

67693-8

67693-8

NO. ~~84886-3~~

67693-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JANETTE LEDING OCHOA,

Petitioner,

v.

PROGRESSIVE CLASSIC INSURANCE COMPANY, a foreign
corporation, THE PROGRESSIVE CORPORATION, a foreign
corporation, and PROGRESSIVE CASUALTY INSURANCE
COMPANY, a foreign corporation,

Respondents.

BRIEF OF RESPONDENTS

Douglas Foley, WSBA #13119
Vernon Finley, WSBA #12321
Douglas Foley and Associates, PLLC
13115 NE 4th Street, Suite 260
Vancouver, WA 98684
(360) 883-0636

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Attorneys for Respondents
Progressive Classic Insurance Company, The Progressive Corporation,
and Progressive Casualty Insurance Company

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A. INTRODUCTION

Respondents Progressive Classic Insurance Company, The Progressive Corporation, and Progressive Casualty Insurance Company, (hereinafter “Progressive”) prevailed in the trial court on a summary judgment motion regarding the amount of the offset for UIM coverage. Ochoa had UM/UIM insurance coverage through Progressive. This case is before the court on stipulated facts.

Petitioner Janette Ochoa, (hereinafter “Ochoa”) presents no basis for this Court to overturn the trial court’s considered decision. As the trial court determined, Progressive was entitled to offset the sum of all applicable insurance policies with respect to the putatively “underinsured” vehicle. The applicable policies included the personal automobile policy of the driver (State Farm) who was working as a pizza delivery driver, and the commercial automotive policy of Dominoes’ Eastside Express, Inc. (“Evanston”) that insured the use of the vehicle.

The trial court was correct in its finding that the liability limit of both the State Farm and Evanston policies serves as an offset for Ochoa’s UIM claim.

B. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Progressive acknowledges Ochoa's sole assignment of error, but believes that this assignment of error could be more appropriately formulated, as follows:

(1) Assignment of Error

1. Did the trial court err when it determined by summary judgment as a matter of law and based upon stipulated facts that the threshold UIM status for the vehicle under RCW 48.22.030(1) is determined by applying the sum of all insurance policies applicable to the ownership, maintenance, or use of an underinsured motor vehicle?

(2) Issues Pertaining to Assignments of Error

Ochoa did not designate any issues pertaining to assignments of error in the opening brief as required under RAP 10.3. Progressive designates the following issues:

1. Does a UIM claim exist under RCW 48.22.030 when the claimant's damages do not exceed the amount of available liability insurance applicable to the ownership, maintenance, or use of the vehicle?

2. Does RCW 48.22.030 authorize the aggregation of insurance on an underinsured vehicle by adding the policy limits of

both the owner of the vehicle and an individual or company insuring the use of the vehicle who is vicariously liable?

3. Should Petitioner's request for the award of attorney fees based on *Olympic Steamship v. Centennial Insurance Company* be denied?

C. RESTATEMENT OF THE CASE

The parties stipulated to the facts for the present appeal which are set forth in the Findings of Fact and Conclusions of Law entered by the Court on July 29, 2010. The trial court entered this Order for the express purpose of presenting this issue to the Court based upon stipulated facts.

Ochoa has presented a lengthy history of the entire case in her brief. However, the factual record must be limited to the stipulated facts which are set forth below. CP 323 – CP 326. The trial court's Findings of Fact and Conclusions of Law are attached to this brief as Appendix A.

1. The Plaintiff, Janette Leding Ochoa (hereinafter "Plaintiff"), was struck by an auto operated by Dawnell Smith (hereinafter "Smith") on June 24, 1999 when Smith went through a stop sign. CP 324.

