

65569-8

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NO. 65569-8-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MICHAEL AND BRENDA OSBORNE,

Plaintiff/Appellant

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Defendant/Respondent

BRIEF OF RESPONDENT
FARMERS INSURANCE COMPANY OF WASHINGTON

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TABLE OF CONTENTS

| | Page |
|---|-------------|
| I. SUMMARY OF THE CASE | 1 |
| II. COUNTERSTATEMENT OF THE CASE | 3 |
| A. Reported Accident | 3 |
| B. Farmers' Policy Language | 6 |
| C. Procedural History | 9 |
| III. LIST OF ISSUES PRESENTED | 12 |
| IV. LEGAL ARGUMENT | 13 |
| A. Standard of Review | 13 |
| B. Inadmissible Evidence Should Not Be Considered On Appeal | 17 |
| 1. Hearsay Should Not Be Considered on Summary Judgment | 18 |
| 2. Expert Opinions Offered By an Unqualified Lay Witness Should Not Be Considered on Summary Judgment | 23 |
| C. Summary Judgment Standard | 26 |
| D. Plaintiffs' Breach of Contract Claim Was Properly Dismissed, Because, as a Matter of Law, Plaintiffs Failed to Submit Sufficient Independent Corroborating Evidence that the Accident Was Caused by a Second Vehicle | 28 |
| V. CONCLUSION | 36 |

TABLE OF AUTHORITIES

| CASES | Page |
|--|--------------------|
| <i>Ashley v. Hall</i> , 138 Wn.2d 151, 978 P.2d 1055 (1999)..... | 16 |
| <i>Bernal v. American Honda Motor Co.</i> , 87 Wn.2d 406, 553 P.2d 107 (1976)..... | 24 |
| <i>Burmeister v. State Farm Ins. Co.</i> , 92 Wn. App. 359, 966 P.2d 921 (1998)..... | 20, 22, 31, 32, 33 |
| <i>Butzberger v. Foster</i> , 151 Wn.2d 396, 401, 89 P.3d 689 (2004)..... | 28 |
| <i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)..... | 27 |
| <i>Colwell v. Holy Family Hosp.</i> , 104 Wn. App. 606, 15 P.3d 210 (2001)..... | 14 |
| <i>Cox v. Spangler</i> , 141 Wn.2d 431, 5 P.3d 1265 (2000)..... | 14 |
| <i>Dixie Ins. Co. v. Mello</i> , 75 Wn. App. 328, 877 P.2d 740 (1994)..... | 31, 32 |
| <i>Doherty v. Municipality of Metropolitan Seattle</i> , 83 Wn. App. 464, 921 P.2d 1098 (1996)..... | 24 |
| <i>Eagle Group, Inc. v. Pullen</i> , 114 Wn. App. 409, 58 P.3d 292 (2002)..... | 14 |
| <i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998)..... | 14 |
| <i>Gerken v. Mutual of Enumclaw Ins. Co.</i> , 74 Wn. App. 220, 872 P.2d 1108 (1994)..... | 34, 35 |

| | |
|---|----------------|
| <i>Germain v. Pullman Baptist Church</i> , 96 Wn. App. 826, 980 P.2d 809 (1999)..... | 23 |
| <i>Hash v. Children's Orthopedic Hosp.</i> , 49 Wn. App. 130, 741 P.2d 584 (1987)..... | 19 |
| <i>Hisle v. Todd Pacific Shipyards Corp.</i> , 151 Wn.2d 853, 93 P.3d 108 (2004)..... | 27 |
| <i>International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.</i> , 122 Wn. App. 736, 87 P.3d 774 (2004)..... | 15, 20, 21 |
| <i>King County Fire Prot. Dists. No. 16, No. 36 and No. 40 v. Housing Auth. of King County</i> , 123 Wn.2d 819, 872 P.2d 516 (1994)..... | 15, 20 |
| <i>LaPlante v. State</i> , 85 Wn.2d 154, 531 P.2d 299 (1975)..... | 27 |
| <i>Lilly v. Lynch</i> , 88 Wn. App. 306, 945 P.2d 727 (1997)..... | 24 |
| <i>Marshall v. Bally's Pacwest, Inc.</i> , 94 Wn. App. 372, 972 P.2d 475 (1999)..... | 29 |
| <i>McIlwain v. State Farm Mut. Auto. Ins. Co.</i> , 133 Wn. App. 439, 136 P.3d 135 (2006)..... | 31 |
| <i>Meadows v. Grant's Auto Brokers, Inc.</i> , 71 Wn.2d 874, 431 P.2d 216 (1967)..... | 15, 20 |
| <i>Nationwide Ins. v. Williams</i> , 71 Wn. App. 336, 858 P.2d 516 (1993)..... | 21, 22, 35, 36 |
| <i>Oregon Mut. Ins. Co. v. Barton</i> , 109 Wn. App. 405, 36 P.3d 1065 (2001)..... | 18 |
| <i>Public Employees Mut. Ins. Co. v. Fitzgerald</i> , 65 Wn. App. 307, 828 P.2d 63 (1992)..... | 27 |

| | |
|--|------------|
| <i>Safeco Ins. Co. v. McGrath</i> , 63 Wn. App.170, 817 P.2d 861 (1991)..... | 16, 23, 24 |
| <i>Sehlin v. Chicago, Milwaukie, St. Paul & Pacific Railroad Co.</i> , 38 Wn. App. 125, 132, 686 P.2d 492 (1984)..... | 16 |
| <i>State Farm Mut. Auto. Ins. Co. v. Seaman</i> , 96 Wn. App. 629, 980 P.2d 288 (1999)..... | 31, 32 |
| <i>State v. Chapin</i> , 118 Wn.2d 681, 826 P.2d 194 (1992)..... | 16, 21 |
| <i>State v. Motherwell</i> , 114 Wn.2d 353, 788 P.2d 1066 (1990)..... | 18 |
| <i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990)..... | 16 |
| <i>Summers v. Great Southern Life Ins. Co.</i> , 130 Wn. App. 209, 122 P.3d 195 (2005)..... | 28 |
| <i>Sunbreaker Condo. Ass'n v. Travelers Ins. Co.</i> , 79 Wn. App. 368, 901 P.2d 1079 (1995)..... | 14 |
| <i>T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n</i> , 809 F.2d 626 (9th Cir.1987)..... | 27 |
| <i>Walker v. State</i> , 121 Wn.2d 214, 848 P.2d 721 (1993)..... | 16 |
| <i>Warner v. Regent Assisted Living</i> , 132 Wn. App. 126, 130 P.2d 865 (2006)..... | 14 |
| <i>Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993)..... | 14 |
| <i>Weyerhaeuser Co. v. Commercial Union Ins. Co.</i> , 142 Wn.2d 654, 15 P.3d 115 (2000)..... | 28 |

| | |
|--|--------|
| <i>Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.</i> , 134 Wn.2d 692, 952 P.2d 590 (1998)..... | 13, 14 |
| <i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989)..... | 27 |

