NO. _____
(Formerly Court of Appeals No. 85466-6-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRENDA WELCH,

Respondent,

vs.

PEMCO MUTUAL INSURANCE COMPANY, a domestic insurance company doing business in Washington,

Petitioner.

APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
Honorable Bruce I. Weiss, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Page

Other Jurisdictions

Statutes

Rules and Regulations

Other Authorities

I. IDENTITY OF PETITIONER

Petitioner PEMCO Mutual Insurance Company, defendant/respondent below, seeks review of the decision identified in part II.

II. COURT OF APPEALS DECISION

PEMCO seeks review of Division One's decision reversing the summary judgment the trial court entered in PEMCO's favor and directing entry of partial summary judgment for plaintiff/appellant Brenda Welch on her breach-of-contract claim. The court awarded *Olympic Steamship* fees on appeal.

A copy of Division One's decision is attached as Appendix A. A copy of Division One's order denying PEMCO's motion for reconsideration is attached as Appendix B.

III. INTRODUCTION

David Morgan intentionally set fire to his own home. Although his ex-wife, Brenda Welch no longer owned the house, she sought coverage under Morgan's homeowner's insurance

policy with PEMCO. But the policy excluded intentional loss except if caused by domestic abuse between "family or household members." Concluding that Welch was not a member of Morgan's family or household, the trial court granted PEMCO summary judgment under the policy's intentional-loss exclusion. That result was consistent with this Court's precedents, under which undefined terms in an insurance policy are interpreted consistent with an average insurance purchaser's understanding and must be given their plain, ordinary meaning.

But Division One reversed. After surveying multiple dictionary definitions of "family," Division One rejected the definition in this Court's preferred dictionary—WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY—and chose a legal definition from BLACK'S LAW DICTIONARY, which it deemed more "modern." Contrary to precedent, the court did not analyze whether an average insurance purchaser would adopt that definition.

Division One's decision conflicts with this Court's precedents and with at least one published decision of the Court of Appeals and raises an issue of substantial public interest. This Court should grant review under RAP 13.4(b)(1), (2), and (4).

IV. ISSUES PRESENTED FOR REVIEW

1. Should this Court accept review because Division One's use of a "modern" definition of "family" in BLACK'S LAW DICTIONARY, instead of the plain meaning that would be understood by the average purchaser of insurance when the policy was issued over a decade ago, conflicts with this Court's decisions establishing the required analysis for policy interpretation?

2. Should this Court accept review because Division One's survey of multiple dictionaries to select a definition out of context conflicts with *Matthews v. Penn-America Ins. Co.*, 106 Wn. App. 745, 25 P.3d 451 (2001), *rev. denied*, 145 Wn.2d 1019 (2002)?

3. Should this Court accept review because Division One's decision finding coverage for property owned solely by the arsonist raises an issue of substantial public interest?

4. Should this Court accept review because, as a matter of substantial public interest, statutory terms are not construed against private parties?

5. Should this Court accept review because Division One's award of *Olympic Steamship* fees before a determination that further policy benefits are owed conflicts with *Greengo v.*

Public Employees Mutual Insurance Co., 135 Wn.2d 799, 820, 959 P.2d 657 (1998)?

V. RELEVANT FACTS AND PROCEDURE

A. WELCH DIVORCED MORGAN TO ESCAPE AN ABUSIVE RELATIONSHIP. THE DIVORCE COURT AWARDED THEIR HOME TO MORGAN.

Welch's divorce from Morgan was finalized in May 2014. CP 1120. Welch testified she could not live in the marital home any longer. Morgan yelled at her constantly. She was in a loveless marriage. She left Morgan because he was controlling and verbally abusive. CP 1188–89, 1191, 1197–99.

The dissolution decree awarded ownership of the house to Morgan as his separate property. It identified Welch as "Grantor" and Morgan as "Grantee." CP 1142–45.

Around the time the divorce was finalized, Welch became romantically involved with another man, Christopher Anderson, and moved into his townhome. Anderson calls their relationship a domestic partnership. CP 1195–96, 1204–07.

B. A JURY CONVICTED MORGAN OF FIRST-DEGREE ARSON AND ATTEMPTED FIRST-DEGREE MURDER AFTER HE INTENTIONALLY SET FIRE TO HIS HOUSE AND ASSAULTED WELCH.

In November 2014, Morgan intentionally set fire to his home and assaulted Welch. CP 1163. A jury convicted Morgan of first-degree arson and attempted first-degree murder. CP 1147–60; *see also State v. Morgan*, 193 Wn.2d 365, 440 P.3d 136 (2019).

In a civil suit against Morgan for her injuries, Welch obtained default judgment for over $5 million. CP 1162–65, 1167–69. She executed on the judgment by buying the insured property at a sheriff's sale. CP 1265–68. Welch's attorney stated in a declaration that Morgan was the "sole owner" of the property, having received it in the divorce. CP 1272, 1276.

C. A PEMCO HOMEOWNER'S POLICY INSURED THE PROPERTY.

PEMCO insured Morgan's home at the time of the fire. The declarations page listed Morgan as the named insured,

CitiMortgage Inc. as mortgagee, and Welch as an additional insured. CP 2119–20.

The policy contained an intentional-loss exclusion. CP 2160. Under an exception, the exclusion does not apply if the loss is caused by "an act of domestic abuse" by another insured under the policy. CP 2160. The policy defined "domestic abuse" to include:

> 1. Physical harm, **bodily injury**, assault or the infliction of fear of imminent physical harm, **bodily injury** or assault between family or household members;
>
> . . .
>
> 4. Intentionally, knowingly or recklessly causing damage to property so as to intimidate or attempt to control the behavior of another family or household member.

CP 2159 (boldface in original).

An endorsement provided that, as to the lender's interest, the insurance would not be invalidated by any act of the named insured. CP 2129. The policy further provided that payment to an insured would be "limited to that insured's insurable interest

in the property less any payments we first made to a mortgagee or other party with a legal secured interest in the property." CP 2160 (boldface omitted).

D. PEMCO PAID THE BALANCE OF THE MORTGAGE ON THE PROPERTY.

PEMCO paid the outstanding mortgage balance of $239,040.69 to the mortgagee's assignee. CP 1354–58. The assignee then released its interest in the property. CP 1365.

E. THE TRIAL COURT GRANTED PARTIAL SUMMARY JUDGMENT TO PEMCO AND DENIED PARTIAL SUMMARY JUDGMENT TO WELCH.

PEMCO moved for partial summary judgment, arguing that the intentional-loss exclusion applied and precluded coverage. Welch cross-moved for partial summary judgment. The trial court granted PEMCO's motion, denied Welch's motion, and dismissed her breach-of-contract claim. The court concluded that the intentional-loss exclusion applied because Welch was not a member of Morgan's "family or household." CP 571–73.

PEMCO also moved for summary judgment on the basis that even if there was coverage, it had paid the amount of Welch's insurable interest when it paid off the mortgage. CP 1366. On reconsideration, the trial court found a question of fact about the extent of Welch's insurable interest in the property. CP 24–28, 467–69. But because a coverage exclusion applied, the trial court concluded, this question was not a material fact precluding summary judgment. CP 27.

