

SUPREME COURT OF WASHINGTON

Butzberger v. Foster

151 Wash. 2d 396 (2004) · Decided May 6, 2004

OPINION

SANDERS, J.

Sanders, J. While attempting to rescue Frank Foster, trapped inside his overturned pickup truck on Interstate 5, Jeffrey A. Butzberger was struck and killed by an underinsured motorist. Butzberger's estate brought suit *399 seeking to recover underinsured motorist (UIM) coverage from the insurer of Foster's vehicle and the insurer of the vehicle Butzberger had been driving.

The trial court granted summary judgment on several claims, ruling Butzberger was entitled to UIM benefits under the policy covering his vehicle but not under the policy covering Foster's vehicle. The Court of Appeals reversed, holding Butzberger was entitled to UIM benefits under the policy covering Foster's vehicle but not under the policy covering Butzberger's vehicle.

We hold Butzberger is entitled to UIM benefits under both policies. Accordingly we affirm in part and reverse in part. FACTS On an early morning in November 1995 Frank Foster was driving his pickup truck north on Interstate 5 when he lost control of the vehicle. His truck spun across the highway, struck a barrier, overturned, and came to rest on its side within the lanes of oncoming traffic.

Foster remained inside the truck, hanging by his seat belt. Allstate Insurance Company insured Foster's truck. Butzberger was also driving north on Interstate 5 that morning on his way to work. He was driving a vehicle owned by Cascade Distributing that T.H.E. Insurance Company insured. When Butzberger saw the overturned pickup he parked his car on the shoulder of the highway, behind another vehicle that had also pulled over, approximately 75 feet from Foster's pickup.

Butzberger ran to Foster's truck where he spoke with Foster for approximately 30 to 45 seconds.¹ While they were talking, Lawrence Phillips, also *400 driving northbound, slammed into the undercarriage of Foster's pickup. Butzberger was thrown by the force of the crash and died at the scene. Butzberger's estate sued Foster, Allstate, and T.H.E., claiming Butzberger was entitled to UIM coverage.² The Allstate policy insuring Foster's truck provides UIM coverage to "[a]ny person while in, on, getting into or out of an insured motor vehicle." Suppl.

Clerk's Papers (SCP) at 502. The policy also provides general liability coverage to "any other person using [the insured auto] with [the named insured's] permission." SCP at 489 (emphasis added). The T.H.E. insurance policy insuring Butzberger's vehicle provides UIM coverage for

anyone who is “occupying” the insured vehicle. SCP at 385. “Occupying” is defined as “in, upon, getting in, on, out or off.” SCP at 387.

In addition to UIM coverage the T.H.E. policy provides general liability coverage for anyone “using” the insured auto with the named insured’s permission. SCP at 367. Neither policy defines the term “using.” The trial court ruled on summary judgment that the T.H.E. policy provided UIM coverage for Butzberger and the Allstate policy did not.

As a result, the trial court awarded attorney fees against T.H.E. in favor of the estate. T.H.E. appealed and the estate cross-appealed. The Court of Appeals, Division One, reversed the trial court and ruled Butzberger was “using” Foster’s pickup truck and not the vehicle Butzberger had been driving. *Butzberger v. Foster*, 112 Wn. App. 81, 84, 47 P.3d 177 (2002).

Therefore, the court held Butzberger was entitled to UIM benefits from Allstate but not from T.H.E. *Id.* The court also awarded the estate attorney fees against Allstate. *Id.* *401 Allstate and the estate filed separate petitions for review, which this court granted.

The estate seeks UIM coverage for Butzberger from both Allstate and T.H.E., while Allstate seeks a reversal of the Court of Appeals ruling that Butzberger was entitled to UIM coverage from Allstate. **STANDARD OF REVIEW** When reviewing an order of summary judgment we engage in the same inquiry as the trial court. See CR 56(c). Our review is de novo. *Jones v. Allstate Ins.*

Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).