STATUTES

| | |
|-----------------------|----------------|
| RCW 48.22.030..... | 12, 13, 25, 31 |
| RCW 48.22.030(8)..... | 2, 17, 30, 34 |

RULES

| | |
|---------------------|--------------------|
| CR 56..... | 9, 18, 19 |
| CR 56(c)..... | 14 |
| CR 56(e)..... | 15, 18, 19, 20, 21 |
| ER 604..... | 9 |
| ER 701..... | 18, 23 |
| ER 702..... | 15, 18, 23 |
| ER 801..... | 20 |
| ER 802..... | 18 |
| ER 803(a)(2)..... | 16, 36 |
| GR 11.2..... | 9 |
| RAP 10.3(a)(6)..... | 18 |

OTHER

| | |
|--------------------------------------|----|
| 15A Washington Practice § 69.7 | 24 |
|--------------------------------------|----|

I. SUMMARY OF THE CASE

Brenda Osborne and Michael Osborne sued their auto insurer, Farmers Insurance Company of Washington (“Farmers”), alleging that Farmers breached its insurance contract with the Osbornes when it declined to pay either of the Osbornes any Underinsured Motorist (UIM) benefits with regard to an April 16, 2009 auto accident. Farmers denied plaintiffs’ UIM claim because there is no independent corroborating evidence that any vehicle other than the Osbornes’ own vehicle was involved in this accident.

Farmers moved for summary judgment, arguing that plaintiffs could not make out a *prima facie* breach of contract cause of action due to the complete absence of any independent corroborating evidence that a second vehicle was involved in this accident. Plaintiffs responded to Farmers’ summary judgment motion by each of them submitting a declaration, but Washington law is clear that plaintiffs’ own testimony cannot serve as the necessary corroboration for their UIM claims. Plaintiffs also submitted an improper declaration from their attorney’s legal assistant which purported to be a translation of a Spanish-language declaration signed by plaintiffs’ neighbor Hugo Valencia. Even assuming the accuracy of this improper translation, the declaration of the legal

assistant was full of hearsay and inadmissible lay opinion testimony, and indicated that Mr. Valencia had not witnessed the accident.

Farmers moved to strike the legal assistant's declaration given that it was an improper translation, and alternatively moved to strike the portions containing hearsay and improper lay opinion testimony. Farmers also moved to strike all testimony regarding what either of the Osbornes told Deputy Morgan, the responding sheriff's deputy, regarding how the accident occurred. In response to Farmers' motion to strike, plaintiffs did not submit a written opposition to the motion, but did submit a certified translation of Mr. Valencia's Spanish-language declaration. However, the certified translation still contained objectionable hearsay and improper lay opinion testimony.

The trial court granted in part Farmers' motion to strike, refusing to consider any testimony regarding what either of the Osbornes told Deputy Morgan regarding how the accident occurred, and refusing to consider portions of the certified translation of Mr. Valencia's declaration. The trial court then granted Farmers' summary judgment motion, finding, as a matter of law, that plaintiffs' pleaded cause of action failed under the plain language of Farmers' policy and RCW 48.22.030(8) because plaintiffs had submitted no independent corroborating evidence that a "phantom vehicle" caused the April 16 accident.

II. COUNTERSTATEMENT OF THE CASE

A. Reported Accident

On April 21, 2009, Michael Osborne, and his wife, Brenda Osborne, reported to Farmers that they had been involved in a motor vehicle accident on April 16, 2009. CP 47-48. At the time of the reported April 16, 2009 accident, Michael Osborne had in effect Farmers' personal auto policy number 79-16475-75-96 ("the Policy"). CP 47, 51. Subject to the terms and conditions of the Policy, the Policy provided certain Underinsured Motorist (UIM) coverage. See CP 51. Both of the Osbornes claimed to have been injured in the April 16 accident, and each submitted a UIM claim under the Policy. CP 47-48.

The Farmers adjusters assigned to evaluate plaintiffs' UIM claims conducted recorded statements of both Mr. Osborne and Mrs. Osborne. CP 48. During recorded statements, both of the Osbornes stated that the April 16, 2009 accident occurred while Mrs. Osborne was driving the Subaru listed in the Policy's declarations. CP 48. Both of the Osbornes also told Farmers that the accident occurred when another vehicle came toward their Subaru, at least partially on the Osbornes' side of the road, and that Mrs. Osborne "swerved" off the road to avoid colliding with this other vehicle. CP 48. Both of the Osbornes stated that there was no physical contact between the Osborne vehicle and the alleged second

vehicle. CP 48. Neither of the Osbornes submitted or identified any physical evidence to support their assertion that another vehicle was involved in the April 16 accident. CP 48. In addition, neither of the Osbornes identified any independent witness to the accident. CP 48.

Farmers' adjuster Margarita Madison also spoke at length with Deputy Brian Morgan, the Skagit County Sheriff's Deputy who responded to the scene of the April 16 accident. CP 48. Deputy Morgan reported that Mrs. Osborne had told him that a second vehicle had been involved in the April 16 accident, but Deputy Morgan stated that he had seen no physical evidence at all of the involvement of a second vehicle. CP 48. Deputy Morgan also stated that neither of the Osbornes had been able to identify any witness to corroborate their claim that a second vehicle had been involved. CP 48. He expressed his belief that the accident had probably resulted from Mrs. Osborne simply continuing to drive straight ahead when the road curved to the left. CP 48. He noted that both of the Osbornes were very calm throughout his interaction with them on April 16, 2009. CP 48.

Under the Policy, where the UIM insured alleges a second vehicle was involved in an accident, but there was no physical contact between the insured vehicle and the alleged second vehicle, the "facts of the accident must also be verified by someone other than you or another person having

an underinsured motorist claim from the same **accident**” in order for the insured to pursue a UIM bodily injury claim. CP 48-49, 75. The same requirement of independent corroboration is contained in the Policy’s UIM property damage coverage. CP 49, 68. Because the April 16 accident involved no physical contact between the Osborne vehicle and any other vehicle, the Policy is therefore clear that neither Mr. Osborne nor Mrs. Osborne can serve as the necessary corroborating evidence for their “phantom vehicle” claim. CP 49, 68, 75.