2. Smith was the only driver at fault in the collision. *Id.*

3. Plaintiff suffered injuries in the collision and retained attorney Ben Wells of Wells & Hammer to represent her. *Id.*

4. At the time of this accident, Smith was delivering pizza for Domino's Pizza, Eastside Express in her own vehicle. *Id.*

5. Smith carried a State Farm Mutual Automobile Insurance Company policy that applied to this accident. It provided liability coverage in the amount of \$50,000 for each person and \$100,000 for each occurrence. *Id.*

6. Evanston Insurance Company had a policy of insurance with limits of \$1,500,000 which insured Eastside Express, Inc. for its liability for any non-owned vehicle driven on the job by an employee of Eastside Express, Inc. The Evanston policy is Exhibit A. *Id.*

7. The Evanston policy was applicable to the collision and the policy covered the vehicle Smith was

driving at the time of the incident since Smith owned the vehicle and Smith was operating the vehicle within the course and scope of her employment with Eastside Express. Smith was not an insured under the Evanston policy. *Id.*

8. Ochoa had a policy of insurance with Progressive Classic Insurance Company which included Underinsured Motorist coverage for Ochoa in the amount of \$50,000. The complete policy is Exhibit B. *Id.*

9. Ochoa made claims with Smith and Progressive. *Id.*

10. On March 15, 2001, Ochoa provided Progressive the opportunity to buy out the tentative settlement with Smith for the State Farm limits of \$50,000. Progressive declined by fax on March 20, 2001. CP 325.

11. On March 21, 2001 Ben Wells had Ochoa sign a release provided by State Farm and settled all claims against Smith and State Farm for \$50,000. *Id.*

12. On March 21, 2001 Wells wrote Progressive providing a copy of the State Farm settlement documents and renewed the UIM claim. After confirming the Evanston policy applied Progressive thereafter took the position that to have a UIM claim the value of Ochoa's damages had to exceed the amount of both the State Farm policy and the Evanston policy combined, regardless of whether the Evanston policy covered Smith as an insured. *Id.*

13. Soon after providing the State Farm settlement information to Progressive, Wells wrote to Domino's Pizza Eastside Express to assert a claim for Ochoa. No offer was made. *Id.*

14. Wells withdrew from Ochoa's representation by June 21, 2001. *Id.*

15. The release from State Farm Wells had Ochoa sign to settle with Smith had language that Domino's Pizza Eastside Express claimed released it from any claim. The Release is Exhibit C. *Id.*

16. In June 2002, Ochoa sued and served Domino's Pizza Eastside Express. Attorney Ben Wells and Hammer & Wells were also named for any damages that may have been lost from Eastside Express by the release but the attorney and law firm were not served. Ochoa served Wells in February, 2004. *Id.*

17. When the dispute on the issue of the threshold for a UIM claim continued Ochoa amended the complaint and added Progressive as a defendant in June, 2004. *Id.*

18. In January 2005, Ochoa settled her claims against Eastside Express for \$25,000 and against Ben Wells and Hammer & Wells for \$32,500 and both defendants were dismissed. Progressive was the only remaining defendant. Ochoa's recovery at that point was \$107,500. *Id.*

19. Ochoa has asserted the value of her damages always exceeded the \$50,000 limits available to her from the State Farm policy and that her damages most likely exceeded \$107,500. Ochoa always agreed

and it is so found that her claims do not remotely exceed \$1,550,000. CP 325.

The trial court entered its order in favor of Progressive finding that the Evanston policy liability limit serves as an offset for the threshold for Ochoa's UIM claim. The Court entered the following conclusions of law:

1. The Evanston policy liability limit serves as an offset for the threshold for Ochoa's UIM claim. CP 326.

2. The appellate resolution of this issue is central to either the necessity of any trial or one that is not useless. Pursuant to CR 54(b) there is no just reason for delay of entry of a final order. *Id.*

The case was then timely appealed to the Washington Supreme Court. CP 1-7.

D. SUMMARY OF ARGUMENT

The trial court correctly applied the statutory definition of an underinsured motor vehicle which is set forth in RCW 48.22.030(1). Smith was the driver of her own car while employed as a pizza delivery driver for Eastside Express.

At issue in this appeal is whether the limits of the liability insurance policy of Smith and the limit of Eastside Express's policy that insures the use of the Smith's vehicle should apply as an offsets against Ochoa's UIM insurance limits. The trial court correctly reasoned that all of the applicable policies that insure the ownership, maintenance, or use of the vehicle applied to determine the UIM offset.

Ochoa has stipulated that her damages do not exceed \$1,550,000. There was sufficient liability insurance available on the Smith vehicle to compensate Ochoa for her injuries. This stipulation results in the vehicle not being classified as an uninsured vehicle pursuant to RCW 48.22.030(1), as the stipulated damages do not exceed the amount of available insurance on the vehicle.