The interpretation of insurance policy language is a question of law, also reviewed de novo. See *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 682, 801 P.2d 207 (1990). The policy language is to be given the same “ ‘fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.’ ” *Overton v. Consol. Ins.*

Co., 145 Wn.2d 417, 424, 38 P.3d 322 (2002) (quoting *Sears v. Grange Ins. Ass’n*, 111 Wn.2d 636, 638, 762 P.2d 1141 (1988)). **ANALYSIS I** UIM coverage is mandated by statute as one of “many regulatory measures designed to protect the public from the ravages of the negligent and reckless driver.” *Touchette v. N.W. Mut. Ins. Co.*, 80 Wn.2d 327, 332, 494 P.2d 479 (1972); see RCW 48.22.030.

Even if the UIM endorsement of a particular policy does not contain the words “use” or “using,” those words are deemed contained in the endorsement “by force of [the UIM] statute and judicial construction.” *Rau v. Liberty Mut. Ins. Co.*, 21 Wn. App. 326, 331, 585 P.2d 157 (1978).

The statutory policy of *402 Washington’s UIM statute “ ‘vitiates any attempt to make the meaning of insured for purposes of uninsured motorist coverage narrower than the meaning of that

term under the primary liability section of the policy.’ ” Id. at 328-29 (quoting *Federated Am. Ins. Co. v. Raynes*, 88 Wn.2d 439, 443, 563 P.2d 815 (1977) and citing RCW 48.22.030).

Therefore, Butzberger, who is not a named insured on either policy at issue, is entitled to UIM coverage if he was using Foster’s truck at the time of his death and/or if he was using the vehicle he had been driving. Whether one was using a vehicle is so common an inquiry in the insurance industry that the Court of Appeals in *Rau* established a four-factor test: (1) there must be a causal relation or connection between the injury and the use of the insured vehicle; (2) the person asserting coverage must be in reasonably close geographic proximity to the insured vehicle, although the person need not be actually touching it; (3) the person must be vehicle oriented rather than highway or sidewalk oriented at the time; and (4) the person must also be engaged in a transaction essential to the use of the vehicle at the time.

Id. at 334 (citations omitted); see also *Roller*, 115 Wn.2d at 687; *Sears*, 111 Wn.2d at 639. In *Rau* a truck driver crossed four lanes of traffic on foot to ask for directions and as he was returning to his vehicle he was hit by an uninsured motorist. *Rau*, 21 Wn. App. at 327.

The accident occurred approximately 20 feet from his truck. Id. The court held he satisfied the four-factor test for use of his vehicle. Id. at 334. It reasoned, “Common sense tells us... that the parties contemplated the driver of a delivery truck on his route might well be expected to have to occasionally leave the truck briefly to ask directions.” Id. at 334.

This court adopted the *Rau* test in *Sears*. *Sears*, 111 Wn.2d at 639. There we held a guest passenger injured in an automobile accident was using the vehicle she was riding in for purposes of UIM coverage. Id. We stated that “ ‘use’ will not be interpreted to have a unique meaning. *403Rather, the general criteria for determining whether a person is using a vehicle and thus insured under a UIM endorsement will be followed.” Id. at 638.

We then applied the four factors of *Rau* but did so without analysis concluding, “[i]n the factual context of this case, we find all four criteria are met.” Id. at 639. Then in 1990 this court decided that a passenger was not using his vehicle after he exited, left the scene to call police, and returned to write down a license plate number.³ *Roller*, 115 Wn.2d at 689.

Once again we relied on the *Rau* test, but as the Court of Appeals in *Cherry v. Truck Insurance Exchange*, 77 Wn. App. 557, 566, 892 P.2d 768 (1995) recognized, we “did not explain causal connection, proximity, vehicle orientation, or [our] reasoning in applying [those] factors.” Thus although this court adopted the *Rau* test in *Sears* and followed that test in *Roller*, we have never critically examined the underlying meaning and purpose of each of the four factors.