Because neither of the Osbornes submitted any corroborating evidence to support their assertion that a “phantom vehicle” was involved in the April 16 accident, there was no evidence that any “underinsured motor vehicle” caused the April 16 accident. CP 49, 68, 75. Because there was no evidence that an “underinsured motor vehicle” caused the April 16 accident, Farmers denied the “bodily injury” and “property damage” UIM claims submitted by Mr. Osborne and Mrs. Osborne. CP 49, 80-82.

On October 7, 2009, plaintiffs filed suit against Farmers. CP 4. In their Amended Complaint, which pleaded a breach of contract cause of action, plaintiffs alleged that they were both injured in the April 16, 2009 accident, and asserted that an “unknown motorist who fled the scene without providing identification” was entirely at fault for the accident. CP

49, 84. In their Amended Complaint, both plaintiffs alleged that they were entitled to UIM “bodily injury” and UIM “property damage” benefits under the Policy. CP 49, 85.

During discovery, plaintiffs admitted that there was no physical contact, and that there was no collision, between their vehicle and the alleged second vehicle. CP 27-28, 31. In addition, Deputy Morgan’s deposition was conducted. CP 28, 35. In his deposition, Deputy Morgan testified that he happened to be driving by the scene of the accident; neither Mr. Osborne nor Mrs. Osborne flagged him down as he approached the scene. CP 36-37, 43. Both Mrs. Osborne and Mr. Osborne were calm during Deputy Morgan’s interaction with them – so calm that he at first believed that the accident must have happened “awhile ago” and they just happened to be back at the scene collecting the vehicle. CP 36-37, 43. Deputy Morgan saw no physical evidence that a second vehicle had been involved in the April 16 accident. CP 37-38. There were no skid marks or yaw marks which would indicate a sudden avoidance maneuver. CP 37-38. Deputy Morgan saw no other vehicle near the scene. CP 39-40. He testified that it was “certainly a good possibility” that the accident occurred when Mrs. Osborne had simply continued driving straight ahead when the road curved. CP 38, 41-42.

At the scene of the accident, neither of the Osbornes indicated a need for, or requested, medical treatment. CP 46. Rather, they simply asked that Deputy Morgan give them a ride to their home in Sedro-Woolley. CP 36, 46. Deputy Morgan complied with the Osbornes' request, and gave them a ride to their home in Sedro-Woolley. CP 36, 46.

B. Farmers' Policy Language

Under the Policy, "'you' and 'your' mean the 'named insured' shown in the Declarations and spouse if a resident of the same household." CP 55. Under this definition, both of the Osbornes qualify as "you" under the Policy and "insured person" for purposes of the Policy's UIM coverage.

The Policy contains the following UIM insuring agreement with regard to "bodily injury":

Part II – UNDERINSURED MOTORIST

Coverage C– Underinsured Motorist Coverage

We will pay all sums which an **insured person** is legally entitled to recover as **damages** from the owner or operator of an **underinsured motor vehicle** because of **bodily injury** sustained by the **insured person**. The **bodily injury** must be caused by **accident** and arise out of the ownership, maintenance, or use of the **underinsured motor vehicle**.

CP 58.

The Policy contains the following UIM insuring agreement with regard to “property damage”:

**ENDORSEMENT ADDING PROPERTY DAMAGE
TO UNDERINSURED MOTORIST COVERAGE**

For an additional premium, **Underinsured Motorist Coverage** is amended to include the following:

We will pay **damages** for **property damage** which an **insured person** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle**. The **property damage** must be caused by **accident** and arise out of the ownership, maintenance, or use of the **underinsured motor vehicle**.

* * * *

This coverage applies to **property damage** arising from an **accident** with a hit-and-run or phantom vehicle which does not make physical contact with you or **your insured car** or **your insured vehicle**, provided that:

- a) The facts of the **accident** can be verified by someone other than you or another person having an underinsured motorist claim from the same **accident**, and
- b) you or someone on your behalf reports the **accident** to the police within seventy-two hours.

CP 68 (emphasis added).

The policy defines “underinsured motor vehicle”, in relevant part,

as:

3. **Underinsured motor vehicle** means:
 - a. 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.

- b. A hit-and-run vehicle or phantom vehicle whose operator or owner cannot be identified and which hits or causes an **accident** resulting in **bodily injury** or **property damage** without physical contact with:
- (1) You or any **family member**.
 - (2) Any vehicle which you or any **family member** are occupying.
 - (3) Your insured vehicle.

When there is no physical contact, the facts of the **accident** must be reported to the police within 72 hours of the accident. The facts of the **accident** must also be verified by someone other than you or another person having an underinsured motorist claim from the same **accident**.

CP 59, 75 (emphasis added). Both the UIM “bodily injury” coverage and the UIM “property damage” coverage make clear that UIM benefits are available only if the insured is injured in an “accident” caused by an “underinsured motor vehicle.” And, as to both “bodily injury” and “property damage” claims, no UIM benefits are available under the Policy where an alleged second vehicle makes no physical contact with the insured vehicle, unless there is independent corroborating evidence that a second vehicle caused the accident.

C. Procedural History

On April 19, 2010, Farmers moved for summary judgment, based on the absence of any independent corroborating evidence that a second vehicle had caused the April 16 accident, arguing that plaintiffs as a matter of law could not establish a breach of the insurance contract. CP 15-26. Farmers' summary judgment motion was noted for hearing on May 17, 2010. CP 90.

Under CR 56, plaintiffs' response was due on May 6, 2010. In response to Farmers' summary judgment motion, plaintiffs relied mainly on their own self-serving declarations. CP 93-95. They filed an opposing brief accompanied by: (1) their own declarations (CP 102-105 and 106-109); (2) a Spanish-language declaration from Hugo Valencia (CP 100-101); and (3) a declaration of Jessica Arreguin, plaintiffs' counsel's legal assistant, purporting to be a translation of Mr. Valencia's Spanish-language declaration. (CP 98-99). The Arreguin declaration was not a certified translation, nor was there any showing that Ms. Arreguin is a certified translator. Moreover, even leaving aside the absence of the required certification, the Arreguin translation of the Valencia declaration contained significant amounts of hearsay. CP 98-99. In addition, it described Mr. Valencia as being the Osbornes' neighbor, but seemed to

indicate that he was purporting to offer expert opinion testimony as to how the accident occurred. CP 98-99.

Farmers filed a timely motion to strike the Arreguin declaration in its entirety as violating ER 604 and GR 11.2, and moved that the court then strike the Valencia Spanish-language declaration in its entirety as being untranslated. CP 140-141. Alternatively, Farmers asked the Court to strike the portions of the Arreguin and Valencia declarations which consisted of hearsay, and expert opinion testimony as to which Mr. Valencia lacked foundation and qualifications. CP 141-142.

