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No. 97652-0

SUPREME COURT
OF THE STATE OF WASHINGTON

TODD MCLAUGHLIN, a Washington resident,

Petitioner,

vs.

TRAVELERS COMMERCIAL INSURANCE COMPANY, a foreign
corporation,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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A. INTRODUCTION

Consistent with this state’s public policy to provide broad coverage for Washingtonians injured in motor vehicle collisions, the Legislature chose to extend Personal Injury Protection coverage (“PIP”) to all “pedestrians” injured in motor vehicle collisions. It specifically defined the term “pedestrian” in the PIP context as any person “not occupying a motor vehicle.” RCW 48.22.005(11). Even though Todd McLaughlin clearly fit this definition when he was struck by an automobile while riding his bicycle – a definition that courts and insurers have applied to bicyclists for decades – McLaughlin’s insurer, Travelers Commercial Insurance Company (“Travelers”), denied coverage citing strict dictionary definitions of the term “pedestrian” after it left the term undefined in the policy it drafted.

Division I wrongfully sided with Travelers in a published decision, that warranted review by this Court. In doing so, Division I ignored the Washington PIP statute and case law showing that bicyclists are pedestrians for PIP purposes. It failed to follow the fundamental procedures for interpreting insurance policies and refused to consider the clear public policy in this state to extend coverage broadly to protect *all victims* of motor vehicle collisions. This Court should reverse and afford Mr. McLaughlin the PIP coverage he paid for.

B. STATEMENT OF THE CASE

The facts of this case are not in dispute. McLaughlin was injured on July 31, 2017 when Daniel Moore opened his driver's side door, striking McLaughlin, who then fell to the ground. CP 11-12. At the time of the incident, McLaughlin was riding his bicycle. *Id.* McLaughlin was not occupying a motor vehicle; the bicycle was not motorized in any way. *Id.* As a result of his injuries, McLaughlin experienced “tens of thousands of dollars in medical expenses.” CP 198.

McLaughlin's policy with Travelers included up to \$5,000 in MedPay coverage (*i.e.* personal injury protection or “PIP” coverage) for “reasonable expenses incurred for necessary medical...services because of ‘bodily injury’: 1) caused by an accident; and 2) [s]ustained by an ‘insured.’” CP 39. McLaughlin was considered an “insured” if he was “occupying” or “[a]s a pedestrian struck by” a motor vehicle. *Id.* The policy did not define the term “pedestrian.” *Id.*; CP 17-59.¹

Travelers denied coverage under the policy, claiming that McLaughlin was not a pedestrian at the time of the accident. CP 64-65. In

¹ The policy was issued in California, but Travelers conceded that Washington law governs this dispute. Resp't br. at 10-11. Likewise, although the policy discusses “MedPay” coverage, Travelers conceded that this coverage is identical to PIP as described in the Washington Insurance Code. *Id.* at 4. As an eleventh-hour tactic, Travelers argued for the first time in its answer to McLaughlin's petition for review that the Court should refrain from taking the case because it implicates California law. The Court should ignore this new argument; Travelers cited Washington law when it initially denied McLaughlin's claim, CP 64, and Travelers failed to cite a single California authority in its appellate brief below.

doing so, Travelers ignored relevant insurance statutes defining pedestrian as “a natural person not occupying a motor vehicle.” RCW 48.22.005(11). Instead of employing insurance-related statutory definitions to interpret an insurance statute, Travelers resorted to dictionary definitions strictly defining a pedestrian as a person “travel[ing] on foot; walker” and the definition of pedestrian found in Title 46 RCW, *i.e.*, the motor vehicles title dealing with traffic infractions, the rules of the road, and vehicle registration to deny coverage to McLaughlin. *Id.*

Both parties moved for summary judgment regarding the definition of pedestrian in the insurance policy, and the trial court sided with Travelers. CP 238-39. In a published decision, Division I affirmed. *McLaughlin v. Travelers Commercial Ins. Co.*, 9 Wn. App. 2d 675, 446 P.3d 654 (2019). Agreeing with Travelers, Division I refused to adopt the plain definition of pedestrian found in the Insurance Code, Title 48 RCW, and relied on a dictionary definition of the term pedestrian.² It “harmonized” the multiple definitions of pedestrian found in traffic laws and the Insurance

