IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JENNIFER HELGESON and ANDREW HELGESON, Appellants, v. VIKING INSURANCE COMPANY OF WISCONSIN a foreign corporation, d/b/a/ SENTRY INSURANCE, d/b/a DAIRYLAND INSURANCE, Respondent.	No. 41371-0-II UNPUBLISHED OPINION

Van Deren, J. — Jennifer Helgeson and her son, Andrew Helgeson,[1] appeal the trial court's order granting Viking Insurance Company of Wisconsin's summary judgment motion and dismissing their claims against Viking in a dispute over whether Jennifer's underinsured motorist insurance (UIM)[2] covered injuries sustained by Andrew when he was hit by an underinsured motor vehicle while he was skateboarding. The Helgesons argue that Jennifer's policy covered

[1] Because Jennifer Helgeson and Andrew Helgeson share the same last name, we refer to them by their first names to avoid confusion. We refer to them collectively as the Helgesons.

[2] We note that "UIM is an acronym for either uninsured or underinsured motorist coverage." *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 306 n.1, 88 P.3d 395 (2004). An "[u]nderinsured motor vehicle" is defined in part as "a motor vehicle with . . . either no bodily injury or property damage liability bond [in effect] at the time of an accident." RCW 48.22.030(1).

Andrew's injury because (1) Viking's broad form "named" driver endorsement excludes mandatory UIM coverage and, thus, violates RCW 48.22.005; (2) public policy prohibits Viking's denial of UIM coverage to a named insured's minor child; (3) public policy prohibits family member exclusions in insurance contracts; and (4) Viking's conduct violated the Insurance Fair Conduct Act, RCW 48.30.010-.015. We affirm the trial court's summary judgment order because Andrew was not insured under Jennifer's insurance policy and Viking's insurance policy does not violate public policy.

FACTS

On October 5, 2008, Jennifer Helgeson renewed her personal automobile insurance coverage through Viking for the period of October 5, 2008, to April 5, 2009. Jennifer's policy provided definitions for terms used throughout the policy. CP at 36. It stated:

> "You" and "your" mean the person shown as the named insured on the Declarations Page and that person's spouse if residing in the same household. You and your also means any relative of that person if they reside in the same household, providing they or their spouse do not own a car.

Clerk's Papers (CP) at 36. "Relative" was defined as "a person living in your household related to you by blood, marriage, or adoption, including a ward or foster child." CP at 36.

The broad form "named" driver endorsement in Jennifer's automobile policy replaced the policy's general definition of "you" and "your," stating, "'You' and 'your' mean the person shown as the named insured on the Declarations Page." CP at 47. Jennifer was the only named insured on the declarations page. The endorsement also amended the policy's liability coverage to state:

> We will pay damages for which you are legally liable because of bodily injury and/or property damage caused by a car accident arising out of your use of your insured car. We will settle any claims or defend any lawsuit which is payable under

the policy, as we deem appropriate.

CP at 47.

The endorsement further stated that the policy provided the named insured medical payment coverage while "occupying your insured car," "as a pedestrian when struck by a motor vehicle or utility trailer," or "any other person while occupying your insured car while the car is being used by you." CP at 47. The endorsement's UIM portion included coverage for

> (A) You.
> (B) Any other person occupying your insured car with your permission.
> (C) Any person for damages that person is entitled to recover because of bodily injury to you or another occupant of your car.[3]

CP at 47.

On February 3, 2009, a motor vehicle struck Andrew while he was skateboarding in Kingston, Washington.[4] Andrew was transferred by ambulance to a hospital and he was treated for fractures of his right leg. Andrew and the driver's insurer settled all claims Andrew had against the driver for $50,000, the driver's policy's claim limit. When Jennifer applied for UIM coverage under her insurance policy for the remainder of Andrew's damages, Viking "disclaim[ed] and deni[ed] any and all liability or obligation" to provide UIM coverage to Andrew. CP at 81. Viking stated that "the policy of insurance covers only 'you' [Jennifer], as the named insured. Andrew . . . does not meet the definition of 'you' under your policy and,

[3] Although Viking's records indicate that Jennifer signed a UIM waiver form and she did not pay a separate premium for UIM coverage, Viking has been unable to locate the waiver. Thus, for purposes of its summary judgment motion and Jennifer's appeal, Viking concedes that Jennifer did not waive UIM coverage.