We take the opportunity to do so here. Causal Relation or Connection. For the first factor, causal relation or connection, *Rau* looked to *Federated Mutual Implement & Hardware Insurance Co. v. Gupton*, 241 F. Supp. 509 (E.D.S.C. 1965), *aff’d*, 357 F.2d 155 (4th Cir. 1966). *Rau*, 21 Wn. App.

at 333. There a gasoline station employee used his employer's pickup truck to deliver a can of gasoline to a stalled vehicle.

Gupton, 241F. Supp. at 510. The employee parked the truck behind the stalled vehicle, removed the gasoline can, and began pouring the fuel into the vehicle's tank. Id. at 510. While the employee filled the gas tank the driver of the stalled vehicle started her car and unexpectedly backed into the employee, pinning him between the two vehicles. Id. at 511.

The court held the employee was using the truck for *404purposes of UIM coverage concluding, "[i]t is all too obvious that it was within the contemplation of the parties that the truck would be used as a service station truck and that operation of delivering gasoline on the highways was a necessary and incidental adjunct." Id. at 512.

The court reasoned, "[w]hether or not an injury arose from the 'use' of a motor vehicle within the contemplation of a liability policy or statute depends upon the factual context of each case. In this setting the term does not imply 'remoteness,' but does extend beyond actual physical contact." Id. at 511.

The cases Gupton relies on are helpful to discern the meaning and purpose of Raw's causal relation or connection factor. Gupton quoted with favor *Carter v. Bergeron*, 102 N.H. 464, 160 A.2d 348 (1960), in which the court stated there was no requirement " 'that the injury (be)... directly and proximately caused by the use of the (insured) vehicle, but only that it arose out of the use.' " Gupton, 241 F. Supp. at 512 (quoting *Carter*, 160 A.2d at 353).

Similarly the court quoted *Schmidt v. Utilities Insurance Co.*, 353 Mo. 213, 182 S.W.2d 181 (1944) where the court stated, "the negligent act and resulting injury [must be] a natural and reasonable incident or consequence of the use of the [insured vehicle] though not foreseen or expected; and... the negligent acts and resulting injury [must be] reasonably incident to, and closely connected with, the use of the [insured vehicle]." Id. 182 S.W.2d at 184, quoted in Gupton, 241 F. Supp. at 512.

It is clear from Gupton and the cases cited favorably therein that for an injury to be covered under a UIM endorsement there must be a sufficient causal relationship or connection between the injury and the use of the insured vehicle. Gupton, 241 F. Supp. at 511. Indeed it would defy common sense for an insured vehicle's UIM coverage to extend to an injury wholly unrelated to the use of the vehicle.

Nonetheless the requisite causal relation or connection does not require the use of the insured vehicle be a proximate cause of the injury. Id. at 511-13; see also *Transamerica Ins. Group v. United Pac. Ins. Co.*, 92 Wn.2d 21, 26, 593 P.2d 156 (1979) (concluding it is not necessary *405that the use be a proximate cause of the injury for there to be a causal connection), overruled

on other grounds by *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995); *Beckman v. Connolly*, 79 Wn.

App. 265, 274, 898 P.2d 357 (1995) (recognizing that “the ‘use’ need not be a ‘proximate’ cause of the occurrence or injury” to satisfy the causal connection requirement). In fact the insured vehicle cannot be the proximate cause of the injury as the UIM statute mandates the injury be caused by the uninsured vehicle before UIM coverage applies. RCW 48.22.030; see also *Cherry*, 77 Wn.

App. at 563 n.3. As such the causal relation or connection factor requires only that the use of the insured vehicle be a “but for” cause of the injury. See *Beckman*, 79 Wn. App. at 274. Geographic Proximity. Rau derived the second factor, reasonably close geographic proximity, from *Hartford Accident Indemnity Co. v. Booker*, 140 Ga. App. 3, 230 S.E.2d 70 (1976).