² The Court of Appeals found its own definition of “pedestrian,” one not offered by either party. 9 Wn. App. 2d at 679 (citing *Webster’s Third New International Dictionary* 1664 (2002) which specifically excludes those who travel by “cycle”); *cf.* resp’t br. at 14-15 (citing the *Merriam Webster* dictionary which does not mention bicyclists). This additional definition shows that there are *multiple* reasonable definitions, including the definition found in the Insurance Code, which necessarily means that the term is ambiguous. *Holden v. Farmers Ins. Co. of Washington*, 169 Wn.2d 750, 755-56, 239 P.3d 344 (2010). The Court of Appeals was wrong to summarily conclude otherwise at the end of its opinion.

Code, concluding that a bicycle could be considered a “motor vehicle” even under the Insurance Code’s definition, and thus a bicyclist is not a pedestrian, even for PIP purposes. This Court granted review.

C. SUPPLEMENTAL ARGUMENT

(1) Division I and Travelers Wrongly Relied on Dictionary Definitions Where Insurance Concepts Are Well-Defined

Automobile insurance is a type of “general casualty insurance” governed by Washington’s Insurance Code. RCW 48.11.070. This type of insurance includes PIP coverage and any policy “covering accidental injury to individuals...caused by being struck by a vehicle.” RCW 48.11.060(2). Importantly, the PIP statute itself defines the term “pedestrian” as: “a natural person not occupying a motor vehicle as defined in RCW 46.04.320.” RCW 48.22.005(11). A bicycle is not a “motor vehicle” under RCW 46.04.320.³

Here, the parties disputed the term “pedestrian” as it appears in a policy that Travelers drafted without defining the term. Ignoring the applicable definition found in the PIP statute, Division I engaged in a strict

³ “‘Motor vehicle’ means every vehicle that is self-propelled and every vehicle that is propelled by electric power obtained from overhead trolley wires, but not operated upon rails.” RCW 46.04.320. Bicycles are not “motor vehicles” because they are not self-propelled; they are “propelled solely by human power.” RCW 46.04.071; *City of Montesano v. Wells*, 79 Wn. App. 529, 532, 902 P.2d 1266 (1995) (“a bicycle is not a motor vehicle”). Likewise, the Insurance Commissioner’s regulations define “motor vehicle” as “any vehicle subject to registration under chapter 46.16 RCW.” WAC 284-30-320(11). Bicycles are not subject to registration, and Division I’s opinion conflicts with this WAC.

contract interpretation analysis, searched for the meaning of the term “pedestrian” in a dictionary, and deemed that definition controlling over the parties’ dispute. 9 Wn. App. 2d at 679-80. Division I erred and violated the clear procedures for interpreting insurance policies in this state.

While it is true that courts *may* consult dictionaries to interpret undefined contractual terms, dictionaries are not gospel when it comes to interpreting insurance policies, particularly where the Legislature has defined a term. “[U]nlike other types of contracts, insurance policies must be interpreted in light of important public policy and statutory considerations.” *Mission Ins. Co. v. Guarantee Ins. Co.*, 37 Wn. App. 695, 699, 683 P.2d 215 (1984); *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 63 n.7, 322 P.3d 6 (2014) (*accord*). As this Court has explained:

[I]nsurance policies...are simply unlike traditional contracts, i.e., they are not purely private affairs but abound with public policy considerations, one of which is that the risk-spreading theory of such policies should operate to afford to affected members of the public-frequently innocent third persons-the maximum protection possible consonant with fairness to the insurer.