[4] The parties agree that a person on a skateboard is considered a pedestrian. *See generally Pudmaroff v. Allen*, 89 Wn. App. 928, 934, 951 P.2d 335 (1998), *aff'd*, 138 Wn.2d 55, 977 P.2d 574 (1999).

therefore, there is no coverage under the [UIM] Coverage." CP at 81.

Andrew and Jennifer sued Viking, asserting that Viking breached its contract and violated the Insurance Fair Conduct Act. On the same day that Andrew and Jennifer filed their complaint against Viking, Viking filed a complaint for declaratory judgment, asking the trial court to rule that Viking did "not have a duty to pay any benefits under the UIM coverage of [Jennifer's] [p]olicy." CP at 225. The two cases were consolidated.

Both parties filed summary judgment motions. The trial court granted Viking's summary judgment motion, declared that Andrew was not entitled to UIM benefits under Jennifer's policy with Viking, and dismissed with prejudice the Helgesons' claims. The Helgesons appeal.

ANALYSIS

I. Standards of Review

A. Summary Judgment

We review a summary judgment order de novo, engaging in the same inquiry as the trial court. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). Summary judgment is proper when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue about any material fact and, assuming facts most favorable to the nonmoving party, establish that the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

B. Interpreting Insurance Policies

"Interpretation of an insurance policy is a question of law, which we review de novo." *Hall v. State Farm Mut. Auto. Ins. Co.*, 133 Wn. App. 394, 399, 135 P.3d 941 (2006). Insurance policies are contracts, and rules of contract interpretation apply. *Hall*, 133 Wn. App. at 399.

> The criteria for interpreting insurance contracts in Washington are well settled. We construe insurance policies as contracts. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665, 15 P.3d 115 (2000). We consider the policy as a whole, and we give it a . . . "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." [*Weyerhaeuser*, 142 Wn.2d] at 666 . . . . Most importantly, if the policy language is clear and unambiguous, we must enforce it as written; we may not modify it or create ambiguity where none exists.
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> . . . Finally, in Washington the expectations of the insured cannot override the plain language of the contract. *See Findlay* [*v. United Pac. Ins. Co.*, 129 Wn.2d 368,] 378[, 917 P.2d 116 (1996)].

Quadrant, 154 Wn.2d at 171–172 (citation omitted) (internal quotation marks omitted).

II. Washington Casualty Insurance—Chapter 48.22 RCW

The Helgesons argue that RCW 48.22.005(5)'s definition of "insured"[5] is incorporated into the underinsured motor vehicle statute, RCW 48.22.030[6] and, thus, RCW 48.22.030 requires Andrew, as Jennifer's seventeen year old son, to be included as an insured person under Jennifer's insurance policy even if he is not a "named" insured. They argue that Viking must pay Andrew's underinsured motorist claim under Jennifer's policy. We disagree because parties to an insurance

[5] RCW 48.22.005(5) defines "[i]nsured" as:

> (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
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> (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.

[6] Washington's underinsured motor vehicle insurance statute, RCW 48.22.030(1), states:

> "Underinsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance, or use of which either no bodily injury or property damage liability bond or insurance policy applies at the time of an accident, or with respect to which the sum of the limits of liability under all bodily injury or property damage liability bonds and insurance policies applicable to a covered person after an accident is less than the applicable damages which the covered person is legally entitled to recover.

policy are free to determine who is insured by the policy.

The issue raised by the Helgesons has long been resolved by our Supreme Court. It held that RCW 48.22.030 "does not mandate any particular scope for the definition of who is an insured in a particular automobile insurance policy." *Farmers Ins. Co. of Wash. v. Miller*, 87 Wn.2d 70, 75, 549 P.2d 9 (1976). Furthermore, it explained that

> [t]he policy of RCW 48.22.030 requires that insurers make available uninsured motorist coverage to a class of "insureds" that is at least as broad as the class in the primary liability sections of the policy. It does not preclude the parties from reaching agreement as to the scope of that class in the first instance.

