

No. 66877-3-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

ALEXANDER M. DEHAAN AND CHRISTINE J. CARLSON,

Appellants,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Respondent.

RESPONSE BRIEF OF APPELLANTS

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and Christine J. Carlson:

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAR -1 AM 10:42

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I. RESPONSE

Appellants, Alexander M. Dehaan and Christine J. Carlson, provide the following response to Respondents Brief.

a. **Non-Disputed Arguments of Respondent**

In Respondent's briefing, under sections A, B, and C of the Argument section, argument is made about the policy and its application. These are not the portions which Appellants argue.

For clarification, Petitioners do not dispute that the damages suffered, to which the Under Insured Motorists ("UIM") Endorsement applies, is limited to "physical injury or destruction of: 1) your insured car." CP 48. It is also not disputed that the policy is consistent with the UIM statute.

b. **Disputed Arguments of Respondent**

1. **Property Damage Limited to Physical Injury**

Basically, Respondents do not dispute that the property damage is limited to physical injury. The question that should remain should Petitioners appeal be granted is whether some of the damages sought are considered property damages. Specifically, the argument that taxes and car insurance that were paid regarding the vehicle are directly related to physical injury.

The ruling of *Daley*, is exactly what this portion applies to. In *Daley*, the issue was whether emotional distress was directly related to physical injuries. Even though this was a tort claim, its

holding that a direct relationship between the injury and the damages must relate. *Daley v. Allstate Ins. Co.*, 135 Wn. 2d 777, 958 P.2d 990 (1998).

It should be determined at the trial court level whether certain damages would be within the basic understanding of property damage. As pointed out in Respondent's brief, which cited to *Overton v. Consol. Ins. Co.*, "the terms of a policy should be given a fair, reasonable, and sensible construction, as would be given to the contract by the average person purchasing insurance." (see Respondent's Brief page 10, citing *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 424 38 P.2d 322 (2002)).

As this was not addressed in the trial court, it should be remanded for purposes of a fact finder to determine if the average person would see the damages suffered by Petitioners are property damages as contained within the UIM Endorsement definition.

2. No Coverage for Repair Costs

Respondent argues that because there was \$50,000.00 available from the third party insurance, this more than pays for the repair costs of approximately \$46,000.00. The issue is that this logic ignores other damages of Petitioners.

As raised in the Petitioners' Brief, the question is how are funds allocated when you have various types of damages? To accept the argument of Respondent and the ruling of the trial court,

they are apparently applied towards property damages first then to everything else next, in essence in favor of the insurance company, leaving the injured party holding the bill on all other damages.

However, this goes against the rulings in Washington that “while an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss from a tortfeasor responsible for the damage, it can recover only the excess which the insured has received from the wrongdoer, remaining **after the insured is fully compensated for his loss.**” (emphasis added) *Thiringer v. American Motors Ins. Co.*, 91 Wash.2d 215, 219, 588 P.2d 191 (1978).

The \$50,000.00 was from a general settlement of damages, which included loss of use, vehicle repairs, etc. If anything a proper allocation must be established to determine distribution of the proceeds. They should not be allocated towards one specific damage though, leaving the injured party to pay the remainder.

If an allocation is given, logically, some of the property damages suffered by Petitioners would be unpaid. This would leave the UIM Endorsement to pay for these damages. What those specific amounts are and how each are allocated are factual issues that should be decided by a fact finder.

3. Stacking

Respondent argues that this is an attempt by Petitioners to

“stack” insurance policies. As cited by Respondent, the Court was clear in *Greengo v. Public Employees Mutual Insurance Co.*, that “if this policy and any other policy providing underinsured motorist coverage apply to the same loss, the maximum limit of liability under all policies will be the highest limit of liability that applies under any one policy.” *Greengo v. Public Employees Mutual Insurance Co.*, 135 Wn.2d 799, 804, 959 P.2d 657, 659 (1998). The Court explained that “In the UIM context, ‘the term ‘similar insurance’ is appropriately understood to be other underinsured motorist insurance coverage’s.” *Id.* at 806.

This matter is not stacking as Petitioners are not attempting to add one UIM onto another. For this simple fact, the argument of stacking is not relevant to this matter.

4. Underinsured

Last, Respondent attempts to argue that the third party was not underinsured (see Respondent Brief page 16-17). Again, this falls under the argument that simply because there was \$50,000.00 paid by the third party and the repair work was approximately \$46,000.00, the third party is not underinsured.

However, Respondent continues to ignore the fact that other damages exist. When these damages are added, the third party is underinsured because she did not have sufficient funds to pay for all damages.

II. CONCLUSION

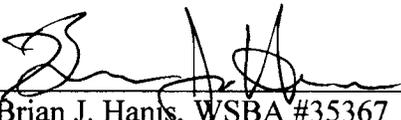
Respondent continues to attempt to receive the benefit of the allocation of funds by simply applying it first to repair of the vehicle, then to the other damages. To allow this would conflict with the established policy in Washington that an injured party is made whole first.

Respondent disagrees with this by questioning the history of *Cammel v. State Farm Mutual Ins Co* (86 Wash.2d 264, 543 P.2d 634 (1975)). To clarify, this case was only cited within *Sherry v. Financial Indem. Co.* (160 Wash.2d 611, 620, 160 P.3d 31 (2007)), which is still good case law. Regardless, the underlying policy is still good law. To rule otherwise would leave potential injured parties holding the bill for damages they otherwise would not be responsible.

For these reasons, the trial court ruling should be overturned and this matter remanded to determine a proper allocation of the funds and to determine which damages fall within the meaning of property damage.

DATED this 28th day of February, 2012.

HANIS IRVINE PROTHERO, PLLC



Brian J. Hanis, WSBA #35367

Attorney for Appellants Dehaan and Carlson

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2012, copies of the following document:

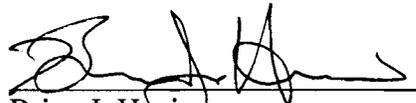
1. Appellants' Response Brief.

was served on counsel at the following address via first class mail and facsimile:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28th day of February, 2012, at Kent, Washington.


Brian J. Hanis