Oregon Auto. Ins. Co. v. Salzberg, 85 Wn.2d 372, 376-77, 535 P.2d 816 (1975); *see also, e.g., Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 254, 850 P.2d 1298 (1993) (reversing the holding that the “intent of the contracting parties [was] the sole determinative issue” in an coverage dispute because the Court of Appeals ignored the rule that “insurance

regulatory statutes become part of insurance policies”); *Ringstad v. Metro. Life Ins. Co.*, 182 Wash. 550, 553, 47 P.2d 1045 (1935) (It is “universally settled that statutory provisions are a part of [an insurance] policy.”).⁴

Thus, a court cannot simply stop after consulting a dictionary when interpreting the definition of an undefined term in an insurance policy. Rather, a court should begin the statutory analysis with consideration of applicable statutory provisions when interpreting insurance policies. Importantly, where multiple reasonable definitions of an undefined term in an insurance policy exist (such as a definition in an applicable insurance statute) a court *must* adopt the definition that most favors the insured. *Holden*, 169 Wn.2d at 755-56.

Here, as part of its “risk-spreading” authority and to maximize protection for insureds in Washington, the Legislature defined pedestrian – *specifically in the PIP context* – broadly as any “natural person not occupying a motor vehicle.” RCW 48.22.005(11). Where Travelers failed to define the term in its own policy, this reasonable definition provided by statute should have applied by law or, *at the very least*, created ambiguity

⁴ Courts have looked to insurance statutes to interpret many types of insurance policies. See *Mission Ins. Co.*, *supra*, (insurer could not alter omnibus clause for a leased vehicle where RCWs mandate upfront omnibus clauses); *Ringstad*, *supra* (life insurance statutes are relevant to coverage question); *Kyrkos v. State Farm Mut. Auto. Ins. Co.*, 121 Wn.2d 669, 673, 852 P.2d 1078 (1993) (noting an “extensive body of jurisprudence” holding that underinsured motorist provisions are interpreted in light of insurance statutes). There is no reason why this rule of interpretation should not also apply to PIP policies.

which the courts below had an obligation to resolve in favor of the insured and in favor of providing coverage. *Holden, supra*. Division I ignored these rules in favor of a dictionary, contrary to this Court’s precedent.

This Court has long cautioned against an overreliance on dictionary definitions when interpreting insurance contracts, especially where doing so favors an insurer who fails to define a term in its own policy. For example, in *Jack v. Standard Marine Ins. Co., Ltd., of Liverpool, England*, 33 Wn.2d 265, 205 P.2d 351 (1949), an insurer denied coverage under a policy insuring heavy machinery, claiming that a toppled steam shovel was not “upset” within the common meaning of the undefined contractual term as found in a standard English dictionary. *Id.* at 270-71. This Court held that while dictionary definitions may be “generally accepted as the common meaning of the word” such definitions “are not controlling.” *Id.* Rather, a court must interpret a term in an insurance policy in light of the “purpose of the contract” (which is to insure) and the public policy that “insurance will be judicially construed in favor of the insured.” *Id.*⁵

Recently, in *Durant v. State Farm Mut. Auto. Ins. Co.*, 191 Wn.2d 1, 419 P.3d 400 (2018) this Court reiterated the proper method of

⁵ “[T]he purpose of insurance is to insure.” *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983); *see also, Safeco Ins. Co. of Am. v. Davis*, 44 Wn. App. 161, 164, 721 P.2d 550 (1986) (holding that a “construction rendering the contract operative is to be preferred” and “if [the insurer] intended simply to exclude coverage for [a particular group], it could have done so in clear terms”).

interpreting undefined terms in a policy. There, the parties disputed the meaning of the terms “reasonable” and “necessary” medical treatment in the PIP context. While the Court exercised its discretion to consult a dictionary – *id.* at 12 (“courts *may* look to...dictionaries”) (emphasis added) – it did not end its analysis there. Rather, the Court considered dictionary definitions only to the extent they aligned with “Washington’s strong public policy in favor of the full compensation of medical benefits for victims of road accidents.” *Id.* at 14. The Court ensured that the dictionary definitions of the terms were consistent public policy considerations, as well as the definitions and uses of the terms found in the Insurance Code and related WACs. *Id.* at 14-19. Importantly, this Court rejected State Farm’s attempt to “harmonize” the meaning of the terms found in the Insurance Code with those found in other sources of law, such as workers’ compensation statutes and maritime law. *Id.* Rather, the Court held that it must interpret the disputed terms “as those terms appear” in the insurance context. *Id.* at 18.