Rau, 21 Wn. App. at 332-33. There the court held a garbage truck driver was using the garbage truck when he was struck by an uninsured motorist while collecting garbage some 30 feet from the truck. *Booker*, 230 S.E.2d at 71.

The court reasoned that to define use of an insured vehicle, courts “must look to the contemplation of the parties in entering into the insurance contract.” *Id.* at 73. *Booker* noted geographic proximity as a factor in determining use but declared, “we are hesitant to delineate an arbitrary distance from a vehicle beyond which a person can no longer be ‘using’ it.” *Id.* at 72-73.

The court ultimately concluded: Common sense tells us that the parties certainly contemplated that the garbage truck would be loaded and unloaded and that the garbage to be loaded on said truck would be hauled to the truck by a garbage collection container and that, in many instances, it would be necessary for the driver to walk down the side of the road near his truck in order to collect the garbage.

Id. at 73. As *Gupton*, *Booker*, and *Rau* make clear, a person does not have to be in physical contact with an insured vehicle to *406be using the vehicle for purposes of UIM coverage. *Rau*, 21 Wn. App. 334-35; *Booker*, 230 S.E.2d at 73; *Gupton*, 241 F. Supp. at 511-12. Nevertheless there must be a rational limit to the distance beyond which an injury may occur to be covered under a vehicle’s UIM policy.

As such, requiring the injured person be within “reasonably close geographic proximity,” *Rau*, 21 Wn. App. at 334, to the insured vehicle at the time of his or her injury provides an important physical limitation on the scope of UIM coverage by ensuring coverage extends only to injuries which occur close to the insured vehicle. Transaction Essential to Use.

For the fourth factor, a transaction essential to the use of the vehicle, *Rau* relied on *Owens v. Ocean Accident & Guarantee Corp.*, 194 Ark. 817, 109 S.W.2d 928 (1937). *Rau*, 21 Wn. App. at 333. There the court found an ambulance’s insurance policy covered a person who fell off a

stretcher as she was being carried from her home to the waiting ambulance. Owens, 109 S.W.2d at 930.

The court concluded, “although use of the stretcher to convey [the patient] from her home to the waiting ambulance was not a necessary incident to use of the automobile as a motor vehicle, it was an essential transaction in connection with use of the automobile as an ambulance.” Id. The essential transaction factor, like the geographic proximity factor, provides an important limitation on the scope of UIM coverage.

Limiting UIM coverage to situations where the injury occurred while the injured party was engaged in a transaction essential to the use of the insured vehicle ensures that the injury and the use are not only causally connected but connected in a manner such that common sense dictates the insured vehicle’s UIM policy should cover the injury at issue.

The essential transaction factor builds on the causal connection and geographic proximity factors by requiring something beyond mere coincidence between the but for cause of the injury and the location of the injured person at the time of the injury. *407 Vehicle Oriented. Lastly Rau derived the third factor, vehicle oriented rather than highway or sidewalk oriented, from Insurance Co. of North America v. Perry, 204 Va. 833, 134 S.E.2d 418 (1964).

Rau, 21 Wn. App. at 334. In Perry a police officer drove his cruiser to a specific location to serve a warrant. Perry, 134 S.E.2d at 419. After parking the cruiser and placing its keys in his pocket, the officer walked along the roadway approximately 164 feet from the police cruiser. Id. He was then struck and killed by an uninsured motorist. Id. The court held the officer was not using the police cruiser at the time of his death because he was 164 feet away from it and engaged in the act of serving a warrant.

Id. at 421. Rau concluded, “[t]he gist of that opinion is that at the time the officer was struck he was no longer vehicle oriented but had become highway or sidewalk oriented.” Rau, 21 Wn. App. at 334. The court in Perry, however, did not discuss the vehicle, highway, or sidewalk orientation of the officer. Indeed as recognized in Cherry, “the Virginia Supreme Court has authoritatively stated that Perry turns on the proximity and essential transaction factors, without reference to a Vehicle oriented’ factor.” Cherry, 77 Wn.