PEMCO also moved for summary judgment on the basis that even if Welch had still owned the house when the fire occurred, recovery would not exceed half the $463,732.82 repair cost—less than PEMCO had already paid. CP 1366, 1388-89. The trial court did not address this issue. CP 24–28.

VI. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court will accept review if one or more of the criteria set forth in RAP 13.4(b) is met. These include if the Court of Appeals' decision conflicts with a decision of this Court or a published decision of the Court of Appeals or if the petition

involves an issue of substantial public interest that this Court should determine. RAP 13.4(b)(1)–(2), (4).

Division One's decision conflicts with decisions of this Court and of the Court of Appeals. RAP 13.4(b)(1)–(2). This case also presents issues of substantial public interest that this Court should determine. RAP 13.4(b)(4). PEMCO asks this Court to accept review.

A. INTERPRETING AN INSURANCE POLICY TO COVER DAMAGE AN ARSONIST CAUSED TO HIS OWN PROPERTY IS AGAINST PUBLIC POLICY AND RAISES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

Morgan intentionally set fire to his home—a home that he, alone, owned. Apart from being indebted on the mortgage that PEMCO paid, Welch had no interest in the house at the time of the fire. Interpreting an insurance policy to cover property owned solely by the arsonist violates public policy.

Washington has a strong public policy against arson. It is a felony. RCW 9A.48.020; RCW 48.30.220. And it is ordinarily a defense to an insurance claim. *See Great Am. Ins. Co. v. K&W Log, Inc.*, 22 Wn. App. 468, 472, 591 P.2d 457 (1979). "It has

long been against public policy to allow a person to purchase insurance for his immoral, criminal or fraudulent acts." *Queen City Farms v. Cent. Nat'l Ins. Co.*, 64 Wn. App. 838, 862 n.15, 827 P.2d 1024 (1992), *aff'd in part*, 126 Wn.2d 50, 882 P.2d 703, 891 P.2d 718 (1994).

Allowing an insured who intentionally damaged property to benefit from insurance is against public policy. *Federated Am. Ins. Co. v. Strong*, 102 Wn.2d 665, 666-68, 689 P.2d 68 (1984), *overruled on other grounds by Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992). In *Federated American*, an innocent spouse who co-owned the property sought recovery under the policy. The Court held that to avoid benefiting the wrongdoer, the innocent spouse could recover only half the damages to the property. *Id.* at 674–75.

Similarly, interpreting an insurance policy to cover damage an arsonist caused to his own property is against public policy. This Court should accept review because Division One's

conclusion that coverage exists involves an issue of substantial public interest that this Court should determine. RAP 13.4(b)(4).

B. THE COURT OF APPEALS' COVERAGE ANALYSIS CONFLICTS WITH PRECEDENT.

1. Courts Must Interpret Insurance Policies as an Average Insurance Purchaser Would Understand Them When the Policy Was Issued.

When interpreting an insurance policy, this Court gives the policy language "'a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.'" *Seattle Tunnel Partners v. Great Lakes Reinsurance (UK), PLC*, 200 Wn.2d 315, 321, 516 P.3d 796 (2022). Undefined terms are given their "'plain, ordinary, and popular meaning.'" *Id.* Clear and unambiguous policy language must be enforced as written—a court "'may not modify it or create ambiguity where none exists.'" *Id.*

"To determine the ordinary meaning of an undefined term, our courts look to standard English language dictionaries." *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990). If words have both a legal, technical meaning

and a plain, ordinary meaning, the ordinary meaning will prevail unless both parties clearly intended that the legal, technical meaning should apply. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998).

2. Instead of Interpreting the Policy as an Average Insurance Purchaser Would, Division One Applied a Definition From a Legal Dictionary.

Division One did not analyze how the average purchaser of insurance might interpret the term "family." Instead, it surveyed multiple dictionaries before selecting a "modern" definition in a legal dictionary. Contrary to precedent, the court did not analyze whether an average insurance purchaser would adopt that definition when the policy was issued.

Division One discussed definitions of "family" from three dictionaries.

First, the court referenced a definition from the 2002 edition of WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, which it called an "[o]lder edition[] of the dictionary":

- "[A] group of individuals living under one roof", and "the basic biosocial unit in society having as its nucleus two or more adults living together and cooperating in the care and rearing of their own or adopted children." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 821 (2002).

Slip op. 17.

Next, Division One found definitions in what it called "more modern editions of the dictionary"—one from WEBSTER'S ONLINE DICTIONARY and one from BLACK'S LAW DICTIONARY:

- "[T]he basic unit in society traditionally consisting of two parents rearing their children." *Family*, WEBSTER'S ONLINE DICTIONARY, https://www.merriam-webster.com (2024).
- "A group consisting of parents and their children." *Family*, BLACK'S LAW DICTIONARY 747 (11th ed. 2019).

Slip op. 17.

Division One ultimately rejected the definition from WEBSTER'S THIRD and applied what it characterized as "the more modern definition." Slip op. 18.

3. Surveying Multiple Dictionaries to Find a Definition That Results in Coverage Conflicts With Precedent.

This Court has never held that differing definitions among multiple dictionaries create ambiguity resulting in coverage. This Court most frequently relies on WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY to define insurance policy terms. *See, e.g.*, *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.*, 200 Wn.2d 208, 219, 515 P.3d 525 (2022); *Kut Suen Lui v. Essex Ins. Co.*, 185 Wn.2d 703, 713–14, 375 P.3d 596 (2016); *Kitsap County*, 136 Wn.2d at 582–83; *State Farm Mut. Auto. Ins. Co. v. Ruiz*, 134 Wn.2d 713, 719, 952 P.2d 157 (1998); *Kish v. Ins. Co.*

of N. Am., 125 Wn.2d 164, 171, 883 P.2d 308 (1994); *Federated Am.*, 102 Wn.2d at 674.[1]

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY is well suited to the task of determining plain meaning. Legal scholars have noted that, unlike some dictionaries, WEBSTER'S "take[s] a more descriptive approach, recounting actual usage, regardless of whether it is technically correct." *Exotic Motors v. Zurich Am. Ins. Co.*, 597 S.W.3d 767, 772 (Mo. Ct. App. 2020) (quoting Hon. Jack L. Landau, *An Introduction to Oregon Constitutional Interpretation*, 55 WILLAMETTE L. REV. 261, 280 (2019) (explaining the basis for the Oregon Supreme Court's preference for WEBSTER'S THIRD in interpreting ordinary meaning)). "Judicial reliance on a non-technical dictionary like

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[1] In addition, the Washington courts have selected WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY as the authority for spelling. GR 14 Appendix. It is noteworthy that Division One referred to a definition from merriam-webster.com, which is based on a different dictionary, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY. *See* https://www.merriam-webster.com/about-us/faq.

Webster's offers reliability and replicability, two important criteria for ensuring fairness and predictability to litigants in the justice system." *Id.* at 773. Internet searches for definition, by contrast, lack these "cornerstones of reliability." *Id.*

But Division One rejected WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY. It referred to a 2002 edition as an "[o]lder edition[] of the dictionary" and ignored a more recent edition, instead choosing to survey two other dictionaries. Slip op. 17. This survey of different dictionaries in search of a definition that would result in coverage is problematic. Division One made no attempt to analyze how the average purchaser of insurance would understand and interpret the term "family." Division One made no attempt to determine the term's plain, ordinary meaning or to analyze it in the property-insurance context.