Here, *in the insurance context*, the Legislature chose to define pedestrian as any person “not occupying a motor vehicle.” RCW 48.22.005(11). This broad definition is commonplace within the insurance industry. McLaughlin produced numerous Washington PIP policies showing that insurers routinely include this definition of pedestrian in their policies. CP 179-95 (policies from four other Washington insurers defining

pedestrian as any person “not occupying a motor vehicle”). And McLaughlin cited numerous examples from published Washington cases where insurers and courts referred to bicyclists as pedestrians for PIP purposes.⁶ Most states have also rejected the strict dictionary definition of “traveling by foot” for PIP purposes, and there are numerous courts around the country treat bicyclists as pedestrians for purposes of PIP coverage.⁷ Thus, insurers and courts have long disregarded the dictionary definition of pedestrian as merely walking or traveling “afoot.”⁸

⁶ See, e.g., *Barriga Figueroa v. Prieto Mariscal*, 193 Wn.2d 404, 441 P.3d 818 (2019) (child on a bicycle qualified as a pedestrian for PIP purposes); *Mattson on Behalf of Mattson v. Stone*, 32 Wn. App. 630, 632, 648 P.2d 929 (1982) (woman who was struck by car while on a bicycle received PIP benefits “as a pedestrian injured in [the] the accident”); see also, *Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 845 P.2d 334 (1993) (insurer paid PIP limits to insured who was struck by a motor vehicle while riding a bicycle).

⁷ See, e.g., *Tucker v. Fireman’s Fund Ins. Co.*, 517 A.2d 730, 733-35 (Md. 1986) (surveying 28 jurisdictions, including Washington, rejecting a dictionary definition, and concluding that, for PIP purposes, “pedestrian” means more than those simply traveling “by foot;” it can include bicyclists, horseback riders, roller skaters, persons in wheelchairs, persons on crutches or stilts, and persons sitting or not moving at all); *Fireman’s Fund Ins. Co. v. Kerger*, 389 S.E.2d 541 (Ga. App. 1989) (bicyclists are pedestrians under Georgia insurance law); *Harbold v. Olin*, 670 A.2d 117 (N.J. Super. Ct. App. Div. 1996) (same in New Jersey); *Pilote v. Aetna Cas. & Sur. Co.*, 427 N.E.2d 746 (Mass. 1981) (same in Massachusetts); *Schroeder v. Auto-Owners Ins. Co.*, 2004 WL 2384350 (Ohio App. Oct. 22, 2004) (same in Ohio).

⁸ *Amicus*, Cascade Bicycle Club, highlighted this fact, noting that major insurers like Progressive and Esurance, inform consumers on their public websites that MedPay and PIP policies cover to all persons who are struck by a car “while walking or cycling.” See Cascade br. in support of McLaughlin’s pet. for review at 6-7 (citing, Esurance, *Medical Payments Coverage*, <https://www.esurance.com/info/car/medical-payments-coverage> (last visited October 25, 2019); Progressive, *Bicycle Insurance*, <https://www.progressive.com/answers/bicycle-insurance/> (last visited October 25, 2019)). This evidence shows that an average purchaser of insurance would expect PIP would cover bicyclists, especially where the PIP statute applies broadly to all occupants *and non-occupants* of motor vehicles.

When it comes to PIP coverage, this history shows that the average purchaser of insurance would expect to be covered “as a pedestrian struck by a motor vehicle” in an automobile accident whether walking, bicycling, rollerblading, or sitting at a bus stop. Division I was wrong to dismiss this evidence, especially where it most favors the insured.⁹

A broad definition makes practical sense. Courts have noted the absurdity of applying a strict dictionary definition of “traveling afoot” when it comes to automobile collisions, which would result in coverage for a parent pushing a stroller but not the baby riding inside it. *Schroeder v. Auto-Owners Ins. Co.*, 2004 WL 2384350 (Ohio App. Oct. 22, 2004).¹⁰ Similarly, this Court recognized the absurdity of treating bicyclists differently than other pedestrians in the context of automobile collisions at crosswalks:

Equally absurd would be practical application of [the rule that bicycles must be treated the same as motor vehicles when crossing at crosswalks]. A hypothetical suggests the

⁹ See, e.g., *Durant, supra* (terms must be considered as they appear in the insurance context); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665, 15 P.3d 115 (2000) (policies should be construed from the perspective of an “average person purchasing insurance.”); *Fiscus Motor Freight, Inc. v. Universal Sec. Ins. Co.*, 53 Wn. App. 777, 782, 770 P.2d 679, review denied, 113 Wn.2d 1003 (1989) (evidence of custom as use within the insurance industry is relevant when interpreting an insurance policy).

