allows Division I's published decision to stand, bicyclists are now the *least protected persons* using public rights of way in our state. Cascade br. at 5-6. Division I's published decision strips coverage even from bicyclists whose policies use

the broad definition found in the Insurance Code, due to Division I's tortured conclusion that a bicycle is a "motor vehicle" under its "harmonized" reading of unrelated statutes. The Court of Appeals was wrong to legislate this exception for bicyclists from the bench, contrary to the plain language of the statute. As Cascade points out, this Court should review this serious error that creates untenable conflicts and implicates issues of public importance. RAP 13.4(b)(1), (2), (4).

(3) UP and Cascade Both Highlight that Division I Failed to Consider the Purpose of PIP Coverage and Public Policy Arguments

Both UP and Cascade correctly point out that Division I ignored the purpose of the PIP statute – to compensate *all victims* of motor vehicle collisions. Again, bicyclists like Cascade's members are "acutely aware" of the danger posed by automobiles. Cascade br. at 8. The Legislature chose to expand insurance coverage to all victims of motor vehicle collisions, due to the special danger posed by motor vehicles. *Id.* at 2-5. UP expands on this policy, pointing out that under the PIP statute, benefits must cover "all reasonable and necessary expenses incurred by or on behalf of the insured for injuries sustained as a result of an automobile accident." UP br. at 4 (citing RCW 48.22.005(7)). In short, PIP covers *all insureds* who are struck by motor vehicles whether "occupying" or "not occupying motor" vehicle themselves. RCW 48.22.005(5)(b), (11). Thus,

persons riding in a car, walking, rollerblading, cycling, or not moving at all are covered.

UP further notes that McLaughlin was the “named insured” in his policy, and, therefore, he fits the definition of insured as a matter of law. UP br. at 4-5. McLaughlin agrees with this argument; however, it is not necessary to resolve the outcome of this case. This does show that the Legislature chose to define the term “insured” *as expansively as possible* in the PIP context, because it sought to cover *all persons* struck by motor vehicles. In short, Division I’s decision runs contrary to the clear public policy in this state to “broaden...the public’s protection against automobile accidents.” *See* Cascade br. at 4-5 (citing *Kyrkos v. State Farm Mut. Auto. Ins. Co.*, 121 Wn.2d 669, 675, 852 P.2d 1078 (1993)).

Cascade also argues that Division I’s decision is contrary to the public policy of encouraging increased bicycle use to combat traffic and climate change, while simultaneously stripping insurance protections to bicyclists. Cascade is correct. Division I wrongfully refused to entertain *any public policy argument*, in clear contradiction to the authority cited *supra*. *See also*, UP br. at 9-10 (noting that Division I was wrong to “side-step[]” public policy arguments entirely). The Court should grant review to restore the public policies eroded by the court below. RAP 13.4(b)(4).

C. CONCLUSION

The *amici* arguments only reinforce why review of Division I's published opinion erroneously addressing an issue of first impression is merited. RAP 13.4(b). This Court should grant review and reverse.

DATED this 3<sup>rd</sup> day of December, 2019.

Respectfully submitted,



Aaron P. Orheim, WSBA #47670  
Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Robert Levin, WSBA #18092  
Anderton Law Office –  
Washington Bike Law  
705 Second Avenue, Suite 1000  
Seattle, WA 98104-1758  
(206) 262-9290

Attorneys for Petitioner  
Todd McLaughlin

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the *Consolidated Answer of McLaughlin to Amicus Curiae Briefs of Cascade Bicycle Club and United Policyholders* in Supreme Court Cause No. 97652-0 to the following:

Thomas Lether  
Jenna Mark  
Lether & Associates, PLLC  
1848 Westlake Avenue N, Suite 100  
Seattle, WA 98109

Ian S. Birk  
Gabriel E. Verdugo  
Keller Rohrback L.L.P.  
1201 Third Avenue, Suite 3200  
Seattle, WA 98101-3052

Robert Levin  
Anderton Law Office –  
Washington Bike Law  
705 Second Avenue, Suite 1000  
Seattle, WA 98104-1758

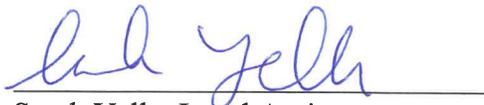
Amy Bach (CA 142029)  
United Policyholders  
381 Bush Street, 8th Floor  
San Francisco, CA 94104

Stephanie Taplin  
Newbry Law Office  
623 Dwight Street  
Port Orchard, WA 98366

Original E-filed with:  
Supreme Court  
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 3, 2019, at Seattle, Washington.

  
\_\_\_\_\_  
Sarah Yelle, Legal Assistant  
Talmadge/Fitzpatrick

**TALMADGE/FITZPATRICK**

**December 03, 2019 - 4:35 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\_Briefs\_20191203163040SC547564\_1074.pdf  
This File Contains:  
Briefs - Answer to Amicus Curiae  
*The Original File Name was Answer to Cascade Brief of Amicus Curiae.pdf*

**A copy of the uploaded files will be sent to:**

- amy@uphelp.org
- ekruh@letherlaw.com
- eneal@letherlaw.com
- gverdugo@kellerrohrback.com
- ibirk@kellerrohrback.com
- jenna.mark@bullivant.com
- jnorwood@omwlaw.com
- lhartt@letherlaw.com
- matt@tal-fitzlaw.com
- phil@tal-fitzlaw.com
- rob@washingtonbikelaw.com
- sarah@tal-fitzlaw.com
- stephanie@newbrylaw.com
- tlether@letherlaw.com

**Comments:**

Consolidated Answer of McLaughlin to Amicus Curiae Briefs of Cascade Bicycle Club and United Policyholders

---

Sender Name: Sarah Yelle - Email: sarah@tal-fitzlaw.com

**Filing on Behalf of:** Aaron Paul Orheim - Email: Aaron@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:  
2775 Harbor Avenue SW  
Third Floor Ste C  
Seattle, WA, 98126  
Phone: (206) 574-6661

**Note: The Filing Id is 20191203163040SC547564**