4. Selecting a Legal Definition to Interpret an Insurance Policy Conflicts With Precedent.

Division One did not select the plain, ordinary meaning of the undefined term "family" from a standard English dictionary.

Instead, contrary to precedent, Division One selected a law-dictionary definition and concluded that this definition included persons who lack any relationship other than sharing parenting responsibilities.

The average purchaser of insurance would understand "family" to have the traditional meaning requiring members to have an enduring and cooperative relationship that binds them into a unit. But Welch and Morgan were not family members under the definition in WEBSTER'S THIRD because it requires that family members be part of the basic unit in society consisting of two adults rearing children together. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 821 (2002); *Family*, WEBSTER'S ONLINE DICTIONARY, https://www.merriam-webster.com (2024).

After their divorce, Welch and Morgan lacked a relationship that an average insurance purchaser would consider to be the traditional basic unit of our society. Welch divorced Morgan because he was abusing her. Welch lived with her

boyfriend in a committed relationship. Objectively, Welch and Morgan did not continue to form a family together.

Nor did Division One explain why it strayed from standard English dictionaries and instead used a law dictionary to define the word "family"—a term used daily by the average person. "[L]egal technical meanings have never trumped the common perception of the common man … 'The language of insurance policies is to be interpreted in accordance with the way it would be understood by the average man, rather than in a technical sense.'" *Boeing Co.*, 113 Wn.2d at 881. Before a legal definition may be applied to an undefined term, "it must be clear that both parties to the contract intended that the language have a legal technical meaning." *Id.* at 882 (emphasis omitted). No evidence exists on this record that PEMCO and Morgan intended for "family" to have such a meaning.

5. Selecting a "Modern" Definition Originating After the Insurance Policy Conflicts With Precedent.

Division One referred to definitions in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY as "older" and definitions in MERRIAM-WEBSTER'S ONLINE DICTIONARY and BLACK'S LAW DICTIONARY as "more modern." Slip op. 17. It did not analyze how the meaning of the common English word "family" has supposedly changed in just over a decade. It would seem unlikely this definition would expand so much over so few years.

Regardless, Division One's application of a "modern" definition conflicts with precedent. "In construing a contract, the court's duty is to determine the parties' intent at the time of contracting." *Eurick v. PEMCO Ins. Co.*, 108 Wn.2d 338, 340, 738 P.2d 251 (1987); *see also Queen City Farms v. Cent. Nat'l Ins. Co.*, 126 Wn.2d 50, 78–79, 882 P.2d 703, 891 P.2d 718 (1994) (focusing on an average insurance purchaser's understanding in earlier years when policies were issued).

Contrary to *Eurick*, Division One selected a "modern" definition that supposedly developed after issuance of the policy. The Legislature selected the term "family or household member" when it enacted RCW 48.18.550 in 1998. PEMCO issued Morgan's policy in 2014. CP 2119. The parties' objective intent could not account for a "modern" 2019 definition of family because it did not yet exist.

C. DIVISION ONE'S DECISION CONFLICTS WITH DIVISION TWO'S DECISION IN *MATTHEWS V. PENN AMERICA*.

To support its bottom-line conclusion, Division One cited Division Two's decision in *Matthews v. Penn-America Ins. Co.*, 106 Wn. App. 745, 25 P.3d 451 (2001), *rev. denied*, 145 Wn.2d 1019 (2002). But Division One's decision conflicts with both the analysis and conclusion in *Matthews*.

In *Matthews*, the injured party, Blake Matthews, sought UIM benefits under his mother's live-in boyfriend's insurance policy. The policy defined "insured" as including "a member of the family who is a resident of the household[.]" *Id.* at 747.

Division Two held that "family" was not ambiguous and meant "connected by blood, affinity, or law." *Id.* at 750.

Division Two observed that this Court had cautioned against a "mechanical survey of possible dictionary definitions" to find the meaning of "family." *Id.* at 751 (citing *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 817, 854 P.2d 1072 (1993)). Division Two concluded that interpreting a term "in context" must mean in context of the insurance policy—"If 'context' means all the possible dictionary definitions, it is meaningless." *Id.* at 751.

The concurring judge wrote separately "to clarify why it is inappropriate to apply the very broad definition" advocated by the dissent. *Id.* at 753. She concluded the average insurance purchaser would not understand "member of the family" to include someone not related to the insured by blood, affinity, or law. *Id.* And she observed that a court does "not look at the various potential definitions for a word in an insurance policy unless the average purchaser would understand the word, as used

in the policy rather than viewed in isolation or in other contexts, to have multiple meanings." *Id.* at 755.

Division One's analysis conflicts with *Matthews*. The court made no attempt to consider the definition of "family" in context. Nor did it heed *Matthews*' admonition not to mechanically survey dictionaries. Division One made no attempt to analyze how the average insurance purchaser would understand "family." Instead, it surveyed definitions in three dictionaries and ultimately adopted one from a legal dictionary.

D. CONSTRUING STATUTORY TERMS AGAINST PRIVATE PARTIES IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

PEMCO did not select the term "family or household member." The Legislature chose this language when it enacted RCW 48.18.550 (1998) (copy attached as Appendix C). PEMCO had no choice but to include that language in its policy with Morgan.

The reason for construing language against an insurer is not present here. "Unresolved ambiguities are resolved against the drafter-insurer and in favor of the insured." *Queen City*

Farms, 126 Wn.2d at 68. "The reason for the rule is that insurance contracts are ordinarily prepared solely by the insurance company. Presumably the insurer, as drafter, is in a better position to prevent mistakes or ambiguities." *Cont'l Ins. Co. v. Paccar, Inc.*, 96 Wn.2d 160, 167, 634 P.2d 291 (1981) (citations omitted).

Where PEMCO did not select the policy language, it should not be construed against PEMCO. Where the reason for construing language against the insurer is not present, this Court will not do so. *See Paccar*, 96 Wn.2d at 167.

Holden v. Farmers Insurance Co. of Wash., 169 Wn.2d 750, 239 P.3d 344 (2010), is distinguishable. In *Holden*, this Court rejected Farmers' argument that it was required to use language in the 1943 New York Standard Fire Insurance Policy based on an insurance regulation, so the language should not be construed against it:

> The particular policy language remains a matter of choice for the drafter, so long as it is "not less favorable to the insured than the 'standard fire

> policy.'" WAC 284-20-010(3)(c). There is no support in our case law for Farmers' proposition that the normal rules of construction do not apply when a policy provision is drafted by an insurer in conformance with applicable insurance regulations.

Id. at 756 n.2.

In contrast the Legislature—not the insurance commissioner—required the domestic-abuse exception in an intentional-loss exclusion to include the term "family or household member." Unlike the regulation in *Holden*, RCW 48.18.550 did not allow insurers to use an alternative form with terms "not less favorable." Instead, the statute provided that intentional-loss exclusions "shall not apply to deny an insured's otherwise-covered property loss if the property loss is caused by an act of domestic abuse by another insured under the policy." "Domestic abuse" was defined by the term "family or household member."[2]

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[2] PEMCO quotes RCW 48.18.550 as enacted in 1998, the statute in effect when PEMCO issued the policy. The statute has since been amended. A copy of the 1998 version is attached as Appendix C.