¹⁰ Division I expressly refused to reckon with the absurdity of excluding a child in a stroller from the definition of pedestrian, 9 Wn. App. 2d at 684, despite the rule that appellate courts must “avoid interpreting statutes and contracts in ways that lead to absurd results.” E.g., *Forest Mktg. Enterprises, Inc. v. Dep’t of Nat. Res.*, 125 Wn. App. 126, 132, 104 P.3d 40 (2005).

problem: Several groups of children return home from school...some on foot, others on skateboards, roller blades and bicycles, and wait at the crosswalk for a clear opportunity to cross...If such group were hit in the crosswalk, under [defendant's] interpretation, the vehicle driver would be liable to all children except those on bicycles. Such interpretation and result make no sense.

Pudmaroff v. Allen, 138 Wn.2d 55, 65-66, 977 P.2d 574 (1999).

The Legislature was wise to remove any doubt from the equation and define pedestrian broadly when it comes to PIP insurance coverage, where the goal is to quickly compensate *all victims* of motor vehicle collisions irrespective of fault and without having to bring a lawsuit.¹¹ See David K. DeWolf and Matthew C. Albrecht, *Purpose of personal injury protection statutes*, 35 Wash. Prac., WASHINGTON INSURANCE LAW AND LITIGATION § 5:1 (2018-2019 ed.). This Court should reverse where Travelers and Division I ignore that clear legislative mandate.

(2) Division I's Opinion Conflicts with Well-Established Procedures for Interpreting Insurance Policies

Division I did not mention the evidence of other Washington PIP policies and ignored the overwhelming caselaw cited *supra*, finding that they were not controlling, the facts were distinguishable, or that the cases were “not relevant” because the definition of pedestrian was not a central

¹¹ As a type of no-fault insurance, PIP discourages lawsuits by providing quick compensation to victims of automobile collisions. Division I's opinion will not only harm bicyclists but also drivers who will undoubtedly face increased litigation as a result of even minor collisions.

issue in the case. 9 Wn. App. 2d at 683-84. Division I's analysis misses the point. Its opinion conflicts with published authorities setting out the proper method for interpreting insurance disputes in several ways.

First, as mentioned above, Division I's opinion conflicts with published authority directing courts to consider evidence of custom and usage within the insurance industry when interpreting insurance contracts. *Fiscus*, 53 Wn. App. at 782. Whether or not the term "pedestrian" was the central issue in the numerous cases cited above is immaterial. Rather, these cases show a practice of custom and usage within the insurance industry that bicyclists are pedestrians *for PIP insurance purposes*. At the very least, these published cases show that the term pedestrian can reasonably be construed to include bicyclists, given that is the overwhelming majority view which has applied to average purchasers of insurance across the country for decades. Moreover, the fact that many courts refer to bicyclists as pedestrians, even if the term is used casually throughout published opinions like *Barriga Figueroa*,¹² shows that it is abundantly reasonable for

¹² Division I's attempt to distinguish *Barriga Figueroa* was particularly tortured, leaning on evidence showing that the child may have been temporarily stopped on his bicycle when he was hit by a car. 9 Wn. App. 2d 682-83. This implies an exception to Division I's own holding that a bicyclist *is* a pedestrian for insurance purposes when temporarily stopped in the roadway. This implied exception makes no practical sense and only adds to the confusion. The Legislature was wise to remove confusion and define pedestrian for insurance purposes simply as any person "not occupying a motor vehicle." *Barriga Figueroa* is a reasonable application of this broad definition, and if this Court is reasonable in using that definition throughout its opinion, so too is an average purchaser of insurance to expect PIP coverage when struck by an automobile while riding a bicycle.

