No. 97652-0

SUPREME COURT
OF THE STATE OF WASHINGTON

TODD MCLAUGHLIN, A WASHINGTON RESIDENT,

Appellant,

v.

TRAVELERS COMMERCIAL INSURANCE COMPANY, A FOREIGN CORPORATION,

Respondent.

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS

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I. INTRODUCTION

United Policyholders (UP) submits this brief as *amicus curiae*. The Court should reverse the Court of Appeals' decision for two reasons, each of which is critical to basic insurance protections affecting all consumers in Washington. First, Washington's Personal Injury Protection (PIP) statute establishes a statutory minimum coverage, which this court has declared the public policy of this state, and which mandates coverage for McLaughlin—and does so regardless of his status as a "pedestrian." The Court of Appeals claimed that it needed to "harmonize" related statutes in order to justify its conclusion of non-coverage, but it ignored the statute that expressly regulates the coverage at issue, as well as every decision of this Court enforcing that statute. *McLaughlin v. Travelers Commercial Ins. Co.*, 9 Wn. App. 2d 675, 681, 446 P.3d 654 (2019), *review granted*, 194 Wn.2d 1016 (2020).

Second, the Court of Appeals relied on a single dictionary definition to narrow an insurance coverage grant. This is a departure from fundamental law and will undermine insurance protection in Washington across all lines of coverage.

The Court of Appeals' failure to enforce the public policy and minimum coverage requirements of the PIP statute substantially weakens

insurance protections for Washington consumers. Travelers' efforts to defend the Court of Appeals' opinion are pernicious. In the courts below, Travelers relied exclusively on Washington law, and the Court of Appeals issued an opinion on Washington law, which adversely affects Washington policyholders. Travelers in its Supplemental Brief argues for the first time that because McLaughlin's policy was issued in California, Washington law does not govern it. This is all the more reason why the Court of Appeals' opinion—which undermines fundamental protections of Washington insurance law—must be reversed in its entirety.

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

Founded in 1991, UP is a non-profit organization that serves as a voice and information resource for insurance consumers in all 50 states. UP is a tax-exempt § 501(c)(3) entity sustained by individual and corporate donations and grants from foundations. Volunteers across the country donate thousands of hours each year to support the organization's work. Through its *Roadmap to Recovery*™ program, UP promotes insurance and financial literacy, and helps individuals navigate the insurance claim process and recover fair and timely settlements. For example, in 2014, UP provided claim assistance to many victims of the Carlton Complex Fire in Pateros, Washington. Additionally, through its *Advocacy and Action* program, UP solves claims and related coverage

problems by working with public officials, other non-profit and faith-based organizations, and a diverse range of other entities, including insurers and producers.

III. STATEMENT OF THE CASE

UP adopts the statement of Petitioner Todd McLaughlin.

IV. ARGUMENT

A. The PIP statute establishes mandatory minimum coverage which covered McLaughlin.

McLaughlin was the named insured on his Travelers' insurance policy. CP 17. Washington's PIP statute mandates coverage for the medical expenses of the named insured arising out of an automobile accident *regardless* of the named insured's status. This court has explained that the statute is mandatory and is the public policy of Washington. *Durant v. State Farm Mut. Auto. Ins. Co.*, 191 Wn.2d 1, 14, 419 P.3d 400 (2018).

1. The PIP statute establishes minimum coverage requirements as a matter of public policy.

In Washington, "UIM and PIP insurance are both creatures of public policy: coverages that every insurer writing automobile policies within the state must, by law, offer their insureds." *Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 620, 160 P.3d 31 (2007). As a result, Washington's "jurisprudence in this field is based largely on public policy." *Id.* Travelers

has sought to argue that the PIP statute is not really mandatory—as the UIM statute certainly is—but this court's decisions show otherwise.

In *Durant*, this court considered whether a PIP insurer could limit coverage to only medical services "essential in achieving maximum medical improvement," despite WAC 284-30-395(1), which restricted insurers to limiting PIP benefits in cases where services were not reasonable, necessary, related to the accident, or incurred within three years. 191 Wn.2d at 5, 8–9. Holding that the limitation violated Washington law, this court explained that the PIP statute establishes minimum required coverage as a matter of public policy: "Washington statutes mandate that insurers writing automobile insurance offer PIP coverage, which includes coverage for payment of '*all* reasonable and necessary expenses incurred ... for injuries sustained as a result of an automobile accident.'" *Id*. at 14 (quoting RCW 48.22.005(7)) (italics in original). The statutes "reflect Washington's strong public policy in favor of the full compensation of medical benefits for victims of road accidents." *Durant*, 191 Wn.2d at 14.