App. at 564 (citing Great Am. Ins. Co. v. Cassell, 239 Va. 421, 389 S.E.2d 476, 477 (1990)). As such Perry provides no guidance as to the purpose or benefit of determining whether the injured person was vehicle oriented at the time of his or her injury.

Although Rau created the vehicle oriented factor, the opinion itself does not explain how a vehicle oriented factor helps illuminate the reasonable expectations of the insured or suggest a method for its application.⁴ Subsequent cases, including the two cases from this court that relied on the *408Rau test, have also failed to explain or demonstrate the need for a vehicle oriented factor.

Sears did not discuss or independently apply the vehicle oriented factor. See *Sears*, 111 Wn.2d at 639. Similarly *Roller* did not endeavor to examine the vehicle oriented factor but instead concluded, “[t]his factor is not met by *Roller* because he was no longer vehicle oriented at the time McKay ran into him on the street.” *Roller*, 115 Wn.2d at 688. Furthermore the causal connection, geographic proximity, and essential transaction factors are designed to foster a “‘common sense’ analysis of the circumstances, broadly looking to the reasonable expectations of the insured, and to the means and purposes of the particular use in question.” *Cherry*, 77 Wn.

App. at 565. Yet the vehicle oriented factor focuses narrowly on the precise physical position of the insured toward or away from the insured vehicle. *Id.* To that extent the vehicle oriented factor is contrary to the underlying purpose of the other three factors and is unhelpful in illuminating the reasonable expectations of the insured. See *id.* *Rau* provides no explanation of the basis for a vehicle oriented factor, no discussion of how it helps illuminate the reasonable expectations of the insured, and no suggestion of how it should be applied.

This court’s application of the vehicle oriented factor in *Sears* and *Roller* demonstrates it adds nothing to the analysis of use for purposes of UIM coverage. Additionally a narrow focus on the injured person’s physical orientation toward or away from the insured vehicle is contrary to the broad commonsense assessment of the reasonable expectations of the insured that the causal connection, geographic proximity, and essential transaction factors are designed to foster.

Consequently we find it appropriate to abandon the vehicle oriented factor entirely. To the extent *Sears* and *Roller* implicitly require all of the *Rau* factors be met in each case, they are overruled. If *Allstate* argues the *Rau* factors are appropriate only for determining when use of a vehicle ends and not when use *409begins. *Allstate* urges this court to follow a Pennsylvania decision which distinguished between beginning and ending use.

Downing v. Harleysville Ins. Co., 412 Pa. Super. 15, 602 A.2d 871, 873-74 (1992). The Pennsylvania court made this distinction to interpret whether an individual was “occupying” a vehicle, not whether he or she was using the vehicle as is the question before us. *Id.* at 873-74. There is no Washington case making a distinction between when use begins and when it ends.

We see no reason to do so here as distinguishing beginning and ending use merely complicates the inquiry. *Allstate* asserts that “[n]o Washington court has applied the *Rau* analysis in a case where the claimant is a stranger to the insured vehicle.”⁵ Suppl. Br. of Pet’r *Allstate* at 6. This is true; however, in *Owens* the injured person had never been in the ambulance, yet the court found the ambulance’s insurance covered her injury.

Owens, 109 S.W.2d at 930. Additionally prior to *Sears* we held that shooting at your own vehicle with a revolver can constitute use of that vehicle. *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 109, 751 P.2d 282 (1988).

In *Detweiler* a man with whom Stephen Detweiler had been drinking beer and whiskey drove off in Detweiler's pickup truck. *Id.* at 101. As the truck drove past Detweiler, he pulled out a revolver and fired several shots at the truck to stop it. *Id.* at 101. One of the bullets ricocheted off his truck and struck Detweiler in the head causing him facial and eye injuries.