Touchette v. Nw. Mut. Ins. Co., 80 Wn.2d 327, 337, 494 P.2d 479 (1972).

Here, the insurance policy's endorsement stated, "'You' and 'your' mean the person shown as the named insured on the Declarations Page." CP at 47. Jennifer was the only person named on the declarations page. The parties to an insurance contract are free to delineate who is covered under the policy. *Miller*, 87 Wn.2d at 75. Additionally, the endorsement's UIM portion defined "insured person" as:

> (A) You.
> (B) Any other person occupying your insured car with your permission.
> (C) Any person for damages that person is entitled to recover because of bodily injury to you or another occupant of your car.

CP at 47. Andrew was not named on the declarations page, nor was he entitled to recovery under any of the policy's other provisions.

Because Andrew was not insured under Jennifer's policy for his injuries sustained when an underinsured motor vehicle injured him while he was skateboarding, we hold that the trial court did not err in finding that the Helgesons were "not entitled to underinsured motorist benefits under" Jennifer's policy with Viking. CP at 204.

III. Public Policy

A. UIM Coverage

The Helgesons also assert a public policy argument that "[t]he Endorsement [wa]s contrary to the public policy behind Washington State's UIM statu[t]e because the Endorsement forclose[d] Andrew's only source of UIM coverage."[7] Br. of Appellant at 14 (italics and boldface omitted). The Helgesons rely on *Tissell v. Liberty Mutual Insurance Co.*, 115 Wn.2d 107, 109, 795 P.2d 126 (1990) to support this argument. But the Helgesons misconstrue the reach of the *Tissell* decision, and its rule is inapplicable here because Andrew was not an insured under Jennifer's policy and he was not a purchaser of UIM insurance.

In *Tissell*, the court held "that certain victim exclusions in [UIM] policies are invalid as against public policy when asserted against the purchaser of a UIM policy." 115 Wn.2d at 108. Ada Tissell was seriously injured in a vehicle accident and died five years after the accident as a result of the injuries she sustained "when her husband accidentally drove the car off the road and into the Green River." *Tissell*, 115 Wn.2d at 109. Tissell was the named insured on the automobile policy providing $300,000 liability coverage and $300,000 UIM coverage. *Tissell*, 115 Wn.2d at 109. The UIM portion of her policy defined "covered person" as "the named insured or a family member" but excluded (1) any vehicle owned by "you or any family member unless the covered person was neither operating nor occupying such vehicle at the time of the accident" and (2) if liability coverage of the policy applied. *Tissell*, 115 Wn.2d at 109. Liberty Insurance paid Tissell the full amount due under the liability portion of the policy but denied UIM

[7] We note that Andrew did have access to other insurance coverage for his injuries since the motorist's insurer paid policy limits to Andrew.

coverage because her husband was operating the family vehicle at the time of the accident and because she recovered under the liability coverage of the policy. *Tissell*, 115 Wn.2d at 109-10. The *Tissell* court explained that, although an insurance company may exclude persons from their status as "insured," once an insurance company has decided to insure a driver, it cannot deny coverage based on the identity of a victim injured by its insured driver. 115 Wn.2d at 108.

Here, Andrew was not an insured under his mother's insurance policy under either the insurance policy's liability portion or under the UIM portion. *Tissell* does not suggest that public policy requires that Andrew be entitled to UIM coverage under his mother's policy because he does not have another source of UIM coverage. Here, Jennifer and Viking were free to determine who was covered under Jennifer's policy, Andrew was not included in that definition, and the circumstances of his vehicle/skateboard accident with an underinsured driver did not bring him under the UIM coverage of his mother's policy.