Durant's analysis of the PIP statute corresponds with decades of Washington jurisprudence holding that the UIM statute establishes minimum required coverage and that insurance policies are void to the extent they purport to eliminate required coverage. *Kyrkos v. State Farm*

Mut. Auto. Ins. Co., 121 Wn.2d 669, 673, 852 P.2d 1078 (1993) ("When language in the policy explicitly conflicts with the statute, the offending language is stricken."). The UIM statute was enacted in 1967, *see* Laws of 1967, ch. 150 § 27, and was held to establish minimum required coverage as early as 1972, *Touchette v. Nw. Mut. Ins. Co.*, 80 Wn.2d 327, 333, 494 P.2d 479 (1972) ("The statute does not contemplate a piecemeal whittling away of liability for injuries caused by uninsured motorists.").

It is presumed that when the legislature added a PIP requirement to chapter 48.22 RCW in 1993, it expected the same treatment of the PIP statute that this court had long given to the UIM statute. *State v. Ervin*, 169 Wn.2d 815, 825, 239 P.3d 354 (2010) ("We presume the legislature is familiar with judicial interpretations of statutes and, absent an indication it intended to overrule a particular interpretation, amendments are presumed to be consistent with previous judicial decisions.") (quotation omitted).[1] Accordingly, as *Durant* held, the PIP statute sets forth minimum required coverage that is mandatory under Washington law.

[1] This court has reiterated the public policy favoring compensation of innocent automobile accident victims many times. *Sherry*, 160 Wn.2d at 620; *Brown v. Snohomish Cty. Physicians Corp.*, 120 Wn.2d 747, 756, 845 P.2d 334 (1993) (declaring void exclusion which would have undermined minimum required UIM coverage); *Thiringer v. Am. Motors Ins. Co.*, 91 Wn.2d 215, 219, 588 P.2d 191 (1978) (PIP carrier may recover in subrogation only after the PIP insured has been fully compensated).

2. McLaughlin's medical expenses were covered under the statutory minimum requirements.

The "minimum" PIP coverage required by the statute must include "[m]edical and hospital benefits." RCW 48.22.095(1)(a). These benefits are required to cover "all reasonable and necessary expenses incurred by or on behalf of *the insured* for injuries sustained as a result of an automobile accident." RCW 48.22.005(7) (emphasis added).

These benefits must be provided to an "insured." The statute defines "insured" as follows:

> (5) "Insured" means:
>
> (a) The *named insured* or a person who is a resident of the named insured's household and is either related to the named insured by blood, marriage, or adoption, or is the named insured's ward, foster child, or stepchild; *or*
>
> (b) A person who sustains bodily injury caused by accident while: (i) Occupying or using the insured automobile with the permission of the named insured; or (ii) a pedestrian accidentally struck by the insured automobile.

RCW 48.22.005(5) (emphases added). Thus, under the PIP statute, the "named insured" is always an "insured," regardless of that person's status on the roadway as a pedestrian, motorist, or otherwise.

McLaughlin is the named insured on the Travelers policy. CP 17. As a result, he is covered under the PIP statute. By failing to cover medical expense "incurred by … the insured for injuries sustained as a

result of an automobile accident," the Travelers policy illegally fails to provide minimum PIP benefits.

This ends the analysis in a finding of coverage. But even if Travelers' construction of the policy did not explicitly violate the PIP statute, it still would violate the broader public policy of the PIP statute and the policy of full compensation of accident victims. Even where exclusionary language does not explicitly violate the relevant statute, it is nevertheless void if it violates the statute's "declared public policy." *Kyrkos*, 121 Wn.2d at 674. Starting with UIM cases, this court has explained the declared public policy of the statutory scheme consistently over nearly the last 50 years:

> [The uninsured motorist statute] is but one of many regulatory measures designed to protect the public from the ravages of the negligent and reckless driver.... The statute is both a public safety and a financial security measure. Recognizing the inevitable drain upon the public treasury through accidents caused by insolvent motor vehicle drivers who will not or cannot provide financial recompense for those whom they have negligently injured, and contemplating the correlated financial distress following in the wake of automobile accidents and the financial loss suffered personally by the people of this state, the legislature for many sound reasons and in the exercise of the police power took this action to increase and broaden generally the public's protection against automobile accidents.