The fact that Smith and Eastside Express are "jointly and severally liable" based on respondeat superior is of no consequence for the determination of whether the vehicle is underinsured for the Progressive policy. RCW 48.22.030(1) provides that the sum of the respective liability policies for the ownership, maintenance, or use of the vehicle determines the applicable offset for purposes of the UIM claim.

E. ARGUMENT

(1) Standard of Review.

As this matter was resolved on summary judgment based upon stipulated facts, this Court reviews the trial court decision de novo. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is properly granted where the pleadings and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

(2) The Trial Court Correctly Determined That The Vehicle Was Not Underinsured Pursuant To RCW 48.22.030(1).

(a) Definition of Underinsured Motor Vehicle.

The statutory definition of an underinsured motor vehicle is set forth in RCW 48.22.030(1):

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

The Progressive policy follows the statute by defining “Underinsured Motor Vehicle,” as follows:

“3. Underinsured motor vehicle means a land motor vehicle or trailer of any type:

(e) to which a liability bond or policy applies at the time of the accident, but the sum of the limits of liability under all applicable bonds and policies is less than the damages which the insured person is entitled to recover.” CP 367.

(b) Principles for Statutory Interpretation in Washington.

This case is essentially one of statutory interpretation.

RCW 48.22.030(1) is plain and unambiguous. “The primary goal of statutory construction is to carry out legislative intent.” *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). In Washington’s traditional process of statutory interpretation, this analysis begins by looking at the words of the statute. “If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself.” *Id.* The Court must look to what the Legislature said in the statute and related statutes to determine if the Legislature’s intent is plain. *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the language of the statute is plain, that ends the Court’s role. *Cerrillo v. Esparza*, 158 Wn.2d 194, 205-06, 142 P.3d 155 (2006).

If, however, the language of a statute is ambiguous, the Court must then construe the statutory language, but the object of such construction is still to effectuate the Legislature's intent. *Dep't of Ecology*, 146 Wn.2d at 9-10, 11-12. A statute is ambiguous if it is subject to two or more reasonable interpretations. *State v. McGee*, 122 Wn.2d 783, 787, 864 P.2d 912 (1993). In undertaking the construction of a statute, the Court must construe it in a manner that best fulfills the legislative intent. *State ex rel. Royal v. Board of Yakima County Comm'rs*, 123 Wn.2d 451, 459, 869 P.2d 56 (1994). But the Court should not read language into a statute even if it believes the Legislature might have intended it. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002).

A court may resort to "principles of statutory construction, legislative history, and relevant case law" to assist it in discerning legislative intent only if the statute's language is ambiguous. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 809, 16 P.3d 583 (2001). Useful legislative history materials may include bill reports on the legislation, *Young v. Estate of Snell*, 134 Wn.2d 267, 280, 948 P.2d 1291 (1997), or fiscal notes on the legislation, *Cena v. Dep't of Labor & Indus.*, 121 Wn. App. 915, 923, 91 P.3d 903 (2004).

(c) The Legislative History Supports Progressive's Position.

The Legislative History supports Progressive's interpretation of the statute. The summary of the bill set forth in the "Analysis As Of March 5, 1980" for RESHB 1983 (Appendix 2) succinctly describes the legislative intent behind the definition of "underinsured motor vehicle", stating:

"Underinsured motor vehicle" is defined to include vehicles on which there is no coverage in force as well as vehicles on which the maximum amount of coverage available is less than the damages which the injured party is legally entitled to recover."

The summary shows that the legislative intent was to look at the "maximum amount of coverage" for the vehicle for the purpose of determining the UIM threshold.

(d) RCW 48.22.030(1) Is Not Ambiguous.

RCW 48.22.030(1) defines a motor vehicle as underinsured - not an individual tortfeasor. The statute unambiguously uses the phrase "ownership, maintenance, or use." The statute plainly states "to which the sum of the limits of liability under all bodily injury...insurance policies..." which requires that all applicable policy limits on the vehicle be applied.