The statutory language would be considered part of the policy even if PEMCO did not include it. "An insurance regulatory statute becomes part of the insurance policy." *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 85, 794 P.2d 1259 (1990). Because PEMCO did not draft this language, no public policy reason exists to construe it against PEMCO.[3]

E. THE APPELLATE-FEES AWARD CONFLICTS WITH *GREENGO* BECAUSE WELCH HAS NOT ESTABLISHED ENTITLEMENT TO ADDITIONAL PAYMENT UNDER THE POLICY.

Division One awarded Welch attorney fees on appeal under *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), because, it held, PEMCO denied coverage. But this is not sufficient to award fees. *Olympic Steamship* fees may be awarded only if the insured establishes an

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[3] In *McLaughlin v. Travelers Commercial Ins. Co.*, 196 Wn.2d 631, 642, 476 P.3d 1032 (2020), citing *Holden*, this Court construed an ambiguous statutory term against an insurer. But it does not appear that this Court considered the argument made here that *Holden* did not involve construction of a term mandated by statute because the insurer was not the drafter.

entitlement to additional payment under the policy. *Greengo v. Pub. Emps. Mut. Ins. Co.*, 135 Wn.2d 799, 820, 959 P.2d 657 (1998). Welch has not established entitlement to payment so the fees award conflicts with *Greengo*.

Olympic Steamship held that an insured may recover attorney's fees that it incurs because it must assume the burden of legal action to obtain the insurance contract's benefit. *Olympic Steamship,* 117 Wn.2d at 53–54. To recover attorney fees, the insured must litigate a coverage question. *Dayton v. Farmers Ins. Grp.*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). And the insured must prevail in the coverage dispute. *N.Y. Life Ins. Co. v. Mitchell*, 1 Wn.3d 545, 570, 528 P.3d 1269 (2023); *see also King County v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 630, 398 P.3d 1093 (2017) (insurer must lose coverage dispute).

An insured is not the prevailing party unless she establishes an entitlement to additional payment under the policy. In *Greengo*, this Court reversed a summary judgment in

PEMCO's favor, finding no coverage. The Court remanded to determine whether two accidents caused the insured's injuries and, if so, whether the driver in the second accident was underinsured.

In the *Greengo* lead opinion, Justice Sanders opined that Greengo should be awarded fees under *Olympic Steamship*. He indicated that the threshold coverage question was resolved against the insurer. And he concluded that a monetary recovery was not necessary to recover *Olympic Steamship* fees. *Greengo*, 135 Wn.2d at 816–19.

But Justice Sanders' opinion was not the majority opinion on the attorney's-fees issue. Instead, Justice Madsen's concurring opinion held a majority of five justices on that issue. In her concurrence, Justice Madsen explained that a fees award was premature:

> Only if it is determined that two accidents were involved will Ms. Greengo be entitled to the benefits of her coverage and attorney's fees properly be considered. … The majority's award of attorney's fees is premature since there has not yet

> been a determination as to whether Ms. Greengo will recover damages pursuant to her UIM policy.

Greengo, 135 Wn.2d at 820 (Madsen, J., concurring).

Under the controlling majority decision in *Greengo*, proving coverage is not enough to justify a fees award. Rather, to merit *Olympic Steamship* fees, an insured must prove that she will recover payment under the policy.

Welch has not established an entitlement to additional payment under the policy. If the trial court or jury determines PEMCO paid all it owed, Welch will recover nothing. Division One's award of appellate fees to Welch thus conflicts with *Greengo*.

VII. CONCLUSION

Division One's decision conflicts with decisions of this Court and Division Two and issues of substantial public interest. PEMCO asks that this Court grant review.

CERTIFICATE OF COMPLIANCE

I certify that the Petition for Review contains 4,377 words.

Dated this 25th day of November 2024.

REED McCLURE

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2024, a copy of the Petition for Review was served on counsel as follows via the Washington State Appellate Court's Electronic Filing Portal:

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

Dated this 25th day of November, 2024, at Lillian, Alabama.

Kate McBride

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FILED
9/3/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BRENDA WELCH, Appellant, v. PEMCO MUTUAL INSURANCE COMPANY, a domestic insurance company doing business in Washington, Respondent.	No. 85466-6-I DIVISION ONE UNPUBLISHED OPINION

BOWMAN, J. — PEMCO Mutual Insurance Company denied Brenda Welch insurance coverage for loss incurred after her ex-husband assaulted her and burned down their former marital home. PEMCO determined that the loss was intentional and rejected Welch's argument that the loss arose from an act of domestic abuse, an exception to the intentional loss exclusion. Welch sued PEMCO for breach of contract, bad faith, and violations of the Consumer Protection Act (CPA), chapter 19.86 RCW, and the Insurance Fair Conduct Act (IFCA), RCW 48.30.010 to .015. The trial court dismissed Welch's claims at summary judgment. Because Welch meets the domestic abuse exception to the intentional loss exclusion, we reverse summary judgment for PEMCO, direct the court to enter partial summary judgment for Welch for breach of contract, and remand for further proceedings.

APPENDIX A

FACTS

Welch and David Morgan married in 2006. Welch owned a home in Lynnwood, and the couple lived there throughout their marriage. The home was subject to a mortgage[1] held by CitiMortgage Inc. ISAOA ATIMA.[2] During their marriage, Welch and Morgan had one child together, K.W.

In 2013, the parties separated, and Welch petitioned for divorce. Welch explained that she sought a divorce because Morgan was "controlling" and "verbally very abusive." On May 21, 2014, the court finalized their divorce, awarding Morgan the family home and requiring that he "either sell the property or refinance the debts into his sole name within three (3) years of February 25, 2014."[3] After the divorce, Welch met a new partner and moved in with him. Still, Welch and Morgan shared custody of K.W., and their parenting plan called for joint decision-making.

On November 16, 2014, Welch went to the Lynnwood home at a prearranged time to pick up K.W. from Morgan's care. But K.W. was not there. Instead, Morgan attacked Welch, beat her unconscious, doused her in gasoline, and set her and the house on fire. Welch survived but suffered significant mental and physical injuries. The fire destroyed the house.

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[1] The home was also subject to a second mortgage held by JPMorgan Chase Bank NA (Chase). Chase's second mortgage interest was not insured under the policy. After the fire, Chase forgave the debt owed under its loan and released its lien on the property.

[2] CitiMortgage sold the mortgage debt to Ditech Financial LLC. For simplicity, we refer to only CitiMortgage.

[3] The court also awarded Welch a judgment of $1,617, a lump sum of $37,500, half of Morgan's retirement accounts, and $1,000 monthly for child support.

At the time of the fire, Morgan had not yet sold or refinanced the Lynnwood home. So, the deed still named Welch as an owner and obligor on the mortgage. Welch and Morgan held an all-risk insurance policy on the property through PEMCO. The policy named both Welch and Morgan as insureds. It also listed CitiMortgage as a mortgagee.