Id. We held *410 the driver of Detweiler's truck was an uninsured motorist, and Detweiler was using his vehicle for purposes of uninsured motorist coverage. *Id.* at 102, 109. Detweiler did not discuss the *Rau* factors in its analysis of use, nor did the *Sears* court discuss Detweiler. Nonetheless, Detweiler demonstrates Washington's expansive reading of use, and as such we do not find Allstate's argument persuasive that use should somehow exclude "strangers." Therefore whether a person was using a vehicle for purposes of UIM coverage depends on the facts of each case, but the following three factors must be met at the time of the injury: (1) there must be a causal relation or connection between the injury and the use of the insured vehicle; (2) the person asserting coverage must be in reasonably close geographic proximity to the insured vehicle, although the person need not be actually touching it; and (3) the person must also be engaged in a transaction essential to the use of the vehicle at the time.

III Butzberger's estate seeks UIM coverage from Allstate, the insurer of Foster's truck. The question here is whether a named insured (i.e., Foster) would reasonably expect coverage for the death of a person attempting to rescue the named insured from his or her overturned vehicle under the UIM endorsement of that vehicle. See *Cherry*, 77 Wn. App. at 565.

To answer this question we apply the three-factor test articulated above. The first two factors are easily satisfied. The first factor is a causal relation or connection between the injury and the use of the insured vehicle.

Here the connection is established because Butzberger was attempting to rescue Foster from the insured vehicle at the time the vehicle was hit by the underinsured motorist. But for Butzberger's attempt to rescue Foster from the insured vehicle, Butzberger would not have been killed.

The second factor is that the injured person must have been in reason*411 ably close geographic proximity to, although not necessarily touching, the insured vehicle. Butzberger was either touching Foster's truck or was within a few feet from it when he was struck and killed, thus establishing geographic proximity.

To determine whether Butzberger was engaged in a transaction essential to the use of Foster's truck, the third factor, the Court of Appeals stated, "[u]nquestionably he was." Butzberger, 112 Wn. App. at 91. We agree. Rescuing a stranded driver who is injured or in peril is essential to the continued use of the vehicle, as the vehicle cannot continue to its destination until the rescue has been accomplished.

We hold a rescue effort to assist an occupant of another vehicle is a transaction essential to the use of that vehicle. Therefore, application of the three factors here leads to the conclusion that a named insured would reasonably expect a rescuer killed while trying to rescue the named insured from an overturned vehicle to be covered under the vehicle's UIM policy.

Consequently, Butzberger is entitled to UIM coverage from Allstate. IV To determine whether Butzberger is covered under the T.H.E. policy, we ask whether a named insured (i.e., Cascade Distributing) reasonably would expect UIM coverage for the death of a driver of the insured vehicle who was killed while engaging in a rescue attempt of a stranded motorist. See *Cherry*, 77 Wn.

App. at 565. To answer this question we again apply the three factors. Contracting parties would anticipate a driver might have occasion to engage in an emergency rescue of another driver on the highway. There is every indication Butzberger intended to proceed in his vehicle after his rescue effort was complete.

The rescue effort was merely part of the process of Butzberger's ongoing travel. This demonstrates Butzberger was engaged *412 in a transaction essential to the use of his own vehicle when he was killed.⁶ It is true, as Judge Cardozo recognized so many years ago, "Danger invites rescue.

The cry of distress is the summons to relief." *Wagner v. Int'l Ry.*, 232 N.Y. 176, 180, 133 N.E. 437, 437 (1921). The law has long recognized that seeing a person injured or in peril compels those called to follow the example of the Good Samaritan to provide assistance. See *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 940, 913 P.2d 377 (1996) (recognizing "public policy of encouraging citizens to save others from life threatening situations."); *State v. Hillman*, 66 Wn.