Eastside Express maintained an insurance policy for the use of Smith's vehicle for pizza delivery. The sum of the applicable policies on the vehicle was \$1,550,000, comprised of \$50,000 for Smith's personal State Farm policy and \$1,500,000 for the Eastside Express policy that insured the use of the vehicle. Thus, the Smith vehicle was not an underinsured vehicle based on the parties' stipulated facts.

Ochoa argues in her brief that RCW 48.22.030(1) should be read in a manner that the policies apply to either the ownership, or the maintenance, or use of the vehicle, each considered separately. (Petitioner's Brief, pgs. 30-31) This interpretation ignores the "sum of the limits" under all applicable policies language and would require a rewriting of the statute by the legislature.

Ochoa next argues that the definition of underinsured motor vehicle set forth in RCW 48.22.030(1) is modified by the language in RCW 48.22.030(2). (Petitioner's Brief, pg. 31) This section of the statute provides for the requirement of UM/UIM coverage for insurance policies and does not apply, in any way, to the determination of the UIM threshold.

RCW 48.22.030(2) includes the phrase "legally entitled to recover damages from owners or operators of underinsured motor

vehicles.” Ochoa argues the disjunctive “or” applies to either owners or operators in RCW 48.22.030(2). Ochoa’s argument ignores the fact that the 1980 amendments specifically added the definition of “underinsured motor vehicle” in RCW 48.22.030(1) to the statute. The two sections of the statute discuss different subjects and there is no ambiguity.

In summary, RCW 48.22.030(1) is not ambiguous and the plain meaning of the statute provides that the Evanston policy limits should be included when determining the UIM threshold for Ochoa’s UIM coverage.

(3) *Finney v. Farmers Ins. Co. Was Decided Under The Former UM Statute.*

(a) *Finney v. Farmers Ins. Co.*

Ochoa relies on *Finney v. Farmers Ins. Co.*, 92 Wn.2d 748, 600 P.2d 1272 (1979) stating that this court has definitively answered the coverage question presented here. (Petitioner’s Brief, pgs. 31-32) *Finney* can be distinguished as the case involved the predecessor statute to RCW 48.22.030 that only covered uninsured motorist claims (UM). The Uninsured Motorist statute was enacted in 1967. See Laws of

1967 c 150 § 27.¹ The statute was rewritten by the 1980 amendments that added coverage for underinsured motorists. See Law of 1980 c 117 § 1. The UM statute that was addressed in 1978 in the *Finney* did not provide a definition for an underinsured vehicle. *Id.* at 751. The definition provided was for an uninsured vehicle. Thus, *Finney* was decided on the basis of the old UM statute.²

¹ The text of former RCW 48.22.030 enacted in 1967 under Laws of 1967 ch. 150 § 27, was set forth in *Strunk v. State Farm Mut. Auto. Ins. Co.*, 90 Wn.2d 210, 214-215, 580 P.2d 622 (1978):

RCW 48.22.030 provides:

"On and after January 1, 1968, no new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in RCW 46.29.490, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom, except that the named insured may be given the right to reject such coverage, and except that, unless the insured requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer."

² A Washington Law Review article titled "*Washington's Underinsured Motorist Statute: Balancing The Interests of Insurers and Insured,*" Vol. 55:819, pg. 820 (1980) noted that much of the prior precedent under the UM statute would not longer be applicable under the UIM statute enacted in 1980:

"The new underinsured motorist statute preempts many of the Washington Supreme Court's interpretations of the present statute, and raises a number of new issues to be resolved in future litigation. These issues ought to be considered in light of the basic conceptual

Unlike the statutory scheme that existed when *Finney* was decided, the present statute expressly defines uninsured vehicle in RCW 48.22.030(1). See Laws of 1980, ch. 117 §1. RCW 48.22.030, in its present form, includes “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....” *Finney* can be distinguished as this decision relied on the former statutory language of RCW 48.22.030.

(b) Response to Cases Cited by Ochoa.