Id. at 675 (quoting *Mut. of Enumclaw Ins. Co. v. Wiscomb*, 97 Wn.2d 203, 208, 643 P.2d 441 (1982) (quoting *Touchette*, 80 Wn.2d at 332)) (italics

omitted). "The no-fault insurance system and personal injury protection (PIP) benefits are intended to provide victims of motor vehicle accidents adequate and prompt reparation for certain economic losses at the lowest cost to both the individual and the no-fault insurance system." *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 62, 322 P.3d 6 (2014) (quoting 12 *Couch on Insurance* 3d § 171:45, at 171–46 (2006)).

The Court of Appeals ignored *entirely* the PIP statute and the cases enforcing it. It did so despite McLaughlin's reliance on that statute's definition of "pedestrian" as "a natural person not occupying a motor vehicle." RCW 48.22.005(11). As shown above, however, McLaughlin is entitled to PIP benefits under the statute because he is the named insured, without further analysis of his status.

3. Travelers fails to overcome the requirements of the PIP statute.

Recognizing that McLaughlin's medical bills fall squarely within the mandatory minimum coverage of Washington's PIP statute, in opposing review in this court Travelers made a series of arguments to the effect the PIP coverage is not really mandatory.

First, Travelers argued that PIP was a creature of contract, rather than of statute, citing *Schab v. State Farm Mut. Auto. Ins. Co.*, 41 Wn. App. 418, 422, 704 P.2d 621 (1985) and *Rodenbough v. Grange Ins.*

Ass'n, 33 Wn. App. 137, 139, 652 P.2d 22 (1982). While that was true in the 1980s, in 1993 the legislature did mandate PIP and set minimum requirements for what PIP must cover. Laws of 1993, ch. 242.

Second, Travelers cited *Tyrrell v. Farmers Ins. Co. of Washington*, 140 Wn.2d 129, 131, 994 P.2d 833 (2000), and *Ramm v. Farmers Ins. Co. of Washington*, 200 Wn. App. 1, 5, 401 P.3d 325 (2017), which held that insureds hurt while falling out of parked vehicles were not entitled to PIP because they were not injured in motor vehicle accidents. Travelers says this means the PIP statute is not mandatory. But the PIP statute mandates benefits only when injuries are sustained "as a result of an automobile accident," RCW 48.22.005(7), so there was no issue in *Tyrrell* and *Ramm* about the statutory minimum coverage.

Last, Travelers pointed to a series of permissible PIP limitations set out in RCW 48.22.090, for cases of intentional injury, drag racing, war, nuclear attack, and others. *See* RCW 48.22.090(1)–(7).

Travelers' arguments do nothing to alter the requirement that PIP must cover injuries a named insured sustains in an automobile accident under the "minimum personal injury protection coverage." RCW 48.22.095(1)(a). This is because 1980s case law pre-dating the PIP statute is irrelevant, there is no dispute McLaughlin was injured in an automobile accident, and there is no dispute McLaughlin's injuries were

not caused by any of the permissible PIP exclusions for intentional injury, drag racing, war, nuclear attack, and the like.

McLaughlin's medical expenses are covered under the statutory requirements, and Travelers makes no persuasive argument otherwise.

4. Travelers' untimely efforts to distance itself from Washington law are unavailing.

In the courts below, Travelers relied exclusively on Washington law. Travelers asked the Court of Appeals to apply Washington law. The Court of Appeals rendered a Washington-law opinion that inexplicably ignores controlling statutes and re-writes the fundamental rules of insurance policy interpretation. Washington policyholders are the consumers who are affected by the Court of Appeals' problematic and restrictive opinion. The Court of Appeals' opinion sows great confusion by using provisions of the Motor Vehicle Code, Title 46 RCW, to interpret *and limit* the insurance requirements of chapter 48.22 RCW. Allowing insurers to cherry-pick restrictive definitions from throughout the Revised Code of Washington to undermine the requirements of chapter 48.22 RCW, would result in the very "piecemeal whittling away" of the insurance requirements that this court rejected more than 40 years ago. *Touchette*, 80 Wn.2d at 333.[2]

[2] The Court of Appeals' resort to collateral statutes to *narrow* mandated insurance coverage is wrong as a matter of statutory interpretation. Statutes that serve different

Again recognizing that McLaughlin's medical bills fall squarely within the mandatory minimum coverage of Washington's PIP statute, Travelers for the first time in its Supplemental Brief asks the court *not* to apply Washington law, arguing, "the policy before the Court is not a Washington PIP policy and it is not governed by RCW 48.22." Travelers' Supp. Br. at 12. This directly contradicts Travelers' insistence in the courts below that they should apply Washington law, and its contention in the Court of Appeals that "MedPay" in the California form at issue is referred to as "PIP coverage" in Washington. Br. of Resp't at 4.

