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 IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

United Policyholders (UP) submits this brief as *amicus curiae* in support of Todd McLaughlin's Petition for Review. The Court should review and reverse the Court of Appeals' decision for two reasons, each of which is critical to basic insurance protections affecting all consumers in Washington. First, the Court of Appeals ignored Washington's Personal Injury Protection (PIP) statute, which establishes a statutory minimum coverage, which this Court has declared the public policy of this state, and which mandates coverage for McLaughlin here—and does so regardless of his status as a "pedestrian." Bizarrely, 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.*, 446 P.3d 654, 657 (Wash. Ct. App. 2019).

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

the insurance protections for Washington consumers. It conflicts with this Court's decisions and justifies review under RAP 13.4(b)(1) and (4).

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 WHY REVIEW SHOULD BE GRANTED

A. The Court of Appeals failed to enforce the public policy and minimum coverage requirements of the PIP statute.

McLaughlin was the named insured on his insurance policy. Washington's PIP statute mandates coverage for medical expenses of the named insured arising out of an automobile accident *regardless* of the named insured's status. By ignoring the PIP statute, the Court of Appeals failed to enforce this statute and the public policy it effectuates.

Travelers acknowledges that the no-fault coverage referred to as "MedPay" in the California form at issue is referred to as "PIP coverage" in Washington. Br. of Resp't at 4. Although Travelers now seeks to distance itself from Washington law, both Travelers' Court of Appeals briefing and more important the Court of Appeals opinion rely exclusively on Washington law. As a result, the Court of Appeals opinion has erroneously eliminated coverage that was previously required, both for McLaughlin and for *all* Washington automobile policyholders.

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.*

Washington holds that insurance policy language is void to the extent it would eliminate UIM and PIP coverage required by statute. *Durant v. State Farm Mut. Auto. Ins. Co.*, 191 Wn.2d 1, 14, 419 P.3d 400 (2018) (declaring illegal restrictions on PIP coverage inconsistent with regulatory requirements); *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 and PIP statutes and the courts' interpretation of them reflect Washington's "public policy favoring full compensation of innocent automobile accident victims." *Brown v. Snohomish Cty. Physicians Corp.*, 120 Wn.2d 747, 756, 845 P.2d 334 (1993). Under this policy, a PIP carrier may recover in subrogation only "after the insured is fully compensated for his loss." *Thiringer v. Am. Motors Ins. Co.*, 91 Wn.2d 215, 219, 588 P.2d 191 (1978). This principle is not limited to subrogation, but is further embodied in the UIM statute, *Brown*, 120 Wn.2d at 756, and in the PIP statute, *Sherry*, 160 Wn.2d at 620.

The "minimum" PIP coverage is required to include "[m]edical and hospital benefits." RCW 48.22.095(1)(a). These benefits are required to cover, in turn, "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 are

required to be provided to an "insured." The statute defines the term "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) (emphasis added). The "named insured" on the policy 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 is enough to end 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 if exclusionary language does not explicitly violate the relevant statute, it is

still void if it violates the statute's "declared public policy." *Kyrkos*, 121 Wn.2d at 674. 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.

Kyrkos, 121 Wn.2d at 675 (quoting *Mut. of Enumclaw Ins. Co. v. Wiscomb*, 97 Wn.2d 203, 208, 643 P.2d 441 (1982) (quoting *Touchette v. Northwestern Mut. Ins. Co.*, 80 Wn.2d 327, 332, 494 P.2d 479 (1972))) (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.

Ignoring the mandate of the PIP statute, the Court of Appeals sows great confusion in Washington law by re-writing the statutory definition of "pedestrian" in RCW 48.22.005. Because this definition incorporates a definition of "motor vehicle" from Title 46, the Court of Appeals elected to "harmonize" the PIP statute and Title 46 by equating two different definitions of "pedestrian" in a manner that narrows the available insurance coverage.

As shown below, this is wrong as a matter of insurance law. It is also wrong as a matter of statutory interpretation. As McLaughlin points out, statutes that serve different 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 of the Court of Appeals' opinion, the PIP statute now apparently no longer includes a bicyclist within the definition of "insured" for PIP purposes when "struck by the insured automobile." RCW 48.22.005(5)(b)(ii). This unwarranted narrowing of the statutory PIP coverage is all the more troubling given that McLaughlin is independently covered as the "named insured" under RCW 48.22.005(b)(i).

The Court of Appeals has undermined and narrowed the statutory PIP coverage *without discussion* of the statute and the many decisions of this Court adopting it as the state's public policy. This warrants review in and of itself.

Travelers fails to offer any justification for the Court of Appeals' complete disregard of the fundamental PIP jurisprudence in this state. Instead, it retreats to the suggestion that this Court should ignore the Court of Appeals' oversight because McLaughlin's policy was originally a California policy. But this in no way justifies the Court of Appeals' unsupportable analysis and application of *Washington* law. The Court of Appeals portrayed its holding as a Washington PIP holding, and unless reviewed by this Court, it will continue as a Washington PIP holding.

Travelers' contention also belies the fact that Travelers itself chose to argue Washington law. 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.

As a result, Washington law applies and the glaring defects in the Court of Appeals' analysis of Washington law should be reviewed and corrected. Now that Travelers has argued, and the Court of Appeals has construed, Washington law, it is Washington insurance consumers who will face the consequences of the Court of Appeals' analysis. Because the Court of Appeals failed to apply the PIP statute and this Court's decisions, review should be granted.[1]

[1] 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

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. As discussed in part IV.A. above, the Court of Appeals erred, because McLaughlin's medical expenses fell within the statutory minimum coverage required by Washington's PIP statute. Nevertheless, the Court of Appeals compounded its error by 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 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

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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).

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 Court of Appeals overlooked that 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: "The courts liberally construe insurance policies to provide coverage wherever possible." *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 694, 186 P.3d 1188 (2008).

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 triggering uninsured motorist (UIM) 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.'" *Id*. at 50 n.5 (quoting *Finney v. Farmers Ins. Co.*, 92 Wn.2d 748, 751, 600 P.2d 1272 (1979)). The Court of Appeals erred by disregarding Washington's public policy entirely. Indeed, through a tortured re-write of a statutory definition of "pedestrian," the Court of

Appeals side-stepped the very public policy referenced in *Christensen*, *Finney*, and this Court's decisions in *Durant* and *Kyrkos* cited above.

V. CONCLUSION

This Court should review the Court of Appeals opinion because it substantially narrows the rights of Washington insurance consumers in ways inconsistent with this Court's decisions and the state's declared public policy.

RESPECTFULLY SUBMITTED this 17th day of February, 2020.

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By _____
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CERTIFICATE OF SERVICE

I, _____, declare under penalty of perjury under the laws of the State of Washington that at all times hereinafter mentioned, I am a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date below, I caused a copy of the foregoing document to be served on the individuals identified below via email and ABC Legal Messenger:

4811-2683-6101, v. 1