the average person purchasing insurance to think the same thing. That reasonable definition *must* be adopted when interpreting an ambiguous policy because it is the one which favors the insured. *E.g., Holden, supra.*

Second, Division I's opinion fundamentally conflicts with the procedure for resolving questions of insurance disputes as laid out by this Court. A court must not strain to distinguish authorities which support extending coverage to an insured, rather a court is obligated to defer to such authorities and construe them broadly to find coverage. For example, in *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 229 P.3d 693 (2010), this Court considered a question of first impression regarding an insurer's duty to defend under an insurance policy. The policyholder cited one federal case from Texas in notifying its insurer that coverage may apply. *Id.* at 403. The Court held that this was enough to put the insurer on notice that it had a duty to defend under the policy because a court must look for "any reasonable interpretation of the facts or the law that could result in coverage." *Id.* at 413. The Court reasoned:

Washington courts have yet to consider the factual scenario before us today. Evaluation of out-of-state cases was appropriate in deciding which rule to apply. The lack of any Washington case directly on point and a recognized [possibility of coverage] in other states presented a legal uncertainty with regard to [the insurer's] duty. Because any uncertainty works in favor of providing a defense to an insured, [the insurer's] duty to defend arose when [a lawsuit was filed].

Id. at 408. This Court reiterated the fundamental principle any doubts in coverage must “be resolved in favor of the insured.” *Id.* at 411.

Here, Division I ignored this clear procedure for interpreting an insurance policy and strained to distinguish or disregard reasonable authority from Washington and elsewhere for an undefined term. In doing so, it failed to honor this Court’s longstanding principle that where there are multiple reasonable interpretations to a policy term, the term is ambiguous and such ambiguity must be resolved *in the insured’s favor* and *in favor of finding coverage*.

Third, Division I’s overreliance on a dictionary ignored the important public policy concerns courts must consider when interpreting insurance contracts, which are “unlike” traditional contracts. *Salzberg*, 85 Wn.2d 372, 376-77. McLaughlin argued a host of policy arguments, explaining why the Legislature chose to define pedestrian so broadly, specifically for PIP purposes. For example, courts recognize that bicyclists are susceptible to serious injury on the roadway – just like any other pedestrian, a bicyclist lacks airbags, seatbelts, impact absorbing bumpers, a surrounding steel car frame, etc. *See State v. Morris*, 87 Wn. App. 654, 666-67, 943 P.2d 329 (1997), *review denied*, 134 Wn.2d 1020 (1998) (finding that bicyclists are no less vulnerable than other pedestrians for

purposes of a sentencing enhancement). The Legislature intended PIP coverage to apply broadly “in favor of the full compensation of medical benefits for victims of road accidents” “irrespective of fault and without having to bring a lawsuit.” *Durant*, 191 Wn.2d at 14; *Ainsworth*, 180 Wn. App. at 62 (citing 12 Steven Plitt, Daniel Maldonado & Joshua D. Rogers, *Couch on Insurance 3d* § 171:45 at 171–46 (2006) (alteration omitted)). Division I’s opinion forecloses this important coverage to bicyclists.¹³

But Division I refused to even consider these policy arguments, claiming that McLaughlin failed to cite any “authority for the proposition that the plain meaning of an undefined term can be set aside on policy grounds.” Op at 10. This is not true – McLaughlin quoted the published case law above, explicitly holding that “unlike other types of contracts, insurance policies must be interpreted in light of important public policy and statutory considerations.” Appellant’s br. at 7 (quoting, *e.g.*, *Mission Ins. Co.*). Division I’s opinion fundamentally conflicts with the many authorities cited in the court below and discussed above holding that insurance contracts must be interpreted in light of public policy because they are “simply unlike traditional contracts.” *Salzberg*, 85 Wn.2d at 376;

¹³ While PIP limits are often low, they are not trivial for average purchasers of insurance. They cover important out of pocket expenses, like insurance deductibles and lost wages. The Legislature intended these benefits to apply to *all victims* of automobile collisions whether injured in a car, on foot, or on a bicycle. *Ainsworth*, *supra*.