The PEMCO policy excluded coverage for "any loss arising out of any act committed by or at the direction of an insured with the intent to cause a loss." But it has an exception to that intentional loss exclusion for acts of "domestic abuse,"[4] which provides that the exclusion "will not apply to deny an insured's claim for an otherwise covered property loss if such loss is caused by an act of domestic abuse by another insured under the policy."[5]

The policy defines "domestic abuse" as "[p]hysical harm, bodily injury, assault or the infliction of fear of imminent physical harm, bodily injury or assault between family or household members," and "[i]ntentionally, knowingly or recklessly causing damage to property so as to intimidate or attempt to control the behavior of another family or household member." But it does not define "family" or "household member." The policy limits claims under the domestic abuse exception to "that insured's insurable interest in the property less any payments we first made to a mortgagee or other party with a legal secured

[4] The policy also includes a "Lenders Loss Payable Endorsement," which provides that PEMCO will pay CitiMortgage for its interest even if there is no coverage for the named insureds under the policy.

[5] The exception also requires that "the insured making claim . . . (1) [f]iles a police report and cooperates with any law enforcement investigation relating to the act of domestic abuse; and (2) [d]id not cooperate in or contribute to the creation of the loss."

interest in the property." And it says that "[i]n no event will [PEMCO] pay more than the limit of liability."

In 2016, a jury found Morgan guilty of attempted first degree murder domestic violence and first degree arson domestic violence. The trial court sentenced him to 260 months in prison. Welch then sued Morgan for her injuries from the assault. Morgan did not respond, and the trial court entered a default order and judgment against Morgan for $5.06 million.[6] Welch also claimed coverage under the PEMCO policy. And CitiMortgage claimed coverage for the outstanding balance on the mortgage. PEMCO estimated the repair or replacement cost of the damage to the home was $463,732.82.

In June 2016, PEMCO found coverage for CitiMortgage. In a letter explaining its decision, PEMCO cited the Lenders Loss Payable Endorsement that covers CitiMortgage's interest under the policy "*despite* any act of the named insured which might invalidate the insurance" as to the named insureds. But PEMCO denied Welch's claim. It explained that the intentional loss provision "precludes coverage not only to the arsonist but to any insured, including Ms. Welch."

In May 2019, Welch sued PEMCO for breach of contract, bad faith, and violations of the IFCA and CPA. The case was assigned to Snohomish County Superior Court Judge Anita Farris. In November 2019, PEMCO moved for partial summary judgment dismissal of Welch's breach of contract and IFCA violation claims. It argued that the policy's intentional loss exclusion precluded coverage.

[6] Welch executed on the judgment in 2019 by purchasing the Lynwood property at a sheriff's sale.

And it argued that the domestic abuse exception to the exclusion does not apply because Welch and Morgan were no longer family or household members since their divorce. It also argued that even if the domestic abuse exception covered Welch's claim, PEMCO paid her "insurable interest in the property" when it satisfied the CitiMortgage debt. PEMCO reasoned that because the divorce order awarded Morgan the property, Welch's insurable interest was limited to only the outstanding mortgage debt at the time of the fire.

Welch responded that the domestic abuse exception covered her claim. She urged the court to define "family" to include former spouses with children in common consistent with domestic violence statutes. She also argued that her insurable interest was for the full cost of repairs, and that PEMCO should be estopped from arguing otherwise because it did not cite a limited insurable interest when it denied coverage. In February 2020, Judge Farris heard argument on PEMCO's partial summary judgment motion and took the matter under advisement.

Welch also moved for partial summary judgment on her breach of contract claim in July 2020. She argued she was entitled to coverage under the domestic abuse exception to the intentional loss exclusion. She also raised her estoppel argument about the extent of her insurable interest.

On August 10, 2020, having not received a ruling on its motion, PEMCO filed a notice of disqualification, asserting it could not receive a fair trial before Judge Farris. Then, two days later on August 12, the court issued an order ruling on PEMCO's motion for summary judgment. Judge Farris dated the order on

April 24, 2020. In a letter attached to the order, the court explained to the parties that the filing delay resulted from an error in "remote electronic order processing" that occurred when the court first moved to remote processing during the COVID-19 emergency.

Substantively, the court granted in part and denied in part PEMCO's motion. The court denied PEMCO's motion on the applicability of the domestic abuse exception. It found the term "family" undefined and ambiguous and determined that the term should be construed against PEMCO. But it granted PEMCO's motion on Welch's insurable interest. And it rejected Welch's estoppel claim, concluding that "her insurable interest is limited to whatever she was owed pursuant to the Dissolution Decree at the time of the covered incident."

On August 18, 2020, Welch asked PEMCO if, despite its pending notice of disqualification, it would agree to have Judge Farris hear Welch's motion for partial summary judgment. PEMCO agreed that Welch's "motion can be set to be heard by Judge Farris, since she is already familiar with some of the issues." And PEMCO said that "[t]he motion to change judge has been stricken."[7]

PEMCO opposed Welch's motion for partial summary judgment. It argued that the court already determined there was a genuine issue of material fact about whether Welch and Morgan were family members, and that PEMCO was

[7] A day earlier on August 17, PEMCO apparently sought to confirm the hearing date for the notice of disqualification with the superior court's confirmations department. Because the hearing was set on Judge Farris' individual calendar, the confirmations clerk informed PEMCO's attorney that he must confirm the date with the judge's law clerk. But PEMCO did not contact Judge Farris' law clerk to confirm the hearing date. Instead, it sent her law clerk a copy of the August 18, 2020 email stating that PEMCO struck its notice of disqualification.

not estopped from arguing limited coverage based on Welch's insurable interest. PEMCO did not address disqualification.

On October 16, 2020, the court heard Welch's motion for partial summary judgment. PEMCO again did not raise disqualification. At the end of the hearing, the court took the matter under advisement. Then, on December 1, 2020, the court issued an order on Welch's motion. The court incorporated by reference its finding that the term "family" is ambiguous from its ruling on PEMCO's motion for partial summary judgment. The court then construed the term against PEMCO and determined that "as a matter of law [Welch] falls within the domestic abuse exception in the policy because she falls within the undefined ambiguous term family." And it concluded that PEMCO "breached the policy by denying coverage on the basis Ms. Welch did not fall within that definition [of domestic abuse assault]."

The court also reconsidered its ruling on Welch's insurable interest. It determined that there was an issue of fact as to whether PEMCO is equitably estopped from asserting that Welch "has no or a limited insurable interest." And it again determined that "the extent of Ms. Welch's insurable interest is the extent to which the home was to act as security" for what Morgan owed her under the dissolution decree. But it did not determine what that amount was.

Three months after receiving the adverse ruling, PEMCO moved to enforce its August 10, 2020 disqualification notice and asked Judge Farris to vacate all her previously issued orders under RCW 4.12.040 and .050. PEMCO argued that Judge Farris lacked authority to hear motions or enter rulings after

PEMCO filed its disqualification notice in August 2020. Welch objected, arguing that PEMCO agreed to strike its notice and thus waived any right to disqualify Judge Farris.