App. 770, 776, 832 P.2d 1369 (1992) (noting "[i]t has long been the policy of our law to protect the 'Good Samaritan.' "). When driving, a Good Samaritan is unable to ignore the sight of a perilously stranded motorist. Hence, we recognize when a motorist interrupts his or her travel to rescue a victim in another vehicle, the rescue is a transaction essential to the use of the rescuer's vehicle, the third factor.

From there the remaining two factors fall neatly into place. *413 There is a causal connection between Butzberger's death and the vehicle he had been driving. At the time of his death Butzberger had not yet arrived at his destination. He would have been able to continue on his way to work and would not have been killed but for his attempt to rescue Foster.

The interruption in Butzberger's use of his vehicle as a means of transportation to work establishes a sufficient causal connection between his death and the vehicle he had been driving. Proximity is also established. Rau considered 20 feet to be reasonably close where the driver crossed four lanes of traffic to ask for directions. Rau, 21 Wn. App. at 334-35.

The approximately 75 feet Butzberger was from his vehicle is also reasonably close when one considers that another vehicle was parked immediately behind Foster's overturned truck and Butzberger parked directly behind it.

Therefore application of the three factors demonstrates Butzberger's actions were within the reasonably expected use of the vehicle he had been driving as contemplated by the insured when contracting for coverage of persons using the insured vehicle.

Accordingly Butzberger is entitled to UIM coverage from T.H.E. The estate argues the trial court erred by ruling on summary judgment that T.H.E. established a valid UIM waiver, thus limiting the amount of its UIM coverage to \$50,000.

The Court of Appeals did not decide this issue in light of its holding that Butzberger was not using the vehicle he had been driving. Because this issue was not decided, we remand the case to the Court of Appeals to determine whether T.H.E. established a valid UIM waiver. See RAP 13.7(b).⁷ V The estate requests reasonable attorney fees under RAP 18.1.

In *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 52, 811 P.2d 673 (1991), this court extended "the right of an insured to recoup attorney fees that it incurs because an insurer refuses to defend or pay *414the justified action or claim of the insured, regardless of whether a lawsuit is filed against the insured." *Olympic Steamship* stands for the proposition that "[w]hen insureds are forced to file suit to obtain the benefit of their insurance contract, they are entitled to attorneys' fees." *Weyerhaeuser Co. v. Commercial Union Ins.*

Co., 142 Wn.2d 654, 687 n.15, 15 P.3d 115 (2000) (citing *Olympic S.S. Co.*, 117 Wn.2d at 52-53). Therefore, the estate is awarded attorney fees against T.H.E. and Allstate for work at trial and on appeal. The trial court shall determine the reasonable amount of such fees after the Court of Appeals resolves the UIM waiver issue. CONCLUSION We hold Butzberger was using both Foster's vehicle and the vehicle Butzberger had been driving when he was struck and killed by an underinsured motorist.

Accordingly, Butzberger's estate is entitled to UIM benefits and attorney fees from both Allstate and T.H.E. We affirm the Court of Appeals in part and reverse in part and remand to the Court of Appeals for further proceedings consistent with this opinion. See RAP 13.7(b) Johnson, Ireland, and Chambers, JJ, concur. What Butzberger did in those 30 to 45 seconds while talking to Foster is unclear.

According to the police report: "[Foster] said that it was a matter of seconds that he saw a man leaning through the drivers [sic] window asking him how they were going to get him out of the car." Suppl. Clerk's Papers (SCP) at 289. One of the accident witnesses declared: "When the accident occurred involving Mr. Butzberger, Mr. Butzberger was either on or within one foot (1') of the overturned truck, attempting to assist the truck's occupant." Clerk's Papers at 12.

Foster submitted a declaration five years after the accident that states: 5. At no time did Butzberger get inside or attempt to get inside my vehicle. While talking to me he was standing a few feet away from the vehicle and looking inside the driver's door window. *4006. At no time did Butzberger stick his hand, head or any other part of his body into my vehicle or through my window.