Ochoa cites the *Allstate Ins. Co. v. Batacan*, 139 Wn.2d 443, 986 P.2d 823, (1999) decision stating that this court expressed disapproval of aggregating multiple tortfeasors’ liability coverages. *Batacan* is inapplicable as it involved the situation where the plaintiffs sued the drivers of both vehicles that had hit them. Thus, in *Batacan* there were two separate tortfeasors and two separate vehicles. *Id.* at 445. This is a wholly different fact situation than the facts presented here where only one other vehicle was involved in the accident with Ochoa.

differences between uninsured motorist coverage and underinsured motorist protection” (Emphasis added)

Ochoa argues that her interpretation of the statute is supported by a public policy argument. In *Bohme v. Pemco Mut. Ins. Co.*, 127 Wn.2d 409, 413-415, 899 P.2d 787 (1995), the court articulated the public policy reasons behind the UIM statute. This court in *Bohme* upheld a policy exclusion that excluded from UIM coverage a vehicle owned by a governmental entity, unless the governmental entity was financially unable to satisfy a claim. *Id.* at 419. The *Bohme* decision emphasized the purpose of the statute was to allow a floating layer of coverage as a “safety net” and not serve as a primary source of recovery. *Id.* at 414-415. The *Bohme* decision stated that the insured was protected, since “if the government entity is insolvent, UIM coverage applies,” and “if the entity is solvent, the victim can seek the damages that would have been received had that governmental entity been insured.” *Id.* at 419.

In *Allstate Ins. Co. v. Dejbod*, 62 Wn.App. 278, 285, 818 P.2d 608 (1991), the court stated that a UIM insurer can subtract a liability policy pursuant to RCW 48.22.030(1) if the person insured by the liability policy is liable to the injured claimant and there is no other reason why the injured claimant could not legally recover from the liability carrier. The *Dejbod* court discussed the policies underlying the

UIM statute at length, and stated that UIM insurance should supplement but not supplant liability insurance. *Id.* at 284.

The dissent in *Allstate Ins. Co. v. Batacan*, (*supra*) cited *Bohme* and explained that UIM insurance is designed to be used when all other insurance is insufficient to pay damages, stating:

“If this court were to construe the UIM statute in a way that changed UIM coverage to primary insurance, we would be doing an injustice to the insurance industry and to the consumers of insurance who should be able to purchase UIM coverage by paying premiums for coverage which is secondary, not primary. The entire financial structure of UIM insurance is that of providing a second layer of recovery when the aggregate of the otherwise available liability insurance is not sufficient to pay the damages of the injured motorist. RCW 48.22.030(1). UIM coverage is designed to be used when all other applicable insurance is insufficient to pay damages; it is in the best interest of the public that this excess type of insurance remains secondary to ordinary primary liability insurance so that UIM insurance remains affordable.” *Id.* at 459-460.

The trial court’s decision is consistent with the policy underlying the UIM statutes to protect victims from financially irresponsible motorists as Eastside Express had sufficient liability coverage. UIM coverage is available here, but the primary coverage provided by Eastside Express (\$1.5 million in liability coverage) must be exhausted first. There was ample available insurance for Ochoa without resorting to UIM coverage under the Progressive policy.

Ochoa's interpretation of the statute would make the UIM coverage a primary source of recovery.

(4) The Trial Court's Decision Is Consistent With Cases In Other Jurisdictions Finding That UM/UIM Coverage Depends On The Insured Status Of The Vehicle.

This issue has been addressed in other jurisdictions with the courts finding that uninsured motorists' coverage status depending on the insured status of the vehicle, not on the driver. See *Mercury Ins. Co. v. Enter. Rent-A-Car Co. of L.A.*, 80 Cal. App. 4th 41, 95 Cal. Rptr. 2d 222 (2000); *California Capital Ins. Co. v. Nielsen*, 153 Cal. App. 4th 1221, 64 Cal. Rptr. 3d 50 (2007).

In *Mercury*, the party seeking underinsured motorist coverage (Okamoto) was injured while a passenger in a rental car being driven by a friend. *Id.* at 44. Okamoto sued the friend for negligent operation of the vehicle and sued Enterprise Rent-A-Car based on its ownership of the vehicle. *Id.* at 44-45. The court cited with approval a California Treatise and concluded that the insurance follows the insured status of the vehicle, explaining:

"That treatise opines: 'UMC [uninsured motorists coverage] status depends on the insured status of the vehicle, not the driver. Thus, a vehicle that is insured cannot be regarded as 'uninsured' when driven by an uninsured person.'" (Id., at ¶6:1280, p. GG-17 (rev. # 1 1998), original italics.) We agree with this position and

conclude that the rental vehicle involved in this action cannot be regarded as uninsured. *Id.* at 47-48. (Emphasis added)