B. Family Member Exclusions

The Helgesons also contend that "[f]amily member exclusions in insurance contracts are invalid in Washington State because such exclusions contravene the public policy behind Washington State's statutory scheme of insurance legislation." Br. of Appellant at 19. To support their argument, the Helegsons rely on *Mutual of Enumclaw Insurance Co. v. Wiscomb*, 97 Wn.2d 203, 643 P.2d 441 (1982).

"Maura McGahan Wiscomb was seriously injured in a collision between the motorcycle she was operating and an automobile driven by her husband." *Wiscomb*, 97 Wn.2d at 204. The issue before the court was "to determine the validity and effect of family or household exclusion clauses in automobile insurance policies." *Wiscomb*, 97 Wn.2d at 205. The clause at issue

prevented "those persons related to and living with the negligent driver, from receiving financial protection under [the] insurance policy." *Wiscomb*, 97 Wn.2d at 208. The court held that the insurer who agrees to indemnify the insured against damages caused by the insured's negligence may not exclude "an entire class of innocent victims." *Wiscomb*, 97 Wn.2d at 208.

Wiscomb is inapplicable here and the Helgesons do not cite any other authority that supports the proposition that minors must always be insured under a parent's or guardian's policy.[8] Insurance policies, as contracts, allow the parties to define the scope of that class of insured, and we will not rewrite that contract. Viking's denial of UIM coverage for Andrew did not involve applying a policy exclusion but, rather, interpreting who was insured under the policy.

Furthermore, "'[e]xclusion clauses do not grant coverage; rather, they subtract from it.'" *Nat'l Union Fire Ins. Co. of Pittsburgh v. Nw. Youth Servs.*, 97 Wn. App. 226, 231, 983 P.2d 1144 (1999) (quoting *Harrison Plumbing & Heating, Inc. v. New Hampshire Ins. Grp.*, 37 Wn. App. 621, 627, 681 P.2d 875 (1984)). Here, Jennifer's policy covered only her as the insured under the liability portion and provided coverage for her in the UIM portion. Andrew was not insured under any portion of the policy nor did the policy state an exclusion applicable to him; thus, it did not have an exclusion clause that excluded "an entire class of innocent victims." *Wiscomb*, 97 Wn.2d at 208. Because Andrew was not an insured under the policy, it was not

[8] Moreover, in *Progressive Casualty Insurance Co. v. Jester*, 102 Wn.2d 78, 78-79, 683 P.2d 180 (1984), our Supreme Court narrowed the reach of its decision in *Wiscomb*:

> In . . . *Wiscomb* . . . , we reserved for another day the question of the validity of motor vehicle insurance policy exclusions consciously bargained for by the insurer and its insured. That day has arrived. We hold public policy is not violated by a motorcycle insurance policy provision which excludes liability coverage for claims made by passengers, when the insured intentionally rejected that coverage when offered.

against public policy to deny him UIM coverage. We hold that the trial court did not err in granting Viking's summary judgment motion.

IV. Insurance Fair Conduct Act, RCW 48.30.010-.015[9]

Finally, the Helgesons argue that Viking violated Washington's Insurance Fair Conduct Act "[b]y denying Andrew . . . insurance coverage based on an Endorsement that is both against statutory language and public policy." Br. of Appellant at 22-23. As discussed above, the endorsement was not contrary to statutory language or public policy and, thus, this argument is without merit. Andrew was not "unreasonably denied a claim for coverage or payment of benefits by an insurer" making RCW 48.30.015 inapplicable. RCW 48.30.015(1).

[9] RCW 48.30.015 states:

> (1) Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of this section.
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> (2) The superior court may, after finding that an insurer has acted unreasonably in denying a claim for coverage or payment of benefits or has violated a rule in subsection (5) of this section, increase the total award of damages to an amount not to exceed three times the actual damages.
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> (3) The superior court shall, after a finding of unreasonable denial of a claim for coverage or payment of benefits, or after a finding of a violation of a rule in subsection (5) of this section, award reasonable attorneys' fees and actual and statutory litigation costs, including expert witness fees, to the first party claimant of an insurance contract who is the prevailing party in such an action.

V. Attorney Fees

The Helgesons request attorney fees. Because they do not prevail, we deny their request.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

Johanson, J.