Plaintiffs responded to Farmers' motion to strike by submitting a certified translation of Mr. Valencia's Spanish-language declaration on May 12, 2010. CP 153-156. The certified translation of Mr. Valencia's declaration had the same substantive problems, however, with regard to hearsay and improper lay opinion testimony. CP 153, 155. Plaintiffs did not file a written opposition to Farmers' motion to strike. CP 157.

The trial court granted in part Farmers' motion to strike. CP 157-158. The trial court held that "[a]ll testimony regarding what either of the Osbornes told Deputy Morgan regarding how the accident occurred is stricken as inadmissible hearsay." CP 157, 160; VRP 17. The court explicitly rejected plaintiffs' assertion that Mrs. Osborne's statement to Deputy Morgan that another car had run the Osborne vehicle off the road

qualified as an excited utterance, finding instead that Mrs. Osborne's statement to Deputy Morgan was simply inadmissible hearsay. VRP 16-17.

The trial court also struck three sentences of Mr. Valencia's declaration, repeating what one or both of the Osbornes had told him regarding how the accident occurred, as consisting of inadmissible hearsay. CP 158, VRP 8. The court also struck one sentence¹ of Mr. Valencia's declaration as containing expert testimony which lacked foundation and as to which plaintiffs had not shown that Mr. Valencia had the necessary expertise to offer. CP 158; VRP 26-27. Although the court did not strike plaintiffs' own declarations, the court did make clear that it did not consider plaintiffs' statements regarding how the accident occurred given that RCW 48.22.030 and the Policy both specify that the involvement of a phantom vehicle must be established by *independent* corroborating evidence. See VRP 26 and CP 157, 160.

The trial court also granted Farmers' summary judgment motion, and dismissed all claims against Farmers. CP 159-161; VRP 26-27. In doing so, the trial court noted the complete absence of independent corroborating evidence that a second vehicle had been involved in the

¹ "The tracks and markings showed that [Mrs. Osborne] did make a hard right turn off the road." CP 155.

accident. VRP 27-28. Plaintiffs filed a timely notice of appeal from the order granting Farmers summary judgment, and the order granting in part Farmers' motion to strike.

III. LIST OF ISSUES PRESENTED

ISSUE ONE: The trial court properly refused to consider plaintiffs' own statements regarding how the accident occurred, and properly struck: (1) the hearsay statements made by Mr. and Mrs. Osborne to third persons regarding how the accident occurred; and (2) the expert opinion testimony offered by plaintiff's neighbor, as to which he lacked foundation and the necessary expertise.

ISSUE TWO: The summary judgment should be affirmed because the plain language of RCW 48.22.030 and the Policy show that plaintiffs' claims fail as a matter of law due to plaintiffs' failure to provide independent corroboration that a second vehicle caused the accident.

IV. LEGAL ARGUMENT

A. Standard Of Review

When reviewing an order for summary judgment, the Court of Appeals engages in the same inquiry as the trial court, and will affirm the summary judgment if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Wilson Court Ltd.*

Partnership v. Tony Maroni's, Inc., 134 Wn.2d 692, 698, 952 P.2d 590 (1998); *see also* CR 56(c).

When reviewing evidentiary rulings made as part of the summary judgment proceedings, however, the deferential “abuse of discretion” standard applies:

The trial court must routinely make evidentiary rulings during summary judgment proceedings. We review these decisions for abuse of discretion. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000).

Colwell v. Holy Family Hosp., 104 Wn. App. 606, 613, 15 P.3d 210 (2001); *see also Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 372, 901 P.2d 1079 (1995), and *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 416, 58 P.3d 292 (2002).² “A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds.” *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054,1075-76 (1993).

² Farmers recognize that there appears to be some uncertainty on this point. Plaintiffs cite to *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998), for the proposition that the *de novo* standard applies to evidentiary rulings made by a trial court as part of summary judgment proceedings. This Court appears to have agreed with this proposition in *Warner v. Regent Assisted Living*, 132 Wn. App. 126, 130 P.2d 865 (2006), but also mentioned many earlier Court of Appeals cases holding that the abuse of discretion standard applies in this situation, without overruling such earlier cases. Moreover, *Folsom* did not overrule earlier cases indicating that the abuse of discretion standard applies in this situation. Nevertheless, even if this Court believes the *de novo* standard applies to this Court’s review of the trial court’s evidentiary rulings, this Court should still affirm all such rulings and affirm the dismissal of plaintiffs’ lawsuit for the reasons explained below.

The abuse of discretion standard applies to rulings on a motion to strike. Washington courts have consistently held that hearsay statements such as those offered by plaintiffs in support of their opposition to Farmers' summary judgment motion should not be considered, because only evidence that would be admissible at trial should be considered when ruling on a motion for summary judgment:

Although a "ruling on a motion to strike is discretionary with the trial court," a "court may not consider inadmissible evidence when ruling on a motion for summary judgment."

International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co. 122 Wn. App. 736, 744, 87 P.3d 774 (2004) (quoting *King County Fire Prot. Dists. No. 16, No. 36 and No. 40 v. Housing Auth. of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994)); see also CR 56(e). Likewise, CR 56(e) requires that affidavits submitted in summary judgment proceedings be made on personal knowledge, set forth admissible evidentiary facts, and affirmatively show the affiant is competent to testify as to his averments. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 878, 431 P.2d 216 (1967).

The abuse of discretion standard likewise applies to rulings on admissibility of expert testimony:

The decision whether to admit expert testimony under ER 702 is within the discretion of the trial court and will not be disturbed absent a showing of an abuse of that discretion.

State v. Swan, 114 Wn.2d 613, 655, 790 P.2d 610 (1990). It is an abuse of discretion to admit such testimony if it lacks an adequate foundation. *Safeco Ins. Co. v. McGrath*, 63 Wn. App.170, 179, 817 P.2d 861 (1991); *Walker v. State*, 121 Wn.2d 214, 218, 848 P.2d 721 (1993). It is also an abuse of discretion to admit such testimony if the proponent does not demonstrate that the witness has the necessary qualifications to offer the expert testimony at issue. See *Ashley v. Hall*, 138 Wn.2d 151, 156-158, 978 P.2d 1055 (1999); see also *Sehlin v. Chicago, Milwaukie, St. Paul & Pacific Railroad Co.*, 38 Wn. App. 125, 132, 686 P.2d 492 (1984).

A trial court's ruling on whether a given statement qualifies as an "excited utterance" under ER 803(a)(2) is also reviewed for an abuse of discretion. *State v. Chapin*, 118 Wn.2d 681, 688-689, 826 P.2d 194 (1992).

In summary, the abuse of discretion standard applies to all of the trial court's evidentiary rulings here: (1) striking, as hearsay, all statements regarding what Mr. Osborne or Mrs. Osborne told Deputy Morgan or Mr. Valencia regarding how the accident occurred; and (2) striking one sentence of Mr. Valencia's translated declaration as containing expert testimony which lacked foundation and which plaintiffs had not shown Mr. Valencia had the necessary expertise to offer.

Assuming that this Court affirms the trial court's evidentiary rulings under the abuse of discretion standard, the Court then reviews the grant of the summary judgment *de novo* based solely on the materials considered by the trial judge. Only if this Court finds that the trial court abused its discretion in excluding these items can these materials be considered on appeal.

ISSUE ONE: The trial court properly refused to consider plaintiffs' own statements regarding how the accident occurred, and properly struck: (1) the hearsay statements made by Mr. and Mrs. Osborne to third persons regarding how the accident occurred; and (2) the expert opinion testimony offered by plaintiff's neighbor, as to which he lacked foundation and the necessary expertise

B. Inadmissible Evidence Should Not Be Considered On Appeal.

Plaintiffs, in opposing Farmers' summary judgment motion, rely almost exclusively on their own declaration testimony regarding how this accident occurred. See Appellants' Brief, pp. 5-6. Under RCW 48.22.030(8), and under Farmers' policy language which is consistent with this statute, neither Mr. Osborne nor Mrs. Osborne can corroborate their own "phantom vehicle" claim. Thus, this Court must disregard, as the trial court did, the Osbornes' declarations to the extent that those declarations assert that another vehicle caused this accident.

Plaintiffs also rely on Mrs. Osborne's statement to Deputy Morgan that another vehicle caused this accident, asserting that this hearsay

statement falls within the “excited utterance” exception to the hearsay rule. Appellants’ Brief, pp. 11-13. However, the trial court properly found the excited utterance exception inapplicable, in light of Deputy Morgan’s testimony regarding the Osbornes’ calm demeanor and their other behavior during his interaction with them.³

1. Hearsay Should Not Be Considered on Summary Judgment

In deciding a summary judgment motion it is appropriate for the trial court to disregard hearsay statements and unsupported expert opinions offered by a lay witness. See CR 56(e); see also ER 701, 702, and 802. All of the hearsay statements contained in plaintiffs’ opposition

³ As discussed above, the trial court struck three sentences of Mr. Valencia’s declaration, in which Mr. Valencia repeated what the Osbornes told him about how the accident occurred, as consisting solely of hearsay. CP 158. The trial court also struck the following sentence as containing expert testimony which lacked foundation, and which plaintiffs did not show that Mr. Valencia had the necessary expertise to offer: “[t]he tracks and markings showed that [Mrs. Osborne] did make a hard right turn off the road.” CP 158. Plaintiffs’ brief contains no argument (or even any assertion) that any of the stricken portions of Mr. Valencia’s declaration should have been considered by the trial court. Plaintiffs do not dispute that the three sentences repeating what the Osbornes told Mr. Valencia were inadmissible hearsay. Likewise, plaintiffs do not provide any argument or authority that there was an adequate foundation for Mr. Valencia’s statement that the tire tracks he saw showed that the Osborne vehicle took a “hard right turn off the road”, or that Mr. Valencia had the necessary expertise to offer any expert opinion regarding how the accident occurred based on the tire tracks he observed. Therefore, plaintiffs have abandoned any argument as to the trial court’s evidentiary rulings regarding Mr. Valencia’s declaration, and have effectively conceded that all of the trial court’s evidentiary rulings regarding Mr. Valencia’s declaration were correct. See RAP 10.3(a)(6); see also *Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 418, 36 P.3d 1065 (2001); see also *State v. Motherwell*, 114 Wn.2d 353, 358 n. 3, 788 P.2d 1066 (1990).

pleadings were inadmissible and should not have been considered under Civil Rule 56, which provides as follows:

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

CR 56(e); see also *Hash v. Children's Orthopedic Hosp.*, 49 Wn. App. 130, 133, 741 P.2d 584 (1987) (unsupported conclusional statements alone are insufficient to prove the existence or nonexistence of issues of fact).

Washington courts have consistently held that inadmissible evidence, such as the hearsay offered by plaintiffs in support of their opposition to Farmers' summary judgment motion, should not be considered on summary judgment because only evidence that would be admissible at trial should be considered when ruling on a motion for summary judgment. A ruling on a motion to strike is within the trial

court's discretion. *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 966 P.2d 921 (1998) (citing *King County Fire Protection*, 123 Wn.2d at 826). But, the court should consider only admissible evidence in a motion for summary judgment. *Id.*; see also *International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.* 122 Wn. App. 736, 744, 87 P.3d 774 (2004). Likewise, CR 56(e) requires that affidavits submitted in summary judgment proceedings be made on personal knowledge, set forth admissible evidentiary facts, and affirmatively show the affiant is competent to testify as to his averments. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 878, 431 P.2d 216 (1967).

Mrs. Osborne's statement to Deputy Morgan claiming that a second vehicle caused the accident is hearsay under ER 801. Plaintiffs do not dispute that the statement is hearsay, but assert that the statement is nevertheless admissible as an "excited utterance". However, the trial court correctly rejected plaintiffs' assertion. As our Supreme Court has explained:

Three closely connected requirements must be satisfied for a hearsay statement to qualify as an excited utterance. First, a startling event or condition must have occurred. Second, the statement must have been made while the declarant was under the stress of excitement caused by the event or condition. Third, the statement must relate to the startling event or condition.

State v. Chapin, 118 Wn.2d 681, 686-687, 826 P.2d 194 (1992). If the first and third elements are met, but the second is not, the statement does not qualify as an “excited utterance”, and is instead simply inadmissible hearsay. *Chapin*, 118 Wn.2d at 687-689. Under this clear Washington authority, Mrs. Osborne’s⁴ statement to Deputy Morgan, **as a matter of law** was not an “excited utterance” because the second element was not met. As the *Nationwide Ins. v. Williams*, 71 Wn. App. 336, 343, 858 P.2d 516 (1993), court explained:

the excited utterance exception to the rule against hearsay evidence is grounded in the notion that under the stress of excitement caused by a startling event a declarant may spontaneously blurt out a statement, and, because of the circumstances, will not have the opportunity to fabricate.

71 Wn. App. at 343. Given Deputy Morgan’s testimony regarding Mrs. Osborne’s calm demeanor, plaintiffs here cannot establish that her assertion to Deputy Morgan is an “excited utterance”. Instead, Mrs. Osborne’s assertion that another vehicle caused the accident is simply inadmissible hearsay which cannot be considered on summary judgment. See CR 56(e); see also *International Ultimate*, 122 Wn. App. at 744.

Plaintiffs’ own testimony regarding their state of mind after the accident cannot establish the foundation necessary for Mrs. Osborne’s

⁴ Deputy Morgan testified that Mr. Osborne did not assert to him that a “phantom” vehicle had caused the accident.

statement to Deputy Morgan to even potentially qualify as an “excited utterance”. *The testimony of an independent witness that the declarant was in a distressed state at the time the statement at issue was made is always necessary before such a statement can even potentially qualify as an “excited utterance”.* See *Williams*, 71 Wn. App. at 341. In other words, only testimony from Deputy Morgan that Mrs. Osborne was distressed and/or visibly injured as he was speaking with her at the scene could even potentially bring Mrs. Osborne’s statement to him into the realm of an “excited utterance”. And, given Deputy Morgan’s very definite testimony that both of the Osbornes were calm throughout his interaction with them, neither appeared injured, and neither requested medical assistance of any kind, Mrs. Osborne’s claims to Deputy Morgan that a “phantom” vehicle caused the accident were simply inadmissible hearsay which could not, and did not, create a question of material fact. The statements of calm individuals, who are not visibly injured and do not even claim to need medical treatment, cannot be “excited utterances”. See *Burmeister*, 92 Wn. App. at 368-70. The trial court did not abuse its discretion in determining that the excited utterance exception to the hearsay rule was inapplicable.

Because the Osbornes’ statements to Deputy Morgan and Mr. Valencia regarding how the accident occurred were inadmissible hearsay,

all such statements were appropriately stricken, and not considered by the trial court.

2. Expert Opinions Offered By an Unqualified Lay Witness Should Not Be Considered on Summary Judgment

As discussed above, Farmers believes plaintiffs have abandoned any argument regarding Mr. Valencia's declaration, including Mr. Valencia's stricken statement that he believed the Osborne vehicle made a "hard right turn" off the road. Even if this Court believes that plaintiffs have not abandoned that argument, the Court should still affirm the trial court's striking of this statement under ER 701 and ER 702.

No witness is automatically qualified to give opinion testimony in any action. It is the burden of the party seeking to introduce the testimony to lay an adequate foundation to allow admission of the testimony. *See Germain v. Pullman Baptist Church*, 96 Wn. App. 826, 980 P.2d 809 (1999) (trial court properly refused to consider affidavit from unqualified expert). Where it does not affirmatively appear from the record that the witness is qualified to testify, the testimony is properly excluded. Here, plaintiffs made no showing that Mr. Valencia was qualified as an expert accident reconstructionist.

It is also an abuse of discretion to admit expert testimony if that testimony lacks an adequate foundation. *Safeco v. McGrath*, 63 Wn. App.

170, 179, 812 P.2d 861 (1991). As explained in 15A Washington Practice § 69.9 at 549:

When presenting expert opinion in an affidavit or declaration, counsel should take care to include a statement of the expert's qualifications, and any other foundational facts that would be necessary if the expert were testifying at trial. *Lilly v. Lynch*, 88 Wn. App. 306, 945 P.2d 727 (1997) (portion of affidavit properly refused because expert's qualifications were not sufficiently established); *Doherty v. Municipality of Metropolitan Seattle*, 83 Wn. App. 464, 921 P.2d 1098 (1996) (same).

In *Lilly v. Lynch*, 88 Wn. App. 306, 945 P.2d 727 (1997), this court affirmed the trial court's order striking portions of an expert's declaration where the declaration did not establish a foundation that the witness was qualified to testify on that topic. In *Doherty v. Municipality of Metropolitan Seattle*, 83 Wn. App. 464, 468-69, 921 P.2d 1098, 1101 (1996), the court excluded a witness' declaration for lack of foundation stating:

We observe that the affidavit does not explain how her background in engineering qualified her to give an opinion in the anatomical, physiological, or medical sciences. A trial court's determination of an expert's qualifications will be upheld absent an abuse of discretion. See *Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 413, 553 P.2d 107 (1976). We therefore uphold the order striking Dr. Ward's affidavit.

Similarly, Mr. Valencia's declaration does not explain how his visual observation of tire tracks led him to his stated opinion that the tire

tracks he observed were consistent with a “hard right turn”. His declaration is accompanied by no measurements or photographs. It was incumbent on plaintiffs to lay an adequate foundation for the admissibility of Mr. Valencia’s opinion, in addition to qualifying him as an expert. This they did not do. Moreover, although he would not be qualified to do so, and would have had no foundation to do so, Mr. Valencia does not even attempt to opine that a “hard right turn” somehow establishes that another vehicle more probably than not caused the accident.

ISSUE TWO: The summary judgment should be affirmed because the plain language of RCW 48.22.030 and the Policy show that plaintiffs’ claims fail as a matter of law due to plaintiffs’ failure to provide independent corroboration that a second vehicle caused the accident

As argued above, plaintiffs have presented nothing establishing that it was a manifest abuse of discretion to exclude hearsay statements and unsupported expert testimony from their neighbor who is not an expert accident reconstructionist. Moreover, the trial court’s summary judgment ruling should also be affirmed because the plain language of RCW 48.22.030, and Farmers’ policy language, make clear that plaintiffs’ own testimony cannot be used to corroborate their own UIM claims, and plaintiffs’ remaining “evidence” does not even come close to creating a question of material fact as to whether a second vehicle caused the accident. As a result, plaintiffs cannot state a *prima facie* breach of

contract claim, and their claims against Farmers therefore failed as a matter of law and were correctly dismissed on summary judgment.

As discussed above, plaintiffs rely mainly on their own declarations' descriptions of how the accident occurred. But, Washington law is clear that plaintiffs' own declarations cannot be used to corroborate a "phantom vehicle" claim. Given their abandonment of any argument relating to the court's striking of portions of Mr. Valencia's declaration⁵, the only potential corroboration therefore is Deputy Morgan's stricken testimony that Mrs. Osborne told him that a second vehicle ran the Osborne vehicle off the road. But, this statement was clearly hearsay, and the trial court correctly ruled that it was not an excited utterance. Therefore, there is no admissible evidence in the record that a second vehicle was involved in, let alone that a second vehicle caused, the April 16 accident, and the trial court correctly granted Farmers' summary judgment motion.

⁵ Plaintiffs also rely on Mr. Valencia's statement, regarding his observation of tire tracks when he was at the scene some time after the accident, that

[the Osbornes'] tire marks and broken brush were visible. These showed a straight path of travel which began on the right shoulder of the road, moved at a sharp angle through an opening in the stand of trees, and ended where we found their car.

See Appellants' Brief, p. 10; see also CP 155. Although the trial court did not strike the sentence regarding Mr. Valencia's vague description of a "sharp angle", the trial court noted that this vague sentence did not help plaintiffs. See VRP 18-19 and 22.

C. Summary Judgment Standard

Summary judgment is proper if there are no genuine issues of material fact, and the moving party is entitled to prevail as a matter of law. *Public Employees Mut. Ins. Co. v. Fitzgerald*, 65 Wn. App. 307, 310-11, 828 P.2d 63 (1992). A material fact is one that affects the outcome of the litigation. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 861, 93 P.3d 108 (2004) (quotation omitted). Any factual dispute which does not affect the outcome of a party's summary judgment motion is immaterial as the Court considers a summary judgment motion:

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. See *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then the trial court should grant the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); see also *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-32 (9th Cir.1987). In *Celotex*, the United States Supreme Court explained this result: "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." 477 U.S. at 322-23, 106 S.Ct. at 2552-53.

Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (footnote omitted). The interpretation of an insurance

policy is a question of law. See, e.g., *Butzberger v. Foster*, 151 Wn.2d 396, 401, 89 P.3d 689 (2004). “An insurance policy is construed as a whole, with the policy being given a fair, reasonable, and sensible construction.” *Summers v. Great Southern Life Ins. Co.*, 130 Wn. App. 209, 213, 122 P.3d 195 (2005) (citing *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 666, 15 P.3d 115 (2000)). If the policy is clear and unambiguous, courts enforce it as written and may not modify it or create ambiguity where none exists. *Weyerhaeuser Co.*, 142 Wn.2d at 666.

In the present case, no question of material fact exists, and Farmers was entitled to judgment as a matter of law. Washington law is clear that the Osbornes had (and have) the burden of proving that the April 16 accident was caused by an “underinsured motor vehicle”. Because the Osbornes failed to prove that the accident was caused by an “underinsured motor vehicle”, they are not entitled to any UIM benefits with regard to this accident, and the trial court correctly granted Farmers’ motion for summary judgment.

D. Plaintiffs’ Breach Of Contract Claim Was Properly Dismissed, Because, As A Matter Of Law, Plaintiffs Failed To Submit Sufficient Independent Corroborating Evidence That The Accident Was Caused By A Second Vehicle

Plaintiffs, in arguing that they submitted sufficient evidence that a second vehicle caused the accident, list a number of equivocal “facts”, and

assert that reasonable inferences from these “facts” create a material question of fact rendering summary judgment inappropriate. But, plaintiffs’ argument fails. These “facts” come almost exclusively from plaintiffs’ own declarations and therefore cannot be considered.

In addition, even leaving aside that plaintiffs’ own description of how the accident occurred cannot be considered, these “facts” are equivocal, meaning that a finder of fact would have to speculate wildly in order to find that any of these “facts” prove that a “phantom vehicle” caused the accident. See Brief of Appellants, pp. 5-6 and 10-11. A verdict cannot be founded on mere theory or speculation, nor is a jury permitted to conjecture how an accident occurred. See *Marshall v. Bally’s Pacwest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999). The admissible evidence put forth by plaintiffs in opposition to Farmers’ summary judgment motion established only that their vehicle was involved in an accident, and did not create a question of material fact as to whether a second vehicle caused that accident.

Both the UIM “bodily injury” coverage and the UIM “property damage” coverage make clear that UIM benefits are only available if the insured is injured in an “accident” caused by an “underinsured motor vehicle.” And, as to both “bodily injury” and “property damage” claims, no UIM benefits are available under the Policy where an alleged second

vehicle makes no physical contact with the insured vehicle, unless there is independent corroborating evidence that a second vehicle caused the accident.

Where there is no physical contact between an insured's vehicle and an alleged second vehicle, both the Policy and Washington's UIM statute require that independent evidence corroborate the alleged involvement of a second vehicle. Here, the only support submitted by the Osbornes with regard to their claim that another car was involved in the April 16 accident is their own assertions. Both the Policy and the UIM statute make clear that assertions by the Osbornes cannot serve as the necessary corroborating evidence for the Osbornes' own UIM claims. Therefore, plaintiffs' UIM claims were properly denied by Farmers because the Osbornes failed to prove that an "underinsured motor vehicle" caused the April 16 accident, and their lawsuit against Farmers was correctly dismissed for the same reason.

Consistent with the Policy, Washington's UIM statute also requires that an insured provide independent corroborating evidence in order to be entitled to UIM benefits where a "phantom vehicle" is alleged to have caused the accident:

- (8) For the purposes of this chapter, a "phantom vehicle" shall mean a motor vehicle which causes bodily injury, death, or property damage to an

insured and has no physical contact with the insured or the vehicle which the insured is occupying at the time of the accident if:

- (a) The facts of the accident can be corroborated by competent evidence other than the testimony of the insured or any person having an underinsured motorist claim resulting from the accident; and
- (b) The accident has been reported to the appropriate law enforcement agency within seventy-two hours of the accident.

RCW 48.22.030(8) (emphasis added). “UIM coverage is not intended to provide compensation for the insured’s own negligence.” *McIllwain v. State Farm Mut. Auto. Ins. Co.*, 133 Wn. App. 439, 449, 136 P.3d 135 (2006). To the contrary, a “UIM policy only provides coverage to its insured for injuries caused by an at-fault underinsured motorist.” *McIllwain*, 133 Wn. App. at 447 (citing *Dixie Ins. Co. v. Mello*, 75 Wn. App. 328, 333-34, 877 P.2d 740 (1994)).

A Washington insured making a UIM claim has the burden of proving that the owner or operator of an “underinsured motor vehicle” caused the accident. See *Mello*, 75 Wn. App. at 334; see also *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 966 P.2d 921 (1998). A Washington insured making a “phantom vehicle” UIM claim has the burden of proving that another vehicle caused the accident, and that the insured has taken all reasonable steps to identify the driver and/or owner of that other vehicle. See *Mello*, 75 Wn. App. at 334; see also *Burmeister*

v. State Farm Ins. Co., 92 Wn. App. at 362. Where the UIM insured fails to meet this burden of proving that the accident was caused by a “phantom vehicle”, a court appropriately dismisses on summary judgment the insured’s claim for UIM coverage. *Burmeister*, 92 Wn. App. at 372; *Mello*, 75 Wn. App. at 340; see also *State Farm Mut. Auto. Ins. Co. v. Seaman*, 96 Wn. App. 629, 980 P.2d 288 (1999).

Both Mr. Osborne and Mrs. Osborne are “you” under the Policy. Both are likewise “person[s] having an underinsured motorist claim from” the April 16, 2009 accident. Therefore, under the Policy’s plain terms, and under RCW 48.22.030, neither of them can serve as the necessary independent corroboration for their claim that a “phantom vehicle” caused the April 16 accident. See CP 68, 75.

Deputy Morgan, the only person who interacted with either Mr. Osborne or Mrs. Osborne at the scene of the accident, saw no physical evidence – or any objective proof of any kind – that another vehicle was involved in the April 16 accident. He also spent several minutes with the Osbornes at the scene of the accident, and then several more minutes with them as he drove them to their home at their request, and testified that both of the Osbornes were calm throughout his interaction with them.

Deputy Morgan’s testimony does not corroborate the involvement of a second vehicle. To the contrary, Deputy Morgan’s testimony

supports only the involvement of the Osbornes' own vehicle in the April 16 accident. There is no physical evidence that a second vehicle was involved. Deputy Morgan saw no vehicles leaving the area as he approached. He saw no skid marks or yaw marks from any attempt by Mrs. Osborne to stop the Osborne vehicle, or avoid a sudden obstacle, as it left the road. As discussed in detail above, given the calm demeanor of both of the Osbornes throughout their interaction with Deputy Morgan, the "excited utterance" exception to the hearsay rule did not apply to Mrs. Osborne's statement to Deputy Morgan that another vehicle had run the Osborne vehicle off the road. See, e.g., *Burmeister*, 92 Wn. App. at 368-370.

Therefore, there was no corroborating evidence that a "phantom vehicle" caused the April 16 accident. Accordingly, Farmers correctly determined that the Osbornes had failed to prove that an "underinsured motor vehicle" caused the accident, and Farmers correctly denied UIM benefits given the terms of the Policy and the terms of RCW 48.22.030. Due to the absence of the required independent corroborating evidence, plaintiffs' sole pleaded cause of action, breach of contract, failed as a matter of law.

The UIM cases cited by plaintiffs in support of their assertion that they submitted sufficient corroborating evidence to survive summary

judgment are easily distinguishable. In *Gerken v. Mutual of Enumclaw Ins. Co.*, 74 Wn. App. 220, 872 P.2d 1108 (1994), the Court of Appeals noted – unlike in the present case – several types of independent corroborating evidence that a “phantom” vehicle had caused the accident at issue.

First, plaintiff Gerken submitted an affidavit from an expert accident reconstructionist who provided expert opinion testimony based upon photographs of yaw marks which were consistent with an avoidance maneuver. In contrast, no yaw marks were seen by the responding officer here, there are no photographs of any yaw marks, and there is no expert accident reconstructionist testimony. Second, plaintiff Gerken provided declarations from two passengers in his car, who had settled their UIM claims and therefore were permitted to act as corroborating witnesses under RCW 48.22.030(8), that a “phantom” vehicle had caused the accident. Here, the only testimony that a phantom vehicle was involved comes from plaintiffs themselves, both of whom are making UIM claims and therefore cannot provide the necessary corroborating evidence. Third, plaintiff Gerken was visibly seriously injured in the accident, such that the Gerken court found “nothing...to suggest his comments were the result of premeditation, reflection or design”, when he claimed to the responding

officer minutes after the accident that a “phantom” vehicle had forced him off the road. 74 Wn. App. at 228.

In contrast, plaintiffs Osborne were calm throughout their interaction with Deputy Morgan, had no visible injuries, and never claimed to need any medical treatment. Unlike plaintiff Gerken, Mrs. Osborne’s statement that a “phantom” vehicle caused the accident had no indication of reliability, given Mrs. Osborne’s calm demeanor. To the contrary, Mrs. Osborne’s calm demeanor indicates a very real risk of “premeditation, reflection or design” with regard to her statement to Deputy Morgan.⁶

Nationwide Ins. v. Williams, 71 Wn. App. 336, 338, 858 P.2d 516 (1993), likewise involved a seriously injured UIM insured who, “as he lay near his truck, bleeding and drifting in and out of consciousness...moaned that he had been run off the road by another vehicle.” Plaintiff Williams submitted expert accident reconstruction testimony that the accident resulted from an avoidance maneuver, as well as affidavits from two witnesses at the scene to whom he had stated that another vehicle had run a stop sign and caused the accident. The *Williams* court found that these

⁶ Moreover, the *Gerken* Court implied that any one of these pieces of evidence, standing alone, would likely have been insufficient to defeat the insurer’s summary judgment motion, but found that “taken as a whole” the several types of independent corroborating evidence were sufficient to meet the UIM insured’s burden. 74 Wn. App. at 226. Here, plaintiffs have not provided even one item of independent corroborating evidence.

two independent witnesses' testimony regarding plaintiff Williams' distressed physical and mental condition at the time he made these statements to them meant that Williams' statements qualified as "excited utterances". Plaintiff Williams' visible, serious injuries convinced the *Williams* court that the testimony of the two independent witnesses, repeating plaintiff Williams' claim to them that a "phantom" vehicle had caused the accident, fell within the "excited utterance" exception to the hearsay rule, because of "sufficient spontaneity and trustworthiness to provide the circumstantial guarantees of reliability and truthfulness required under ER 803(a)(2)." 71 Wn. App. at 344.

Plaintiffs Osborne, in their opposition to Farmers' summary judgment motion, provided the trial court with no basis from which to conclude that a material issue of fact existed regarding whether a "phantom vehicle" caused the April 16 accident. To the contrary, as a matter of law, the admissible evidence proffered by plaintiffs was insufficient to support a UIM claim. Consequently, plaintiffs provided the trial court with no basis to deny Farmers' summary judgment motion.

V. CONCLUSION

The trial court properly struck the hearsay statements in which Hugo Valencia and Deputy Morgan repeated the Osbornes' assertions that another vehicle had caused the accident. The trial court also properly

struck the sentence in Mr. Valencia's declaration in which he had purported to offer expert opinion testimony regarding how the accident occurred. The trial court correctly disregarded plaintiffs' own declarations to the extent that those declarations contained statements regarding how the accident occurred, because plaintiffs' own declarations cannot serve as the necessary corroboration for their own UIM claims.

In short, neither Mr. Osborne nor Mrs. Osborne submitted the independent corroborating evidence that both the Policy and Washington's UIM statute require when a UIM insured claims that a second, "phantom", vehicle caused the April 16 accident. Because the Osbornes failed to meet their burden of proving that an "underinsured motor vehicle" caused the accident, Farmers correctly determined that neither of the Osbornes was entitled to UIM benefits of any kind under the Policy.

Due to the absence of the required independent corroborating evidence that a "phantom vehicle" caused the April 16 accident, plaintiffs' breach of contract claim failed as a matter of law, and Farmers was entitled to summary judgment dismissal of plaintiffs' lawsuit. No issues of material fact exist. The trial court should be affirmed in all respects.

DATED this 19th day of November, 2010.

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