Nat'l Sur. Corp. v. Immunex Corp., 176 Wn.2d 872, 878, 297 P.3d 688 (2013) (“[I]nsurance contracts are imbued with public policy concerns”); RCW 48.01.030 (“The business of insurance is one affected by the public interest”). Division I was wrong to divorce any public policy concerns from its analysis of an insurance dispute in order to rely solely on a dictionary definition. Its flawed methodology warrants reversal by this Court.

(3) Division I Wrongfully “Harmonized” Definitions of “Pedestrian” in Separate Statutes

Despite the clear and reasonable definition in the PIP statute that a pedestrian is any “person not occupying a motor vehicle as defined in RCW 46.04.320,” Division I refused to consider that definition or even find that the meaning of the term “pedestrian” is, *at the very least*, ambiguous due to multiple reasonable definitions. 9 Wn. App. 2d at 685-86. Rather, the court found that a bicyclist did not even fit the definition of pedestrian in the PIP statute, RCW 48.22.005(11). The court reasoned that because Title 46 RCW – the title dealing with the rules of the road and motor vehicle registration – excludes bicyclists from its definition of “pedestrian,” it had a duty to “harmonize” that definition with the one in the Insurance Code and conclude that a bicyclist is not a pedestrian under either statute. *Id.* at 681 (citing RCW 46.04.400). Put another way, Division I held that a bicyclist is not a pedestrian even under the PIP statute because a bicyclist is

a “person occupying a *motor vehicle*.” This interpretation makes no practical or legal sense and renders the PIP definition entirely superfluous.

Even if Division I’s “harmonization” of two different definitions appearing in wholly separate statutes were appropriate – which it is not as discussed below – Division I failed at its task to give a sensible construction of the contract. A bicycle is not a motor vehicle. This is true as a matter of common sense; a bicycle has no motor.¹⁴ Importantly, it is also true as a matter of law, *see* RCW 46.04.320, and Division II addressed this issue years ago in a published decision which now conflicts with Division I’s published opinion here. In *Montesano*, Division II determined that DUI laws requiring the operation of a motor vehicle do not apply to bicyclists. The court reasoned that “RCW 46.04.320 defines a motor vehicle as ‘every vehicle which is self-propelled.’” 79 Wn. App. at 532. A bicycle is not self-propelled and “thus, a bicycle is not a motor vehicle.” *Id.* (citing RCW 46.04.071 (“‘Bicycle’ means every device propelled solely by human power”)). This Court should resolve this conflict by holding that Division II was correct.

Division I also reasoned that because a bicycle is a “vehicle” for purposes of traffic laws, it should be considered a “motor vehicle” under the

¹⁴ Travelers even stipulated in the trial court that McLaughlin “was not occupying a motor vehicle at the time of the accident.” CP 12.

Insurance Code and excluded from the PIP statute's definition of pedestrian under its "harmonized" reading of the statutes. 9 Wn. App. 2d at 681. Again, this is not supported – a bicycle has no motor; it is not a *motor* vehicle. Division II also rejected this interpretation in its now conflicting opinion in *Montesano*, holding that laws referring to "motor vehicles" do not include bicyclists, even though bicyclists are included in the definition of "vehicles" in Title 46 RCW and must follow the rules of the road for safety purposes. *Montesano*, 79 Wn. App. at 532-36. This split in authority is untenable.

Division I's opinion is not only an improper construction of the statute; it is an improper construction of the policy itself. A bicyclist, McLaughlin paid premiums for PIP coverage. He was entitled to PIP coverage under his policy if he was injured in an accident while "occupying or [a]s a pedestrian struck by" a motor vehicle. CP 39. Thus, if McLaughlin was not a pedestrian under RCW 48.22.005(11) because he was "occupying a motor vehicle" pursuant to Division I's "harmonized" reading of the statutes, then Travelers *still* had an obligation to pay him under the policy.