7. Butzberger was not touching my vehicle when the other vehicle smashed into it. In fact, he had started moving away from my vehicle seconds before the impact. SCP at 457. Butzberger's estate released Phillips from liability after his insurance company tendered its \$50,000 policy limit and submitted a declaration from Phillips that his assets were exempt from execution.

In *Roller* we held that because the injury was caused by an intentional act and not by accident, UIM coverage did not apply. *Roller*, 115 Wn.2d at 686. Nonetheless we went on to apply the *Rau* four factors and concluded Daniel *Roller* did not satisfy the fourth factor, reasoning that standing in the street to write down a license plate number was not essential to the use of the vehicle *Roller* had been riding in.

Id. at 687-89. A close examination of *Rau* reveals that although the court required application of the vehicle oriented factor, the court did not apply it. The court concluded: The driver had left the truck to seek directions as to where to make a delivery, and was returning to his truck and was 20 feet from it at the time he was struck by the uninsured motorist....

For the reasons discussed, we hold that the truck driver was "using" the insured truck at the time he was injured.... *Rau*, 21 Wn. App. at 334-35. Allstate contends the consequence of rejecting its stranger argument would lead to UIM coverage where a person is injured while engaging in the following activities: (1) standing next to a vehicle talking to an occupant of the vehicle, (2) walking toward a vehicle intending to get in, (3) taking a photograph of the vehicle, (4) taking money from an occupant of the vehicle, (5) burglarizing the vehicle, (6) vandalizing the vehicle, (7) taking money from an occupant at a toll booth or parking lot, and (8) directing the vehicle in traffic.

It is hard to imagine that after applying the causal connection, geographic proximity and essential transaction factors a court would conclude that a named insured would reasonably expect UIM coverage under the insured's policy to extend to many of these activities. This is made clear by the fact that most of these activities are not essential to the use of the vehicle.

Justice *Bridge's* contrary conclusion relies in part on *Roller*, 115 Wn.2d at 688-89. Concurrence/dissent (*Bridge, J.*) at 418. But *Roller* is distinguishable because there the other driver intentionally rammed into the vehicle in which *Roller* was riding until the bumpers locked, 115 Wn.2d at 681, and the record did not suggest *Roller* intended to return to the vehicle.

Here, however, there is every indication Butzberger intended to proceed in his vehicle, and the rescue effort was merely part of the process of his ongoing travel. Justice Bridge's discussion of *United States Fire Insurance Co. v. Parker*, 250 Va. 374, 463 S.E.2d 464 (1995) is also unpersuasive. Concurrence/dissent (Bridge, J.) at 418-19. There, Parker, a landscape gardener, drove herself, her coworkers, and their equipment to a work site in a company-owned pickup truck.

Parker, 463 S.E.2d at 465. She parked the truck next to the site to provide a "safety barrier" to protect her and her crew from passing traffic and to allow them to hear a two-way radio inside the truck. *Id.* Parker was struck and injured by a speeding vehicle while she was digging a hole in a flower bed 12 to 15 feet from the truck. *Id.* The court held that Parker was not using the truck at the time of her injury because she was not engaged in a transaction essential to the use of the truck.

Id. at 466. Here, as in *Parker*, Butzberger was using his vehicle as a means of transportation to work. Unlike *Parker*, however, Butzberger was struck and killed while still in the process of driving to work. *Parker* on the other hand had already arrived at her jobsite, parked the insured truck, and was working when she sustained her injuries.

Thus although Justice Bridge correctly states, "Parker was not engaging in any activity at the time of her injury that directly pertained to her particularized use of her employer's truck as a means of transportation to and from the jobsite," concurrence/dissent (Bridge, J.) at 419, the same cannot be said of Butzberger. RAP 13.7(b) provides in relevant part: If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues.