

No: 39881-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

BY 
BEN F. BARCUS

STATE OF WASHINGTON

10 MAR 22 PM 3:51

FILED
COURT OF APPEALS
DIVISION II

KIM A. HANN, individually,

Appellant,
vs.

PROGRESSIVE NORTHWESTERN INSURANCE CO.
Respondent.

AMENDED BRIEF OF APPELLANT

Ben F. Barcus, WSBA# 15576
Paul A. Lindenmuth, WSBA#15817
The Law Offices of Ben F. Barcus & Associates, PLLC
4303 Ruston Way
Tacoma, WA 98402
(253) 752-4444

ORIGINAL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

I. INTRODUCTION 1

II. ASSIGNMENT OF ERROR 5

III. ISSUES RELATING TO ASSIGNMENT OF ERROF 6

IV. STATEMENT OF FACTS 7

V. ARGUMENT 14

VI. CONCLUSION 35

TABLE OF AUTHORITIES

<u>Table of Cases</u>	<u>Page</u>
<u>State Cases</u>	
<i>Anderson v. King County</i> , 158 Wn.2d 1, 138 P.3d 963 (2006) . . .	4,31
<i>Balise v. Underwood</i> , 62 Wn.2d at 199-200	17
<i>Barth v. Allstate Insurance Co.</i> , 95 Wn.App 552, 560, 977 P.2d 6 (1999)	34
<i>Bennett v. Hardy</i> , 113 Wn.2d 312, 926, 784 P.2d 1258 (1990)	19
<i>Biggers v. City of Bainbridge Island</i> , 162 Wn.2d 683, 693, 169 P.3d 14 (2007)	15
<i>Blackburn v. Safeco Insurance Co.</i> , 115 Wn.2d 82, 794 P.2d 1259 (1990)	20
<i>Brown v. Superior Underwriting</i> , 30 Wn.App 303, 632 P.2d 887 (1980)	12,29
<i>Capitol Hill Methodist Church of Seattle v. Seattle</i> , 52 Wash.2d 359, 324 P.2d 1113	15
<i>City of Puyallup v. Pac Bell</i> , 98 Wn.2d 443, 450, 656 P.2d 1035 (1982)	18
<i>Condit v. Lewis Ref. Co.</i> , 101 Wn.2d 106, 111, 676 P.2d 466 (1984)19	
<i>Davis v. Employment Security Department</i> , 108 Wn.2d 272, 737 P.2d 1262 (1987)	23
<i>Edwards v. Farmers Insurance Co.</i> , 111 Wn.2d 710, 763 P.2d 1226 (1988)	17,28,29,30
<i>Emwright v. King County</i> , 96 Wn.2d 538, 543, 637 P.2d 656 (1981)	18
<i>Fraternal Order of the Eagles v. Grand Aerial</i> , 146 Wn.2d 224, 59 P.3d 655 (2002)	20

<i>Hale v. Wellpinit School District, No. 49</i> , 165 Wn.2d 494, 198 P.3d 1021 (2009)	3
<i>Hall v. State Farm Mutual Auto Insurance Co.</i> , 133 Wn.App 394, 399, 135 P.3d 941 (2006)	17
<i>Hegwine v. Longview Fiber Company</i> , 162 Wn.2d 340, 172 P.3d 688 (2006)	20
<i>Kastanis v. Educational Employee's Credit Union</i> , 121 Wn.2d 483, 859 P.2d 26 (1994)	24
<i>Leskovar v. Nickles</i> , 140 Wn.App 770, 166 P.3d 1251 (2007)	4
<i>Lacey Nursing Center, Inc. v. DOR</i> , 128 Wn.2d 40, 53, 905 P.2d 338 (1995)	18
<i>Linville v. State</i> , 137 Wn.App 201, 209, 151 P.3d 1073 (2007) ...	18
<i>Loveland v. Leslie</i> , 21 Wn.App 84, 583 P.2d 664 (1978)	22,23,25,27,30,31,32
<i>Macky v. Acorn Custom Cabinetry, Inc.</i> , 127 Wn.2d 302, 310, 898 P.2d 284 (1995)	31
<i>Magula v. Benton Franklin Title Co.</i> , 131 Wn.2d 171, 930 P.2d 307 (1997)	24
<i>McFadden v. Elma Country Club</i> , 26 Wn.App 195, 613 P.2d 146 (1980)	23
<i>Post v. City of Tacoma</i> , 167 Wn.2d 300, 308, 217 P.3d 1179 (2009)	14
<i>Preston v. Duncan</i> , 55 Wash.2d 678,349 P.2d 605.	15,16
<i>Quadrant Corp. v. American States Insurance Co.</i> , 154 Wn.2d 165, 171, 110 P.3d 733 (2005)	18
<i>Roberts v. Dudley</i> , 140 Wn.2d 58, 993 P.2d 901 (2000)	19
<i>Shannon v. Pay N Save Corp.</i> , 140 Wn.2d 722, 726, 709 P.2d 799 (1985).	28

<i>State v. Stannard</i> , 109 Wn. 2d 29, 36, 742 P.,2d 1244 (1987)	18
<i>State v. Theilken</i> , 102 Wn.2d 271, 273, 684 P. 2d 709 (1984)	19
<i>Stewart Carpenter Services v. Contractor Bonding and Insurance</i> , 105 Wn.2d 353, 358, 715 P.2d 1115 (1986)	19
<i>Swanner v. Anchorage Equal Rights Comm.</i> , 874 P.2d 274 (1994) . .	30
<i>Thoma v. C.J. Montag & Sons, Inc.</i> , 54 Wash.2d 20, 337 P.2d 1052	16
<i>Tissell v. Liberty Mutual Insurance Co.</i> , 115 Wn.2d 107, 795 P.2d 126 (1990)	20
<i>Truly v. Heuft</i> , 138 Wn. App. 913, 921, 158 P.3d 1276 (2007)	19
<i>Waggoner v. Ace Hardware Corp.</i> , 134 Wn.2d 748, 953 P.2d 88 (1998)	24,25,26,27
<i>Washington Water Power Co. v. Human Rights Commission</i> , 91 Wn.2d 62, 586 P.2d 1149 (1978)	22
<i>Waste Management v. WUTC</i> , 123 Wn.2d 621, 629, 869 P.2d 1034 (1994)	18
<i>Wood v. Seattle</i> , 57 Wn.2d 469, 358 P.2d 140	16
<i>Zedrick v. Kosenski</i> , 62 Wn.2d 50, 380 P.2d 870	16

Pierce County Superior Court Cases

<i>Combs v. Metropolitan Casualty Insurance Company</i> , Pierce County Cause No. 08-3-06279-7	8
--	---

Statutes

RCW 4.84.185	11
RCW 9.79.120	25
RCW 48.30.300	1,2,4,12,17,29
RCW 48.44.220	1

RCW 48.46.370	1
RCW 49.60.040	2,3,24
RCW 49.60.178	1
RCW 49.60.222	22

Articles/Publications

<i>2 A Sutherland Statutory Construction</i> SS 47-17 (7 th Ed)	19
--	----

<i>Marital Status Discrimination in Washington: Relevance of the Identity and Actions of an Employee Spouse</i> , Katrina R. Kelly, 73 WA Law Review 135 (1998)	21
---	----

I. INTRODUCTION

As discussed below, this case involves a question of whether or not automobile insurance carriers can discriminate against unmarried (single) heterosexual co-habitants, without running afoul of Washington's Law Against Discrimination (WLAD). Generally, and specifically, RCW 49.60.178, precludes discrimination in connection with insurance transactions, and RCW 48.30.300, which is a provision within Washington's Insurance Code, which also precludes discrimination in insurance matters based on the same characteristics covered otherwise covered by RCW 49.60 et seq.

RCW 49.60.178, under the heading of: "Unfair Practice With Respect to Insurance Transactions," provides the following:

*It is an unfair practice for any person whether acting for himself, herself, or another, in connection with an insurance transaction, or transaction with a health maintenance organization, to cancel, refuse to issue, or renew insurance or a health maintenance agreement to any person because of ...**marital status, sexual orientation...** provided, that a practice which is not unlawful under RCW 48.30.300, RCW 48.44.220, or RCW 48.46.370 does not constitute an unfair practice for the purpose of this section... (Emphasis added).*

Additionally, RCW 48.30.300 places particular emphasis on the characteristic of sex, marital status, or sexual orientation, when it

comes to the protections afforded by our anti-discrimination laws relating to insurance transactions. This statute provides:

*Notwithstanding any provision contained in RCW 48, to the contrary, a person or entity engaged in the business of insurance in this State may not refuse to issue any contract or insurance or to cancel or decline to renew such contract because of **sex, marital status, or sexual orientation** as defined by RCW 49.60.040, ...the amount of any benefits payable, or any terms, rates, condition or type of coverage may not be restricted, modified, excluded, increased or reduced on the basis of the...marital status, or sexual orientation, ...[of the insured]. This subsection does not prohibit prior discrimination on the basis of ...sex, marital status, or the presence of any sensory, mental or physical handicap when bona fide statistical differences in risk exposure has been substantiated. (Emphasis added).*

1

As indicated within the terms of RCW 48.30.300, the definition of marital status or sexual orientation utilized therein, are defined within RCW 49.60.040.

Since 1993, “marital status” for the purposes of our laws against discrimination have been defined within RCW 49.60.040 (17) as follows:

1

It is interesting to note that while providing a statistical risk exposure/business, affirmative defense to a claim of marital status discrimination, this does not apply when claims involve discriminatory insurance practices relating to sexual orientation.

(17) "Marital status" means the legal status of being married, single, separated, divorced, or widowed.

Additionally, in its wisdom, in the year 2006, the legislature for the first time included “sexual orientation” amongst the characteristics protected by the WLAD. RCW 49.60.040 (26) as of 2006, provided the following definition of “sexual orientation:”

(26) "Sexual orientation" means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth. (Emphasis added).

2

2

Although not addressed by the trial court, it is noted that although the instant case involves an automobile accident which occurred in 2005, and an insurance policy that logically had to be issued prior to that time, the Supreme Court in *Hale v. Wellpinit School District, No. 49, 165 Wn.2d 494, 198 P.3d 1021 (2009)*, found that an amendment to the term of “disability” for the purposes of statutory protection was retroactive. The 2006 amendment to RCW 49.60, which included for the first time “sexual orientation” was obviously remedial in nature, and for the purposes of correcting an injustice, and thus under the principles set forth in *Hale*, should also have retroactive application. There is nothing within the legislative history of RCW 49.60.040 (26), which would indicate that it is intended to operate prospectively only.

As discussed below, it is respectfully suggested that the inclusion of “sexual orientation” in combination with the utilization of the word “single” within the definition of marital status substantially changes the legal landscape within the State of Washington, particularly as it relates to insurance coverages and the specific demands of RCW 48.30.300. As further discussed in detail below, given such statutory changes, when addressing the issue of insurance coverages, in order to avoid the prohibitions of RCW 49.60 et seq, the law now commands that single, heterosexual individuals who co-habitate should be treated the same as married individuals, and to not recognize as such could result in the anomalous circumstances where homosexuals, who currently as a matter of law cannot marry, would be afforded greater rights than single, heterosexual individuals who also specifically fall within the terms of the above-referenced statutes. ³

Thus, it is suggested that principles previously applicable in the area of “marital status” discrimination must be re-examined in light of recent legislative developments.

3

Currently, under Washington law, same sex couples cannot marry. See, *Anderson v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006). Nevertheless, the trend clearly is toward extending to same sex couples many of the same benefits otherwise afforded to opposite sex couples who have married. See, for example, *Leskovar v. Nickles*, 140 Wn.App 770, 166 P.3d 1251 (2007) (upholding the City of Seattle’s ability to extend employment-related benefits to City employees and their partners within in same sex relationships).

II. ASSIGNMENT OF ERROR

1. The Trial Court erred in granting the Defendant's motion for summary judgment when, as a matter of law, it should have been found that in order to avoid statutory prohibitions against "marital status" discrimination, Progressive's policy of insurance with John Combs, who was driving Ms. Hann's vehicle at the time of a significant motor vehicle accident, provided coverage for the injuries sustained by Ms. Hann, who had a dating and co-habiting relationship with Mr. Combs.

2. The Trial Court erred in failing to find that the Defendant's policy of insurance with John Combs, who had a dating and co-habiting relationship with Ms. Hann, did not provide UIM coverage because to hold otherwise would be to endorse a policy of insurance which was discriminatory due to "marital status" (that of being "single"), and due to Ms. Hann's and Mr. Combs' sexual orientation (that of being heterosexual).

3. The Trial Court erred in granting summary judgment to the Defendant insurance company when at least factual issues existed as to whether or not the policy of insurance issued to John Combs, with whom Ms. Hann had a dating relationship, and with whom she resided, provided UIM coverage, when there were factual issues as to whether or not the provisions of such policy otherwise would

discriminate against Ms. Hann based on her marital status and/or sexual orientation.

4. The Trial Court erred in granting summary judgment when there were factual issues as to whether or not Ms. Hann's vehicle which was involved in the collision was an "other owned vehicle," part of the same household, thus subject to exclusion, when there were/are at least factual issues, as to whether or not it should have been treated as a vehicle subject only to temporary use by Mr. Combs, the insured, and the driver at the time of the subject motor vehicle collision.

III. ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Did the Trial Court err in granting Defendant Progressive Insurance Company's motion for summary judgment when as a matter of law it should have been determined that to exclude Ms. Hann from coverage would violate Washington's Laws Against Discrimination against individuals because of their "marital status" (being "single), and due to her sexual orientation (heterosexual)?

2. Did the Trial Court err in granting Defendant's motion for summary judgment, when it was a factual issue as to whether or not excluding Ms. Hann from the applicable UIM coverages would run afoul of Washington's Laws Against Discrimination in insurance transactions because of her marital status (that of being single), and her "sexual orientation" (in this instance, her being heterosexual)?

3. Did the Trial Court err in failing to recognize that there were at least factual issues as to whether or not Ms. Hann's vehicle was subject to an "other vehicle" exclusion, when the undisputed facts establish that the driver of her vehicle (her co-habitant, John Combs) rarely used the vehicle and its use was analogous to a vehicle only subject to temporary use, thus not subject to an "other vehicle" exclusion?

IV. STATEMENT OF FACTS

From May 2004 until October 2007, Plaintiff Kim Hann resided with Progressive insured, John Combs, in an exclusive dating relationship. At the relevant time, they resided within Tacoma, Pierce County, Washington. (CP 143)

On September 9, 2005, at approximately 5:30 p.m., Mr. Combs was driving Ms. Hann's 1998 Ford Expedition SUV in a northbound direction on S. Jackson Avenue, in Tacoma, Washington, when, as they were traveling through the intersection of S. Jackson and S. 6th Street, on a green light, an uninsured motorist named Richard Squire failed to stop for a red light, causing a violent collision between his 1986 Chevrolet pick-up truck and Ms. Hann's Expedition. (CP 148-149)

Apparently, at the time of the collision, Mr. Squire was distracted because he was reaching for some chicken, and took his

eyes off the road. (CP 149) Mr. Squire did not have any insurance on his pick-up truck, and was an uninsured motorist.

At the time of the subject collision, Mr. Combs, the driver of Ms. Hann's Expedition, was insured by Progressive Insurance Company, Defendant/Respondent herein. (Hereinafter "Defendant"). The accident involved a "heavy hit" as depicted within the photographs of the involved motor vehicle, which were before the Trial Court. (CP 151-192)

Both Mr. Combs and Ms. Hann suffered significant and severe personal injuries as a result of the collision. ⁴

At the time of the subject collision, the primary UM/UIM coverages applicable to the claim was Ms. Hann's policy of insurance with Metropolitan Insurance Company. (CP 49) The Metropolitan per person policy limit applicable to this accident was \$ 250,000.00. (CP 130)

In addition, Mr. Combs, the driver at the time of the subject accident, had a policy of insurance with Progressive Northwest

4

Mr. Combs' uninsured motorist claim was ultimately resolved by way of an arbitration, which resulted in a damage award totaling \$409,000.00. This arbitration occurred under the auspices of the case of *Combs v. Metropolitan Casualty Insurance Company*, Pierce County Cause No. 08-3-06279-7. Recently, Ms. Hann's claim against uninsured motorist Squire was resolved by way of a default judgment hearing, wherein the Trial Court found that her total damages resulting from the subject collision totaled \$733,483.71.

Insurance Company, which provided for a \$500,000.00 combined single policy limit for UM/UIM coverage. (CP 75)

It was an undisputed fact that Mr. Combs, although he co-habitated with Ms. Hann's at the time in question, rarely used Ms. Hann's 1998 Ford Expedition, and would have to ask for specific permission to do so. In other words, Mr. Combs was only a rare and very occasional user of the subject 1998 Ford Expedition, which was otherwise Ms. Hann's vehicle.

Under the terms of Mr. Combs' UM/UIM policy with Progressive, Progressive was contractually bound/obligated to pay benefits as follows:

Subject to the limits of liability if you pay the premium of the underinsured motorist coverage, we will pay for damages, other than punitive or exemplary damages, which an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury. (1) sustained by an insured person; (2) caused by an accident; and (3) arising out of the ownership, maintenance or use of an underinsured motor vehicle.

(CP 87)

The definition of an "insured person" within the policy was as follows:

"Insured person" and "insured persons" means: (a) you or a relative; (b) any person occupying a covered vehicle; and (c) any person who is entitled to recover damages covered by this part 3 because of bodily

injury sustained by a person described in (a) or (b) above.

(CP 88)

The policy goes on to provide a definition of the words “you,” “your,” and “relative” in the following terms:

“You” and “Your” mean: (a) a person or persons shown as a named insured on the declarations page; and (b) the spouse of a named insured if residing in the same household. “Relative” means a person residing in the same household as you, and related to you by blood, marriage or adoption, including a ward, stepchild, or foster child. Your unmarried dependent children temporarily away from home will be considered residents if they intend to continue to reside in your household. (Emphasis added).

(CP 53); (CP 81)

Finally, the definition of “covered vehicle” within the policy is:

“Covered vehicle” means: (a) any vehicle shown on the declaration page, unless you have asked us to delete the vehicle from your policy; (b) any additional vehicle on the date you become the owner if; (3) you acquire the vehicle during the policy period shown on the declaration page; (ii) we insure all vehicles owned by you; and (iii) no other insurance policy provides coverage for the vehicle... (c) any replacement vehicle on the date you become the owner if; (1) you acquire the vehicle during the policy period shown on the declaration page; (ii) the vehicle that you acquire replaces one shown on the declaration page; and (iii) no other insurance policy provides coverage for that vehicle.

(CP 80); (CP 207)

The case was initially filed by Ms. Hann pro se against Defendant. Within her pro se Complaint, Ms. Hann sought payment of underinsured motorist benefits under the terms of Progressive's policy. Ultimately, Ms. Hann's current counsel appeared in the case. (CP 1-6).

Defendant Progressive Insurance Company, despite being served through the Insurance Commissioner's Office on October 15, 2008, did not file an Answer in this matter until April 14, 2009. (CP 9-14) Unfortunately, in a rather bullying fashion, not only did Progressive answer Ms. Hann's Complaint and set forth affirmative defenses, but also brought a counter-claim against Ms. Hann, alleging that her lawsuit was violative of RCW 4.84.185 (the frivolous lawsuit statute). (CP 9-14).

On or about July 10, 2009, Defendant Progressive filed a motion for summary judgment, arguing that Ms. Hann was not a person "covered" and/or a beneficiary of Mr. Combs' UM/UIM coverages with Progressive. In addition, without significant briefing or analysis, the Defendant Progressive also sought an award of attorney's fees pursuant to RCW 4.84.185. (CP 47-121).

On or about July 28, 2009, Ms. Hann through counsel responded to Progressive's motion for summary judgment, and argued that Progressive's policy, which would have afforded Ms. Hann

benefits had she been Mr. Combs' spouse, was discriminatory due to marital status, and sexual orientation (because Mr. Combs and Ms. Hann were a heterosexual couple), and that as a matter of law and public policy coverage had to be extended to her in order to avoid prohibited marital status and/or sexual orientation discrimination set forth within the above-referenced statute. ⁵ (CP 123-192).

Defendant's motion for summary judgment was assigned to The Honorable Lisa Worswick for hearing. On or about August 7, 2009, the matter was called for hearing. (Transcript of 8-7-09, p.3).

During the course of hearing, counsel for Progressive, apparently unable to successfully respond to Plaintiff's position regarding the discriminatory nature of Progressive's policy, began arguing matters outside of the four corners of the initial summary judgment pleadings. In response to objections of Ms. Hann's counsel, Judge Worswick continued the hearing so that Plaintiff's counsel could adequately respond to the new arguments interjected by Progressive for the first time during oral argument on Progressive's summary judgment motion. (See, transcript of August 7, 2009, p.8-

5

Unless, of course, under the applicable precedent discussed below, Progressive was able to establish a "business necessity" defense based on an appropriate risk based analysis. See generally, *Brown v. Superior Underwriting*, 30 Wn.App 303, 632 P.2d 887 (1980). See also, RCW 48.30.300 (providing an affirmative defense "when bona fide statistical difference in risk of exposure have been substantiated...").

12).

On or about August 12, 2009, Progressive filed a “supplemental” memorandum in support of summary judgment, which for the first time briefed the issue as to whether or not Ms. Hann’s Expedition could be a “covered vehicle” under the terms of the policy, arguing that, for the sake of discussion, assuming that Mr. Combs and Ms. Hann were nevertheless married, her vehicle would be excluded under what is known as the “owned vehicle” exclusion, which essentially provides that an insured cannot receive coverage of another household vehicle under the terms of a single policy, without including that vehicle expressly within the coverages. (CP 206-210).

Plaintiff responded that Progressive’s basic premise that Mr. Combs and Ms. Hann, in order to avoid the prohibitions against marital status discrimination have to be treated as if they were married, was a faulty premise in that the contention was that they were entitled to protection because they were “single”, which by definition includes the maintenance of separate property and affairs. Further, it was contended by the Plaintiff that as opposed to being viewed as a “household vehicle” owned by a relative, the more accurate analogy was that the matter should be treated as if this was simply an occasion where Mr. Combs was “temporarily using someone else’s vehicle.” (CP 215-236).

In order to establish this proposition, Ms. Hann submitted a declaration indicating that her Expedition was not for the regular use of Mr. Combs, but rather he utilized it only on rare and ad hoc occasions. (CP 221)

On or about September 11, 2009, the Defendant's motion for summary judgment was once again before Judge Worswick. Following extensive argument, Judge Worswick granted Progressive's motion for summary judgment. (CP 237-238). She did so despite the fact that she stated she agreed that the definition of "you" within the policy was discriminatory based on marital status, but given other policy language, the vehicle, which was part of the Hann/Combs household, was excluded under the policy terms. (Transcript of 9/11/09, p. 33-34).

A timely Notice of Appeal was filed on October 6, 2009. (CP 241-243).

V. ARGUMENT

A. The standard of review applicable to motions for the grant of motions for summary judgment is de novo review.

The standard of appellate review applicable to a Trial Court's grant of a motion for summary judgment is de novo. See, *Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009). When reviewing an order of summary judgment, the Appellate Court

engaged in the same inquiry as the Trial Court, and summary judgment is only appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.* Under such standard of review, all facts and reasonable inferences therefrom must be viewed in a light most favorable to the non-moving party. *Id.*, citing to *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 693, 169 P.3d 14 (2007).

Additionally, it is noted that issues of statutory interpretation involves questions of law that are subject de novo review by the Appellate Court. *Id.*

When considering a motion for summary judgment, an Appellate Court, like a Trial Court, should consider the following:

(1) The object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact. Preston v. Duncan, 55 Wash.2d 678, 349 P.2d 605.

(2) Summary judgments shall be granted only if the pleadings, affidavits, depositions or admissions on file show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Rule of Pleading, Practice and Procedure 56, RCW Vol. 0; Capitol Hill Methodist Church of Seattle v. Seattle, 52 Wash.2d 359, 324 P.2d 1113.

(3) A material fact is one upon which the outcome of the litigation depends. Capitol Methodist Church of Seattle v. Seattle, supra. Zedrick v. Kosenski, 62 Wash.2d 50, 380 P.2d 870.

(4) In ruling on a motion for summary judgment, the court's function is to determine whether a genuine issue of material fact exists, not to resolve any existing factual issue. Thoma v. C.J. Montag & Sons, Inc., 54 Wash.2d 20, 337 P.2d 1052.

(5) The court, in ruling upon a motion for summary judgment, is permitted to pierce the formal allegations of facts in pleadings and grant relief by summary judgment, when it clearly appears, from uncontroverted facts set forth in the affidavits, depositions or admissions on file, that there are, as a matter of fact, no genuine issues. Preston v. Duncan, supra.

(6) One who moves for summary judgment has the burden of proving that there is no genuine issue of material fact, irrespective of whether he or his opponent, at the trial, would have the burden of proof on the issue concerned. Preston v. Duncan, supra.

(7) In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably to the nonmoving party and, when so considered, if reasonable men might reach different conclusions the motion should be denied. Wood v. Seattle, 57 Wash.2d 469, 358 P.2d 140.

(8) When, at the hearing on a motion for summary judgment, there is contradictory

evidence, or the movant's evidence is impeached, an issue of credibility is present, provided the contradicting or impeaching evidence is not too incredible to be believed by reasonable minds. The court should not at such hearing resolve a genuine issue of credibility, and if such an issue is present the motion should be denied. 6 Moore's Fed.Prac. (2d ed) ¶ 56.15(4), pp. 2139, 2141; 3 Barron & Holtzoff, fed. Prac. And Proc., § 1234, p. 134.

(Balise v. Underwood, 62 Wn.2d at 199-200).

In this case, as discussed below, there are factual and legal issues with regard to whether or not Progressive's insurance policy discriminated against Ms. Hann because of her marital status, i.e., that of being single, and because she and Mr. Combs are heterosexual. There could also be a factual issue as to whether or not the exclusion of Ms. Hann from Mr. Combs' UIM policy can be justified based on a statistical risk analysis. See, RCW 48.30.300; see also, *Edwards v. Farmers Insurance Co.*, 111 Wn.2d 710, 763 P.2d 1226 (1988). However, as Defendant presented no statistical defense below, such a potential defense may be academic.

Finally, with respect to preliminary considerations and standards of review, it is noted that generally, in matters involving the interpretation of insurance policies, the rules of contract interpretation apply. See, *Hall v. State Farm Mutual Auto Insurance Co.*, 133 Wn.App 394, 399, 135 P.3d 941 (2006). Accordingly, Washington courts, when

engaging in such a review, examine the insurance policy as a whole to give it a fair and reasonable and sensible construction, as would be given to the contract by an average person purchasing insurance. See, *Quadrant Corp. v. American States Insurance Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005).

B. The rules of statutory construction.

The beginning point when interpreting a statute or regulation is its “plain language.” See, *Linville v. State*, 137 Wn.App 201, 209, 151 P.3d 1073 (2007), citing to *Lacey Nursing Center, Inc. v. DOR*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). When a statute or regulation is unambiguous, courts determine legislative intent from the statutory or regulatory language alone. *Id.* See, also, *Waste Management v. WUTC*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994).

Generally, statutes and regulations should be construed to effect their purposes and unlikely, absurd or strained consequences should be avoided. See, *State v. Stannard*, 109 Wn. 2d 29, 36, 742 P.,2d 1244 (1987). Any interpretation of a statute which would render it unreasonable or result in an illogical consequence should be avoided. See, *City of Puyallup v. Pac Bell*, 98 Wn.2d 443, 450, 656 P.2d 1035 (1982). All provisions of statutes and regulations should be harmonized whenever possible, and all terms should be given effect whenever possible. *Emwright v. King County*, 96 Wn.2d 538, 543, 637 P.2d 656 (1981). Further, whenever possible, a statute should

be construed in a manner which does not nullify, void or render meaningless or superfluous any section or words. *Truly v. Heuft*, 138 Wn. App. 913, 921, 158 P.3d 1276 (2007). When the language of a statute is plain and free from ambiguity there is no room for construction, the plain meaning must be given its effect without resort to the rules of statutory construction. *State v. Theilken*, 102 Wn.2d 271, 273, 684 P. 2d 709 (1984).