Under choice-of-law principles, "there must be an actual conflict between the laws or interests of Washington and the laws or interests of another state before Washington courts will engage in a conflict of laws analysis." *Seizer v. Sessions*, 132 Wn.2d 642, 648, 940 P.2d 261 (1997). If there is not a conflict in the laws of the concerned states, "the presumptive local law is applied." *Id*. In the trial court, both McLaughlin, CP 86, and Travelers, CP 221, argued that there was no conflict and relied on Washington law.

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purposes do not conflict and are not appropriately harmonized. *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 842, 215 P.3d 166 (2009). Nothing suggests that the legislature's definition of "pedestrian" in the motor vehicle code is intended to narrow the mandatory insurance protection of the PIP statute, yet that is what the Court of Appeals did. By adopting a narrower definition of the term "pedestrian" for the PIP statute, the Court of Appeals undermined the legislature's right to determine that "pedestrian" would include a bicyclist in some contexts but not in others.

As a result, Washington law applies and the minimum required coverage of the PIP statute controls. There is nothing unfair about this: if Travelers had insured McLaughlin in Washington all along, it would have been required to provide the minimum required coverage in Washington's PIP statute. In contrast, as a result of the Court of Appeals' opinion construing Washington PIP law, Washington policyholders are now subject to denial of their PIP claims if injured while bicycling, despite the protection they are supposed to enjoy from their own legislature's provision for minimum PIP coverage.[3] This Court should apply Washington law and uphold the minimum coverage required by chapter 48.22 RCW.

[3] No party asked the trial court to engage in a choice-of-law analysis, but even so this is not a situation where a California citizen had a transient accident in Washington. The uncontroverted evidence is that McLaughlin had moved to Washington with intent to permanently reside here. CP 199. Even before asking the court to apply Washington law, Travelers addressed its claim denial to McLaughlin in Washington and relied on Washington law in its coverage analysis. CP 64. The injury occurred in Washington to a Washington citizen. CP 198. Washington, its public institutions, and its healthcare providers would bear the consequences of diminished financial resources to cover McLaughlin's injuries. Accordingly, Washington's public policy regarding compensation of innocent accident victims is controlling. Under general principles of conflicts of laws, a forum will not apply foreign law that conflicts with its own "fundamental public policy." *McKee v. AT & T Corp.*, 164 Wn.2d 372, 384, 191 P.3d 845 (2008).

B. The Court of Appeals departed from—and weakened—fundamental Washington law on the interpretation of insurance policies.

McLaughlin's policy covered medical expenses sustained by an "insured," and defined "insured" in relevant part as "a pedestrian when struck by" a motor vehicle. *McLaughlin*, 446 P.3d at 655. Because the policy did not define the term "pedestrian," the Court of Appeals viewed the coverage question as turning on whether the term "pedestrian" embraced McLaughlin while he was riding a bicycle. But the Court of Appeals used a fundamentally flawed analysis of the undefined term: the court looked to a single dictionary definition which was unfavorable to McLaughlin and concluded he lacked coverage. *Id*. at 656. This has never been Washington law.

1. The interpretation of an insurance policy requires consideration of the policy language, alternate reasonable constructions of the language, and public policy.

This court has stated that to determine the meaning of undefined terms, a court *may* look to standard English language dictionaries. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990). In *Boeing*, the court reviewed three dictionary definitions of the term "damages"—among a host of other authorities—in determining that insurers covering liability for "damages" could not, based on a narrow interpretation of that term, exclude coverage for liability for pollution

clean-up costs. *Id*. But the court has always emphasized that turning to dictionaries is permissive, and only one component of the broader task of interpreting an insurance policy. The meaning of an undefined term "*may* be ascertained by reference to standard English dictionaries." *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 77, 882 P.2d 703 (1994) (emphasis added). It has never been Washington law that a single adverse dictionary definition defeats coverage.