In *California Capital Ins. Co. v. Nielsen*, 153 Cal. App. 4th 1221, 64 Cal. Rptr. 3d 50, 2007 (Cal. App. 3d Dist. 2007), the court discussed *Mercury* and found it significant that the Legislature could have defined an uninsured motor vehicle as one in which neither the driver, nor the car, did have liability insurance at the time of the accident but they did not do so. *Id.* at 1226. The same reasoning should apply here with the present plain and ambiguous language in RCW 48.22.030(1). The legislature did not create an exception for vicarious liability. Ochoa's argument for a distinction based on vicarious liability would result in the court rewriting the statute.

(5) Ochoa's Request for Attorney Fees *Olympic Steamship* for This Appeal Should Be Denied.

In *Olympic Steamship Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 53, 811 P.2d 673 (1991), this court held that an insured may recover reasonable attorney fees where the insurer, by denying coverage, compels the insured to take legal action, to obtain the full benefit of his insurance contract. Based on the arguments raised above, Progressive respectfully requests that attorney fees be denied to Ochoa for this appeal.

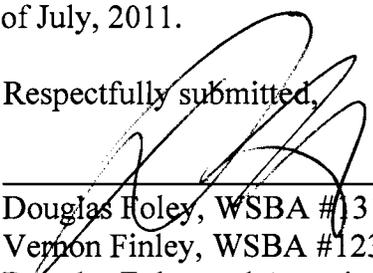
F. CONCLUSION

The UIM status for Ochoa depends on the definition of an underinsured motor vehicle set forth in RCW 48.22.030(1). The vehicle was insured with the \$50,000 liability insurance that Smith had with her personal automobile insurer, State Farm, and the \$1.5 million in liability coverage from the Evanston Insurance Company policy, for a total of \$1.55 million in available liability coverage. Progressive is, therefore, entitled to a full credit of \$1.55 million.

It is respectfully submitted that the trial court's order be affirmed.

DATED this 5th day of July, 2011.

Respectfully submitted,



Douglas Foley, WSBA #13119
Vernon Finley, WSBA #12321
Douglas Foley and Associates, PLLC
13115 NE 4th Street, Suite 260
Vancouver, WA 98684
(360) 883-0636

Attorneys for Respondents Progressive
Classic Insurance Company, The
Progressive Corporation, and Progressive
Casualty Insurance Company

APPENDIX

APPENDIX 1

FILED
KING COUNTY

JUL 29 2010

SUPERIOR COURT CLERK
BEVERLY ANN ENEBRAD
DEPUTY

Visiting Judge Brian Gain

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

JANETTE LEDING OCHOA

Plaintiff

vs.

PROGRESSIVE CLASSIC INSURANCE
CO., a foreign corporation, THE
PROGRESSIVE CORPORATION, a foreign
corporation, and PROGRESSIVE
CASUALTY INSURANCE COMPANY, a
foreign corporation,

Defendants.

No.: 02-2-07712-7

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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Following the Court's suggestion at the pre-trial conference held June 25, 2010, the parties presented agreed Findings of Fact to the Court on July 29, 2010 (except Progressive requested one addition to Findings 2 and one addition to Finding 18). The Court resolved those two requests *by mt*

1 In order to obtain appellate guidance before conducting an expensive trial,
2 the Court made the Conclusions of Law stated below.

3 I. FINDINGS OF FACT

4 1. The Plaintiff, Janette Leding Ochoa (hereinafter "Plaintiff"), was
5 struck by an auto operated by Dawnell Smith (hereinafter "Smith") on June 24,
1999 when Smith went through a stop sign.

6 2. Dawnell Smith was the only ^{driver} ~~person~~ at fault in the collision. *WPA RAC 100*

7 3. Plaintiff suffered injuries in the collision and retained attorney Ben
8 Wells of Wells & Hammer to represent her.

9 4. At the time of this accident, Smith was delivering pizza for
10 Domino's Pizza, Eastside Express in her own vehicle.