Generally, if a statute is ambiguous, it must be interpreted in a manner which is most consistent with legislative intent as derived from the language of the act as a whole. See, *Stewart Carpenter Services v. Contractor Bonding and Insurance*, 105 Wn.2d 353, 358, 715 P.2d 1115 (1986). In addition, when a statute provides both general and specific terms, they should be harmonized with specific terms controlling over the more general. 2 A *Sutherland Statutory Construction* SS 47-17 (7th Ed); *Condit v. Lewis Ref. Co.*, 101 Wn.2d 106, 111, 676 P.2d 466 (1984), see also, *Bennett v. Hardy*, 113 Wn.2d 312, 926, 784 P.2d 1258 (1990).

When analyzing Washington's Law Against Discrimination, the logical starting place is RCW 49.60.010, which sets forth one of the strongest declarations of public policy "on the books" in the State of Washington. Indeed, the statutory language within RCW 49.60.010 is of such a magnitude, that its reach goes beyond its direct statutory scheme. See, *Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000) (finding that the public policy forwarded by RCW 49.60 are not exclusive of the statutory

scheme, but are indicative of such fundamental public policies within the State of Washington that they are supportive of a common law tort action).

Further, RCW 49.60.020 commands:

[T]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof.

Such statutory language is a mandate from the legislature that there should be a liberal interpretation of the Laws Against Discrimination, not only as to its general principles, but also as to its definitional terms. See, *Fraternal Order of the Eagles v. Grand Aerial*, 146 Wn.2d 224, 59 P.3d 655 (2002). Not only must there be liberal construction of the terms and coverage of the statute, but also the exceptions to the statute must be narrowly confined. See, *Hegwine v. Longview Fiber Company*, 162 Wn.2d 340, 172 P.3d 688 (2006). The reason why the statute must be liberally construed is because such liberal construction aids in achieving the purposes of the statute, which is to eliminate and prevent discrimination. *Id.*

In addition, when reviewing this matter, the Court should also be mindful of the public policies which animate Washington's underinsured motorist statute. See, RCW 48.22.030. The underinsured motorist statute are reflective of a strong public policy of protecting innocent victims of auto accidents from underinsured/uninsured motorists. See, *Blackburn v. Safeco Insurance Co.*, 115 Wn.2d 82, 794 P.2d 1259 (1990). See also, *Tissell v. Liberty Mutual Insurance Co.*, 115 Wn.2d 107, 795 P.2d 126 (1990).

C. The Washington Appellate Court’s historical treatment of matters involving claims of marital status discrimination.

As shown below, when dealing with the issue of “marital status discrimination,” the Washington courts have been far from consistent in their approach, and frankly, have avoided the fact that “marital status” also includes the status of being “single.” Frankly, despite the existence of such a term, it has largely been ignored or avoided.

The history of Washington’s prohibition against marital status discrimination is discussed in a University of Washington law review article, authored in 1998, *Marital Status Discrimination in Washington: Relevance of the Identity and Actions of an Employee Spouse*, Katrina R. Kelly, 73 WA Law Review 135 (1998).

As discussed within that article, “marital status” initially appeared in RCW 49.60 by way of a 1973 amendment. At that time, “marital status” was not defined within the statutory terms.

Two years after the addition of “marital status” to Washington’s anti-discrimination law, the Washington State Human Rights Commission (HRC) defined marital status discrimination in a detailed regulation. Within that regulation, the Commission adopted a broad definition of marital status discrimination, identifying three situations in which such discrimination occurred: “In general, discrimination against an employee or applicant because of (a) what a person’s

marital status is; (b) who his or her spouse is; or (c) what the spouse does, is an unfair practice because the action is based on the person's "marital status." The regulation provided for a business necessity defense, which was defined as "circumstances where an employer's actions are based upon compelling and essential need to avoid business-related conflict of interests, or to avoid the reality of appearance of improper influence or favor." *Id.*

In 1978, the Washington State Supreme Court upheld the Human Rights Commission's broad definition of marital status in *Washington Water Power Co. v. Human Rights Commission*, 91 Wn.2d 62, 586 P.2d 1149 (1978), (upholding HRC rule prohibiting anti-nepotism employment policies).