If Division I had followed the fundamental rule that courts have no authority to harmonize statutes that affect separate subject matters and serve "separate purposes," *Washington Utilities & Transp. Comm'n v. United Cartage, Inc.*, 28 Wn. App. 90, 97, 621 P.2d 217, *review denied*, 95 Wn.2d

1017 (1981), these issues could have been avoided. Two distinct definitions in separate statutes should not be harmonized because “[w]here the legislature uses certain statutory language in one statute and different language in another, a difference in legislative intent is evidenced.” *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 842, 215 P.3d 166 (2009). Harmonizing the two distinct definitions found in two separate chapters so that they have one meaning, violates a cardinal rule of statutory interpretation that courts “may not interpret statutes in a way that renders a portion meaningless or superfluous.” *Cent. Puget Sound Reg'l Transit Auth. v. WR-SRI 120th N. LLC*, 191 Wn.2d 223, 234, 422 P.3d 891 (2018) (quotation omitted).

Here, the Legislature chose to define pedestrian two ways, using different statutory language, in two wholly separate titles. Traffic laws in Title 46 RCW and the Insurance Code Title 48 RCW serve separate and distinct purposes. When it comes to the rules of the road, the Legislature chose to exclude bicyclists from the term “pedestrian” to increase safety by ensuring that bicyclists obey traffic laws. *See Montesano*, 79 Wn. App. at 535 (explaining the purpose behind adding bicyclists to traffic laws). The Legislature chose a broader definition when it comes to PIP coverage, because it intended to provide quick compensation for medical expenses to *all victims* of motor vehicle accidents “irrespective of fault and without

having to bring a lawsuit.” *Ainsworth*, 180 Wn. App. at 62 (quotation omitted). There is no reason to carve out a judicial exception for bicyclists, where the legislature intended PIP to cover *all victims* of automobile collisions whether occupying a motor vehicle or not.

By “harmonizing” the definitions which serve these vastly different purposes, Division I ignored the plain intent of the Legislature, created conflicts among published authorities, and rendered the definition in the PIP statute superfluous. This Court should apply its clear procedures for interpreting questions involving insurance coverage, and reverse.

(4) McLaughlin Should Be Awarded Attorney Fees on Appeal

McLaughlin requests an award of its attorney fees and expenses on appeal and on review pursuant to *Olympic S. S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) and RAP 18.1.

D. CONCLUSION

Division I and the trial court erred in ruling that a bicyclist is not a pedestrian for PIP purposes. Controlling insurance laws dictate otherwise, and to the extent there are multiple reasonable definitions, Washington courts must construe the policy against the drafter-insurer and in favor of finding coverage. This Court should reverse and remand with instructions to enter summary judgment in favor of McLaughlin. Costs and reasonable attorney fees on appeal should be awarded to McLaughlin.

DATED this 6th day of February, 2020.

Respectfully submitted,



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APPENDIX

RCW 48.22.005(11) (Insurance Code)

“Pedestrian” means a natural person not occupying a motor vehicle as defined in RCW 46.04.320.

RCW 46.04.320

(1) “Motor vehicle” means a vehicle that is self-propelled or a vehicle that is propelled by electric power obtained from overhead trolley wires but not operated upon rails.

(2) “Motor vehicle” includes:

- (a) A neighborhood electric vehicle as defined in RCW 46.04.357;
- (b) A medium-speed electric vehicle as defined in RCW 46.04.295;
- and
- (c) A golf cart for the purposes of chapter 46.61 RCW.

(3) “Motor vehicle” excludes:

- (a) An electric personal assistive mobility device;
- (b) A power wheelchair;
- (c) A golf cart, except as provided in subsection (2) of this section;
- (d) A moped, for the purposes of chapter 46.70 RCW; and
- (e) A personal delivery device as defined in RCW 46.75.010.

RCW 46.04.071

“Bicycle” means every device propelled solely by human power, or an electric-assisted bicycle as defined in RCW 46.04.169, upon which a person or persons may ride, having two tandem wheels either of which is sixteen inches or more in diameter, or three wheels, any one of which is more than twenty inches in diameter.

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the *Supplemental Brief of Petitioner* in Supreme Court Cause No. 97652-0 to the following:

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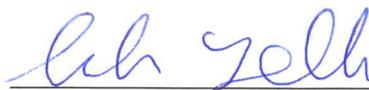
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 7, 2020, at Seattle, Washington.



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