11 5. Smith carried a State Farm Mutual Automobile Insurance Company
12 policy that applied to this accident. It provided liability coverage in the amount
of \$50,000 for each person and \$100,000 for each occurrence.

13 6. Evanston Insurance Company had a policy of insurance with limits
14 of \$1,500,000 which insured Eastside Express, Inc. for its liability for any non-
owned vehicle driven on the job by an employee of Eastside Express, Inc. *The*

15 7. The Evanston policy was applicable to the collision and the policy
16 covered the vehicle Dawnell Smith was driving at the time of the incident since
17 Dawnell Smith owned the vehicle and Dawnell Smith was operating the vehicle
within the course and scope of her employment with Eastside Express. Dawnell
Smith was not an insured under the Evanston policy.

18 8. Plaintiff Ochoa had a policy of insurance with Progressive Classic
19 Insurance Company which included Underinsured Motorist coverage for
20 Plaintiff in the amount of \$50,000. The complete policy is Exhibit B.

21 9. Ochoa made claims with Smith and Progressive.

23 Findings of fact and conclusions of law
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24 hchoa findings rla.doc

Richard B. Kipatrck, P.S.
1750 - 112th Ave. N.E., Ste. D-155
Bellevue, WA 98004
(425) 453-8161
Fax: (425) 605-8540
Kipatrck.d@comcast.net

1 10. On March 15, 2001, Plaintiff provided Progressive the opportunity
2 to buy out the tentative settlement with Smith for the State Farm limits of
\$50,000. Progressive declined by fax on March 20, 2001.

3 11. On March 21, 2001 Ben Wells had Ochoa sign a release provided
4 by State Farm and settled all claims against Smith and State Farm for \$50,000.

5 12. On March 21, 2001 Wells wrote Progressive providing a copy of
6 the State Farm settlement documents and renewed the UIM claim. After
7 confirming the Evanston policy applied Progressive thereafter took the position
8 that to have a UIM claim the value of Ochoa's damages had to exceed the
amount of both the State Farm policy and the Evanston policy combined,
regardless of whether the Evanston policy covered Smith as an insured.

9 13. Soon after providing the State Farm settlement information to
10 Progressive, Wells wrote to Domino's Pizza Eastside Express to assert a claim
for Ochoa. No offer was made.

11 14. Wells withdrew from Ochoa's representation by June 21, 2001

12 15. The release from State Farm Wells had Ochoa sign to settle with
13 Smith had language that Domino's Pizza Eastside Express claimed released it
from any claim. The Release is Exhibit C.

14 16. In June 2002 Ochoa sued and served Domino's Pizza Eastside
15 Express. Attorney Ben Wells and Hammer & Wells were also named for any
16 damages that may have been lost from Eastside Express by the release but the
attorney and law firm were not served. Ochoa served Wells in February 2004.

17 17. When the dispute on the issue of the threshold for a UIM claim
18 continued Plaintiff amended the complaint and added Progressive as a defendant
19 in June 2004.

20 18. In January 2005 Ochoa settled her claims against Eastside Express
21 for \$25,000 and against Ben Wells and Hammer & Wells for \$32,500 and both
defendants were dismissed. Progressive was the only remaining defendant.
22 Plaintiff's recovery at that point was \$107,500.

23 Findings of fact and conclusions of law
Page 3 of 5

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Richard B. Kilpatrick, P.S.
1750 - 112th Ave. N.E., Ste. D-155
Bellevue, WA 98004
(425) 453-8161
Fax: (425) 605-9540
Kilpatrick.d@comcast.net

1 19. Ochoa has asserted the value of her damages always exceeded the
2 \$50,000 limits available to her from the State Farm policy and that her damages
3 most likely exceeded \$107,500. Ochoa always agreed and it is so found that her
4 claims do not remotely exceed \$1,550,000.

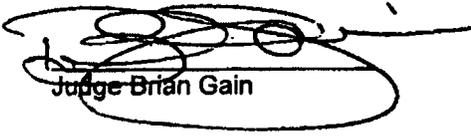
5 **II. CONCLUSIONS OF LAW**

6 1. The Evanston policy liability limit serves as an offset for the
7 threshold for Ochoa's UIM claim regarding Dawnell Smith's liability.