On April 12, 2021, Judge Farris granted PEMCO's motion to enforce disqualification, recused herself from the case, and vacated all her previously issued orders. She found that PEMCO likely engaged in "gamesmanship" when deciding whether to enforce disqualification. Still, Judge Farris concluded that the notice of disqualification took effect from the time PEMCO filed it in August 2020. Judge Farris acknowledged that PEMCO's email clearly waived the disqualification as to Welch's partial motion for summary judgment. But she concluded that PEMCO's and Welch's motions for summary judgment were so intertwined that she could not separate the rulings.

In May 2021, the case was reassigned to Judge Bruce Weiss. Both PEMCO and Welch renewed their motions for partial summary judgment. PEMCO again argued that the intentional loss exclusion precludes coverage, that the domestic abuse exception did not apply because Welch and Morgan were not family, and that even if coverage were not excluded, PEMCO already paid Welch's insurable interest. And Welch again argued that the domestic abuse exception applied, and that PEMCO should be equitably estopped from seeking to limit her insurable interest.

This time, the court granted PEMCO's motion and denied Welch's. It dismissed the breach of contract claim, determining that because Welch and Morgan were no longer married or living together, Welch and Morgan were not

family, so the domestic abuse exception to the intentional loss exclusion did not apply. It also determined that Welch failed to show PEMCO was estopped from asserting she had a limited insurable interest. The court concluded that Welch's only insurable interest was the outstanding mortgage debt, which PEMCO satisfied when it paid the mortgage holder. It also concluded that "there is insufficient evidence to support the claim that PEMCO unreasonably denied the claim for coverage," and dismissed Welch's IFCA claim.

In August 2021, Welch moved for reconsideration, which the court granted in part and denied in part. The court affirmed its dismissal of Welch's breach of contract claim, but it concluded there were issues of material fact about Welch's equitable estoppel argument and IFCA claim and reinstated those claims. Then, in early 2023, the court invited the parties to move for reconsideration or clarification about coverage. So, Welch moved for partial summary judgment and for reconsideration. PEMCO also moved for partial summary judgment. This time, the court vacated its prior rulings, but again determined there was no coverage. In May 2023, Judge Weiss entered orders dismissing all of Welch's claims.

Welch appeals

ANALYSIS

Welch argues that Judge Farris erred by disqualifying herself and vacating her prior orders. She asks that we reverse Judge Farris' ruling on disqualification and reinstate her orders. In the alternative, Welch argues that Judge Weiss erred by granting summary judgment for PEMCO.

1. Disqualification

Welch argues that Judge Farris wrongly disqualified herself and vacated her prior orders because PEMCO did not timely file its notice of disqualification. We agree but conclude that Welch shows no prejudice from the disqualification.

Disqualification of a single judge without a showing of prejudice is a right granted to parties by statute. *Garza v. Perry*, 25 Wn. App. 2d 433, 443, 523 P.3d 822 (2023). We review issues of statutory construction de novo. *Id.* When engaging in statutory interpretation, our goal is to determine and carry out the legislature's intent. *Fode v. Dep't of Ecology*, 22 Wn. App. 2d 22, 30, 509 P.3d 325 (2022). So, when interpreting a statute, we first look to its plain meaning. *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). " 'A statute that is clear on its face is not subject to judicial construction.' " *City of Seattle v. Kopperdahl*, 22 Wn. App. 2d 708, 711, 513 P.3d 139 (2022) (quoting *State v. J.M.*, 114 Wn.2d 472, 480, 28 P.3d 720 (2001)). Instead, "we assume the legislature meant exactly what it said and apply the statute as written." *Id.* If we determine a statute is unambiguous after considering its plain meaning, our inquiry ends. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

Under RCW 4.12.050(1)(a), a party may disqualify a judge from hearing a matter by filing a notice of disqualification "before the judge has made any discretionary ruling in the case." If a party timely disqualifies a judge, that judge cannot hear or try any action or proceeding in the case. RCW 4.12.040(1). The party filing a notice of disqualification need not show actual prejudice. *Godfrey v.*

Ste. Michelle Wine Ests. Ltd., 194 Wn.2d 957, 961, 453 P.3d 992 (2019). " '[O]nce a party timely complies with the terms of RCW 4.12.050, prejudice is deemed established,' " and the disqualified judge " 'is divested of authority to proceed further into the merits of the action.' " *Pub. Util. Dist. No. 1 of Klickitat County v. Walbrook Ins. Co.*, 115 Wn.2d 339, 343, 797 P.2d 504 (1990)[8] (quoting *Marine Power & Equip. Co. v. Industr. Indem. Co.*, 102 Wn.2d 457, 460, 687 P.2d 202 (1984)).

Here, PEMCO filed a notice of disqualification on August 10, 2020. But Judge Farris made a discretionary ruling on PEMCO's motion for summary judgment on April 24, 2020, more than three months before PEMCO filed its notice. Under the plain language of the statute, PEMCO's notice of disqualification was untimely.

Citing *Malott v. Randall*, 83 Wn.2d 259, 517 P.2d 605 (1974), PEMCO argues that its notice of disqualification was timely because it filed the notice before Judge Farris "made" a ruling under RCW 4.12.050(1)(a). According to PEMCO, a ruling is not "made" until it is filed.

In *Malott*, our Supreme Court held that a judgment was not "formally entered" under CR 58 where a judge signed the judgment, but a deputy clerk placed it in a desk drawer rather than filing it. 83 Wn.2d at 261-62. This is because a judgment is "entered" from "the time of delivery to the clerk for filing." CR 58(b). But a notice of disqualification is not a judgment governed by CR 58. Instead, it is a rule created by statute. And RCW 4.12.050(1)(a) provides that a

[8] Alteration in original; internal quotation marks omitted.

party may disqualify a judge by filing a notice of disqualification before the judge has "made" any discretionary ruling in the case. Had the legislature intended that a judge must *file* a discretionary ruling before it is "made," it would have said so in the disqualification statute.

As much as PEMCO suggests such a rule is unfair or violates due process, it is incorrect. In *State ex rel. Haskell v. Spokane County District Court*, 198 Wn.2d 1, 10, 491 P.3d 119 (2021), our Supreme Court held that a defendant's notice of disqualification was untimely even though the defendant was unaware that the court had made a discretionary ruling. There, the State petitioned the superior court ex parte for a writ of review of a district court decision. *Id.* at 7. The defendant was not notified of the hearing where the State presented the writ. *Id.* Nor was defense counsel contemporaneously advised of which superior court judge would preside over the ex parte proceedings. *Id.* The court granted the writ. *Id.* Days later, the defendant filed a notice to disqualify the judge. *Id.* The court denied the notice of disqualification as untimely because it already made a discretionary ruling. *Id.* Our Supreme Court affirmed. *Id.* at 9-10. It concluded the court made a discretionary ruling when it granted the writ of review, and it did not matter that the defendant had no notice of the ruling. *Id.* at 10-11. The court determined that the lack of notice did not implicate due process because the right to disqualify is statutory, not constitutional. *Id.*

Because PEMCO filed its notice of disqualification after Judge Farris made a discretionary ruling, the notice was untimely, and RCW 4.12.050 did not

require Judge Farris to recuse.[9] Still, Welch fails to show that she was prejudiced from the disqualification.