The interpretation of an undefined term in an insurance policy is a much broader task than merely looking up the word in one dictionary. Insurance contracts are broadly construed to provide coverage when possible. This principle is expressed in numerous Washington decisions setting forth the interpretive guidelines for insurance policies. *E.g. Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300 (2012) ("Because [e]xclusions from insurance coverage are contrary to the fundamental protective purpose of insurance, we construe exclusions strictly against the insurer.") (quotation omitted); *Boeing*, 113 Wn.2d at 887 (The "industry knows how to protect itself and it knows how to write exclusions and conditions."); *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 694, 186 P.3d 1188 (2008) ("The courts liberally construe insurance policies to provide coverage wherever possible."). Insurance policies are construed in favor of coverage when possible

because: "the purpose of insurance is to insure." *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983).

Critically, a term in an insurance contract may be subject to multiple, reasonable definitions drawn from many different sources. In *Holden v. Farmers Ins. Co. of Wash.*, this Court found that an undefined term was subject to more than one reasonable definition because the insurer had *applied* it differently in different claims. 169 Wn.2d 750, 756–57, 239 P.3d 344 (2010) (in some contexts, "fair market value" was determined by calculating the cost to replace the damaged property and subtracting depreciation, and, when this method was used, the insurer "sometimes calculate[d] replacement cost to include sales tax."). Likewise, this court has found that undefined terms are subject to different interpretations by looking to Washington statutes. In *N. Pac. Ins. Co. v. Christensen*, 143 Wn.2d 43, 50 n.5, 17 P.3d 596 (2001), this court looked to a *statutory* definition of the undefined term "operator"—among other sources—in concluding that a passenger who grabbed the steering wheel could be an "operator" of a motor vehicle for UIM coverage.

That fact that a term may reasonably be defined in more than one way implicates the principle that ambiguities in an insurance policy must be construed in favor of coverage. In *Holden*, where the term "fair market value" was "at least ambiguous" on whether it would include sales tax as

part of the loss settlement, this court concluded the "[policyholder's] reasonable interpretation of the policy must be accepted." 169 Wn.2d at 760. Similarly, in *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 410–11, 229 P.3d 693 (2010), this court construed a policy in favor of coverage where out-of-state case law showed that there was a reasonable construction of the policy favoring coverage.

Finally, in interpreting insurance policies, Washington courts also look to the state's declared public policy. Thus, in *Christensen*, the court noted that its broad interpretation of an undefined term was "also consistent with public policy: 'RCW 48.22.030 [the UIM statute] is to be liberally construed in order to provide broad protection against financially irresponsible motorists.'" 143 Wn.2d at 50 n.5 (quoting *Finney v. Farmers Ins. Co.*, 92 Wn.2d 748, 751, 600 P.2d 1272 (1979)).

2. Consideration of all the relevant interpretive guides leads to the conclusion that McLaughlin has coverage.

The Court of Appeals fundamentally misperceived its task when it relied on a single dictionary definition to narrow the policy and deprive McLaughlin of coverage. The Court of Appeals was faced with the combination of: at least three definitions of the term "pedestrian" drawn from the Insurance Code, the Motor Vehicle Code, and a dictionary; decisions from other states finding that "pedestrian" can include a

bicyclist; and a coverage governed by statute setting forth minimum coverages as a matter of public policy. This did not call for the Court of Appeals to "harmonize" these in a manner adverse to coverage. To the contrary, given the mandate to find coverage "whenever possible," *Bordeaux*, 145 Wn. App. at 694, a statutory definition favorable to coverage, *Christensen*, 143 Wn.2d at 50 n.5, multiple reasonable definitions supporting coverage, *Holden*, 169 Wn.2d at 760, out-of-state decisions supporting coverage, *Alea London*, 168 Wn.2d at 411, and a statutory mandate establishing Washington's public policy supporting coverage, *Christensen*, 143 Wn.2d at 50 n.5, interpreting the term "pedestrian" to include a bicyclist and find coverage was required by fundamental Washington law.

V. CONCLUSION

UP respectfully asks the Court to uphold Washington's minimum coverage requirements for PIP coverage set forth in chapter 48.22 RCW and to uphold Washington's principles of policy interpretation in favor of coverage when possible. Retreating from either the PIP statute or this court's longstanding principles of policy interpretation would substantially and seriously undermine insurance protections for Washington policyholders.

RESPECTFULLY SUBMITTED this 10th day of April, 2020.

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CERTIFICATE OF SERVICE

I, Megan Johnston, certify that on the date below, I caused a copy of the foregoing document to be served via the Supreme Court File Upload Manager, on the individuals identified below:

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SIGNED this 9th day of April, 2020, at Seattle, Washington.

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