8 2. The appellate resolution of this issue is central to either the
9 necessity of any trial or one that is not useless. Pursuant to CR 54(b) there is no
10 just reason for delay of entry of a final order.

11 3. The pending trial date is stricken and stayed, and any other the
12 appropriate order regarding dismissal shall be entered.

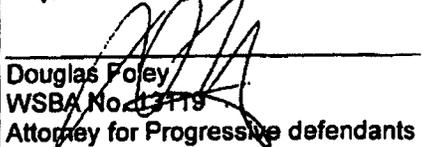
13 DATED this 29th day of July, 2010.

14 
15 Judge Brian Gain

16 *Findings agreed, conclusions of law are disputed.*
Richard B. Kilpatrick

17 Richard B. Kilpatrick
18 WSBA No. 7058
19 Attorney for Plaintiff Ochoa

20 *Approved on the form:*

21 
22 Douglas Foley
23 WSBA No. 17119
24 Attorney for Progressive defendants

APPENDIX 2

RESHB 1983

BRIEF TITLE: Revising laws relating to motor vehicle insurance.

SPONSORS: House Committee on Insurance
(Originally Sponsored by Representatives Rohrbach, Houchen,
McGinnis, Ellis, and Zimmerman)

HOUSE COMMITTEE: Insurance

SENATE COMMITTEE: Financial Institutions and Insurance

ANALYSIS AS OF MARCH 5, 1980

RATIONALE:

In cases where a person is hit by a motor vehicle on which there is an insurance policy in force, but the limits of that policy are less than the amount of damages sustained by the victim, the courts have ruled that the uninsured coverage provided by the victim's own policy may not be tapped since the at-fault driver is not technically uninsured. To solve this problem, some companies have begun to offer underinsured coverage, which allows an injured person to collect from his own company when the damages that he suffers cannot be covered by the liability coverage offered under the driver's policy.

Courts have also allowed "stacking" of policies, which means that if an insured is paying several premiums to cover several vehicles and one of those vehicles is involved in an accident, damages may be paid up to the combined limit of all policies owned by the policyholder.

The minimum legal limits of financial responsibility were last adjusted in 1967.

SUMMARY:

Every insurance company must offer policyholders underinsured motor vehicle coverage in amounts equal to the limits of the policyholder's own liability coverage. The policyholder may reject all or part of such coverage.

"Underinsured motor vehicle" is defined to include vehicles on which there is no coverage in force as well as vehicles on which the maximum amount of coverage available is less than the damages which the injured party is legally entitled to recover.

Companies are not required to extend underinsured coverage to motorcycles, or to vehicles occupied by an insured which are owned or regularly used by the insured or a family member, but not insured under the liability coverage of the policy.

Anti-stacking provisions state that if an insured has coverage available under more than one policy, the total limit of liability will not exceed the highest single limit provided by any one of the coverages, regardless of the number of people involved, claims made, or premiums paid.

The minimum limits of coverage which must be provided by any motor vehicle policy in an accident in which one person is injured are increased from \$15,000 to \$25,000, from \$30,000 to \$50,000 for coverage in an accident in which more than one person is injured, and from \$5,000 to \$10,000 to provide liability protection against property damage. The minimum amount of cash or securities which may be filed with the State Treasurer in lieu of insurance is increased from \$35,000 to \$60,000.

This bill takes effect September 1, 1980.

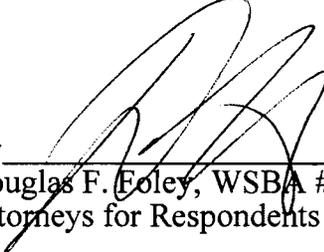
House: (a)	96	1
Senate: (a)	44	3
House Concur,		
Final Passage:	90	0

CERTIFICATE OF SERVICE

I, Douglas F. Foley, certify that I mailed, or caused to be mailed,
a copy of the foregoing Respondents' Brief, postage prepaid, via U.S.

Mail on July 5, to the following counsel of record at the following
address:

Shannon M. Kilpatrick
Attorney at Law
1750 – 112th Avenue, NE, Ste. D-155
Bellevue, WA 98004

By 
Douglas F. Foley, WSBA #13119
Attorneys for Respondents