The Ninth Circuit has rejected the argument that improper recusal is reversible error on appeal. In *In re Cement Antitrust Litigation*, 688 F.2d 1297, 1299-1300 (9th Cir. 1982),[10] the trial judge recused himself from a class action lawsuit against private cement producers because his wife owned shares of stock in some of the class members. The judge recused under the mistaken impression that federal statute required it. *Id.* at 1300. On appeal, petitioners sought a writ of mandamus directing the trial judge to vacate his order of recusal. *Id.* The Ninth Circuit determined that "when a trial judge enters an order granting a motion for disqualification[,] the error, if any, cannot serve as a basis for reversal on appeal." *Id.* at 1302. It explained:

> A party cannot ordinarily predicate a claim of prejudicial error on the fact that he was required to try his cause before one judge who was duly qualified to preside rather than another. Prejudicial error does not occur simply because a particular judge fails to handle a case or some other judge does; the mere assignment of a matter to a judge does not affect the outcome of the case. It is the conduct of the judge in conducting the proceeding that gives rise to error which is prejudicial and requires reversal, not the assignment of the case to the judge.

Id. So, the Ninth Circuit determined that "despite the fact that an erroneous order of recusal may cause collateral injury to the party, the error is harmless." *Id.*

We agree with the Ninth Circuit's reasoning. Indeed, the basic requirement of due process is only " '[a] fair trial in a fair tribunal.' " *Cronin v.*

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[9] Because we conclude PEMCO did not timely file its notice of disqualification, we do not address Welch's argument that PEMCO later waived disqualification.

[10] *Aff'd*, 459 U.S. 1191, 103 S. Ct. 1173, 75 L. Ed. 2d 425 (1983).

Cent. Valley Sch. Dist., 23 Wn. App. 2d 714, 760, 520 P.3d 999 (2022)[11] (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955)). And we "presume that judicial hearings and judges are fair." *Id.* Welch does not show that Judge Farris' disqualification from her case deprived her of a fair process or decision-maker.

Still, Welch suggests that the disqualification prejudiced her because Judge Farris ruled in her favor and Judge Weiss did not. But Welch cites no authority in support of her suggestion that she has a right to a particular interlocutory ruling. *See DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (where a party cites no authority in support of a proposition, we "may assume that counsel, after diligent search, has found none"). In any event, Judge Farris' rulings on partial summary judgment did not amount to a final judgment on the merits. And "an order which adjudicates fewer than all claims or the rights and liabilities of fewer than all parties is subject to revision at any time before entry of final judgment as to all claims and the rights and liabilities of all parties." *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 300, 840 P.2d 860 (1992); CR 54(b).

We conclude that Judge Farris unnecessarily disqualified herself under RCW 4.12.050 but that Welch fails to show prejudice warranting reversal.

[11] Alteration in original.

2. Summary Judgment

Welch argues that Judge Weiss erred by granting summary judgment for PEMCO. She contends PEMCO "cannot establish an exclusion from coverage due to Morgan's domestic abuse."[12] We agree.

We review a trial court's grant of summary judgment de novo, engaging in the same inquiry as the trial court. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). A party is entitled to summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We view all evidence and draw all reasonable inferences in the light most favorable to the nonmoving party. *Young*, 112 Wn.2d at 226.

We interpret language from an insurance policy de novo. *Vision One, LLC v. Phila. Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300 (2012). And we "construe insurance policies as the average person purchasing insurance would." *Id.* That is, we give the language a fair, reasonable, and sensible construction. *Id.* And we give undefined terms their plain, ordinary, and popular meaning. *Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC*, 18 Wn. App. 2d 600, 611, 492 P.3d 843 (2021), *aff'd*, 200 Wn.2d 315, 516 P.3d 796 (2022). We

[12] Welch also argues that PEMCO is estopped from arguing against coverage under the policy's effective intentional loss provision because it initially denied coverage under a different intentional loss provision that was deleted from the policy by an endorsement. In denying an insured's claim for coverage, an insurer must assert a basis for the denial, and "during litigation insurers may be precluded from asserting new grounds for denying coverage." *Vision One, LLC v. Phila. Indem. Ins. Co.*, 174 Wn.2d 501, 520, 276 P.3d 300 (2012). But PEMCO's initial incorrect citation to the deleted intentional loss provision and subsequent correction to the effective intentional loss provision does not amount to new grounds for denial.

may turn to the dictionary definition of an undefined term to determine its plain meaning. *Id.*

Because coverage exclusions " 'are contrary to the fundamental protective purpose of insurance,' " we strictly construe exclusions against the insurer, not extending them " 'beyond their clear and unequivocal meaning.' " *Vision One*, 174 Wn.2d at 512 (quoting *State Farm Fire & Cas. Co. v. Ham & Rye, LLC*, 142 Wn. App. 6, 13, 174 P.3d 1175 (2007)). An insurance clause is ambiguous when, on its face, it is susceptible to two reasonable interpretations. *Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 134 Wn.2d 413, 428, 951 P.2d 250 (1998). We construe ambiguities in a policy against the insurer. *Vision One,* 174 Wn.2d at 512.

Welch's policy excludes coverage for intentional loss unless "an act of domestic abuse by another insured under the policy" causes the loss. The policy defines "domestic abuse" as "[p]hysical harm, bodily injury, assault or the infliction of fear of imminent physical harm, bodily injury or assault between family or household members," and "[i]ntentionally, knowingly or recklessly causing damage to property so as to intimidate or attempt to control the behavior of another family or household member."[13] The PEMCO policy language parallels former RCW 48.18.550 (1998), the statute in effect when Morgan tried to kill Welch and burned down the house.

[13] The policy definition also includes sexual assault or stalking of family or household members.

RCW 48.18.550(3) requires insurers to cover intentional loss "caused by an act of domestic abuse by another insured under the policy."[14] But neither the policy nor the former statute define the word "family." So, we look to the dictionary to determine the ordinary meaning of the term. *Seattle Tunnel Partners*, 18 Wn. App. 2d at 611. Older editions of the dictionary define "family" as "a group of individuals living under one roof," or "the basic biosocial unit in society having as its nucleus two or more adults living together and cooperating in the care and rearing of their own or adopted children." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 821 (2002). Under that definition, Welch does not meet the definition of "family." Welch divorced Morgan, moved out of the house, and was living with a new partner at the time of the fire.

But more modern editions of the dictionary define "family" as "the basic unit in society traditionally consisting of two parents rearing their children," or "[a] group consisting of parents and their children." MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com (last visited Aug. 20, 2024); BLACK'S LAW DICTIONARY 747 (11th ed. 2019). Welch meets these definitions because she and Morgan were raising K.W. under a parenting plan that granted them shared custody and called for joint decision-making.[15] As such, they were two parents rearing their child.

In *Matthews v. Penn-America Insurance Co.*, 106 Wn. App. 745, 747-48, 23 P.3d 451 (2001), Division Two of our court considered the definition of "family"

[14] The former statute had the same language.

[15] We note that even if both dictionary definitions are reasonable, they create an ambiguity that we must resolve against PEMCO. *Vision One,* 174 Wn.2d at 512.

under the terms of an uninsured motorist policy. It noted that "the most *common* use of 'family' 'conveys the notion of some relationship—blood or otherwise,' " and that " '[i]n its most common use, the word implies father, mother and children—immediate blood relatives.' " *Id.* at 749[16] (quoting *Collins v. Nw. Cas. Co.*, 180 Wash. 347, 352, 39 P.2d 986 (1935)). And it said that "[a]lthough this does not foreclose further analysis of the meaning of 'family,' the most common use is, by definition, the meaning an average insurance purchaser is most likely to consider." *Id.*

We agree with Division Two and conclude that an average person purchasing insurance would understand the term "family" under the more modern definition. Because Welch and Morgan share a child that they were raising together, Welch is "family" under the policy's domestic abuse exception to the intentional loss exclusion. As a result, the trial court erred by granting summary judgment for PEMCO and refusing to grant partial summary judgment for Welch.[17]

We reverse summary judgment for PEMCO, direct the court to enter partial summary judgment for Welch for breach of contract, and remand for further proceedings.[18]

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[16] Alteration in original.

[17] Because we conclude Welch and Morgan are family as defined in the domestic abuse exception to the intentional loss exclusion, we do not address her alternative arguments for coverage.

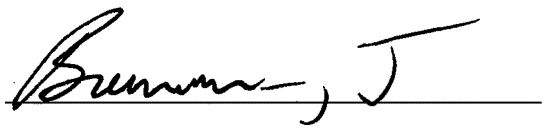
[18] Because the trial court dismissed Welch's bad faith, IFCA, and CPA claims on the ground that they stemmed from Welch's claim of unreasonable denial of coverage, we reverse the order dismissing those claims as well and remand for further proceedings.

3. Attorney Fees

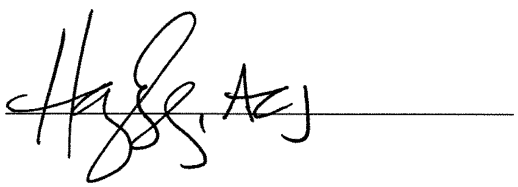
Welch requests attorney fees on appeal under RAP 18.1 and *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991).[19]

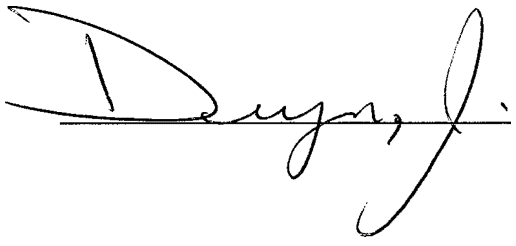
Under RAP 18.1(a), we may award attorney fees on appeal if "applicable law grants to a party the right to recover reasonable attorney fees." And under *Olympic Steamship*, we award attorney fees to "[a]n insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract." 117 Wn.2d at 53-54. PEMCO denied Welch coverage under the policy, compelling Welch to sue PEMCO. Because we find coverage, we award Welch attorney fees on appeal subject to compliance with RAP 18.1(d).

We reverse summary judgment for PEMCO, direct the court to enter partial summary judgment for Welch for breach of contract, and remand for further proceedings.



WE CONCUR:





[19] Welch also argues that the IFCA and CPA both provide for reasonable attorney fees to successful claimants. Because we remand for further proceedings on those claims, we do not reach her request for attorney fees under either statute.

FILED
10/29/2024
Court of Appeals
Division I
State of Washington

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

BRENDA WELCH, Appellant, v. PEMCO MUTUAL INSURANCE COMPANY, a domestic insurance company doing business in Washington, Respondent.	No. 85466-6-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondent PEMCO Mutual Insurance Company filed a motion for reconsideration of the opinion filed on September 3, 2024. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Judge

APPENDIX B

CERTIFICATION OF ENROLLMENT

SUBSTITUTE SENATE BILL 6565

Chapter 301, Laws of 1998

55th Legislature
1998 Regular Session

INSURANCE PAYMENTS FOR INSUREDS WHO ARE VICTIMS OF DOMESTIC ABUSE

EFFECTIVE DATE: 6/11/98

Passed by the Senate March 9, 1998
YEAS 46 NAYS 0

BRAD OWEN

President of the Senate

Passed by the House March 4, 1998
YEAS 97 NAYS 0

CLYDE BALLARD

Speaker of the House of Representatives

Approved April 2, 1998

GARY LOCKE

Governor of the State of Washington

CERTIFICATE

I, Mike O Connell, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 6565** as passed by the Senate and the House of Representatives on the dates hereon set forth.

MIKE O'CONNELL

Secretary

FILED

April 2, 1998 - 2:52 p.m.

Secretary of State
State of Washington

APPENDIX C

SUBSTITUTE SENATE BILL 6565

AS AMENDED BY THE HOUSE

Passed Legislature - 1998 Regular Session

State of Washington 55th Legislature 1998 Regular Session

By Senate Committee on Financial Institutions, Insurance & Housing (originally sponsored by Senators Hale, Prentice, Winsley, Franklin, Long, Roach, Haugen, Stevens, Spanel, Wood, Rasmussen, T. Sheldon, Loveland, Benton, Johnson, Thibaudeau, McDonald, B. Sheldon, Snyder, Anderson, Oke and Goings)

Read first time 02/06/98.

AN ACT Relating to insurance payments for insureds who are victims of domestic abuse; and adding a new section to chapter 48.18 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** A new section is added to chapter 48.18 RCW to read as follows:

(1) No insurer shall deny or refuse to accept an application for insurance, refuse to insure, refuse to renew, cancel, restrict, or otherwise terminate a policy of insurance, or charge a different rate for the same coverage, on the basis that the applicant or insured person is, has been, or may be a victim of domestic abuse.

(2) Nothing in this section shall prevent an insurer from taking any of the actions set forth in subsection (1) of this section on the basis of loss history or medical condition or for any other reason not otherwise prohibited by this section, any other law, regulation, or rule.

(3) Any form filed or filed after the effective date of this section subject to RCW 48.18.120(1) or subject to a rule adopted under RCW 48.18.120(1) may exclude coverage for losses caused by intentional or fraudulent acts of any insured. Such an exclusion, however, shall

not apply to deny an insured's otherwise-covered property loss if the property loss is caused by an act of domestic abuse by another insured under the policy, the insured claiming property loss files a police report and cooperates with any law enforcement investigation relating to the act of domestic abuse, and the insured claiming property loss did not cooperate in or contribute to the creation of the property loss. Payment by the insurer to an insured may be limited to the person's insurable interest in the property less payments made to a mortgagee or other party with a legal secured interest in the property. An insurer making payment to an insured under this section has all rights of subrogation to recover against the perpetrator of the act that caused the loss.

(4) Nothing in this section prohibits an insurer from investigating a claim and complying with chapter 48.30A RCW.

(5) As used in this section, "domestic abuse" means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members; (b) sexual assault of one family or household member by another; (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member; or (d) intentionally, knowingly, or recklessly causing damage to property so as to intimidate or attempt to control the behavior of another family or household member.

Passed the Senate March 9, 1998.
Passed the House March 4, 1998.
Approved by the Governor April 2, 1998.
Filed in Office of Secretary of State April 2, 1998.

REED MCCLURE

November 25, 2024 - 1:22 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	85466-6
Appellate Court Case Title:	Brenda Welch, Appellant v. Pemco Mutual Insurance Company, Respondent
Superior Court Case Number:	19-2-03791-0

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