Even prior to that, in the case of *Loveland v. Leslie*, 21 Wn.App 84, 583 P.2d 664 (1978), the Court of Appeals upheld an administrative determination by the HRC that a landlord had committed an unlawful practice prohibited by RCW 49.60.222 (statute prohibiting discrimination in real estate transactions) by refusing to rent an apartment to individuals who were not married. In that case, a landlord refused to rent to two single males because they only rented to married couples. The Court of Appeals rejected an argument that the term "marital status" was unconstitutionally vague, and that it should be afforded a common meaning of relating to the existence or

absence of the martial bond. In other words, at least in the *Loveland* case, the right of two single males to co-habitate was deemed to be protected, and a landlord cannot preclude renting to such individuals because they were not married.

Remarkably, the *Loveland* opinion, in two short years, was followed by this Court's decision in *McFadden v. Elma Country Club*, 26 Wn.App 195, 613 P.2d 146 (1980). In that case, this Court found that it was not marital status discrimination to refuse to sell a country club membership (which included real property ownership). The Court reasoned that the prohibition against marital status discrimination did not preclude discrimination against unmarried couples who co-habitated. The Court, in part, reasoned that given the fact that at the time the marital status was incorporated within RCW 49.60 et seq, a criminal statute existed which made criminal co-habitation amongst unmarried people, was indicative of an intent that single persons who co-habitate would not fall within the statutory protections of "marital status."⁶

Subsequent to the *McFadden* opinion, the Supreme Court decided *Davis v. Employment Security Department*, 108 Wn.2d 272, 737

6

Again, remarkably, despite the obvious changes in morality which occurred in the 1960's and early 1970's, RCW 9.79.120 was not repealed until 1976.

P.2d 1262 (1987), wherein the Court found that a woman who left her job to follow a boyfriend, who had moved out of the area where she had worked, was not entitled to unemployment benefits, even though had she been married and had quit her job to follow her husband to a different location, she would be.

Again, the Court reasoned that the law did not protect individuals who were engaged in what could be characterized as a meretricious relationship.

In 1993, RCW 49.60.040 was amended to include the current definition of marital status as set forth above. Since that time, there has only been a handful of appellate decisions discussing marital status generally. The Supreme Court first re-visited the issue in the case of *Kastanis v. Educational Employee's Credit Union*, 121 Wn.2d 483, 859 P.2d 26 (1994), and thereafter, in *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 930 P.2d 307 (1997). In both *Kastanis* and in *Magula*, the Court did not consider the 1993 amendment to the definition of "marital status," but rather relied on the older regulatory definition promulgated by the HRC, which included the identity of the spouse of the victim of discrimination.

It was not until *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 953 P.2d 88 (1998), that the Court examined the impact of the 1993 amendment. In that case, the Court addressed the issue as to

whether or not an adverse employment action against co-habiting or dating employees violated RCW 49.60.180's prohibition against marital status discrimination, and if so, whether or not such discrimination could be justified based on "business necessity." In that case, relying on *McFadden* and *Davis*, the Supreme Court rejected the notion that "marital status" protection precluded discriminatory actions against those who are co-habiting or dating. Rather shockingly, in determining what the term "marital status" meant, the Court provided the following:

The ordinary meaning of marital status pertains to the status of being married, separated, divorced or widowed. (Citation omitted).

What is telling, is that, regardless of what the "plain meaning" of "marital status" might be, the statute in and of itself includes within its definition the status of being "single." In other words, the *Waggoner* opinion literally rendered the term, "single," within the statutory scheme to be superfluous and meaningless.

As it currently stands, under the *Waggoner* opinion, an employer can discriminate against you because you are co-habiting with a co-worker, or when an unmarried person is co-habiting or dating someone the employer does not like, but a landlord, under the *Loveland*

opinion, cannot preclude you from renting based on the fact that the two renters are unmarried.

Such potential for inconsistently, and anomolous results, is further compounded by the fact that “sexual orientation” is now included amongst the classifications protected under Washington’s anti-discrimination statutory scheme.

As noted above, same sex couples, by definition, cannot marry under the current state of Washington law. Nevertheless, the fact that they are a same sex couple, which implicates “sexual orientation,” is nevertheless afforded protection. Thus, should an employer discriminate against a same sex couple, the employer clearly would run afoul of the prohibition against “sexual orientation” discrimination. However, when a man and a woman (a heterosexual couple) are involved in a co-habiting or dating relationship, under the *Waggoner* opinion, they would arguably be unprotected from adverse employment actions based on such status. That makes no sense under the terms of the statutory scheme, which purports to protect those who are “single” and those who are “heterosexual.”

As such, it is suggested that the current inclusion of “sexual orientation” forces a re-examination as to whether or not Washington’s anti-discrimination scheme, set forth in RCW 49.60 et seq, now commands that protections be afforded to what previously were

characterized as co-habiting, dating and/or social relationships. It is suggested that such expansion has to be recognized, because otherwise same sex couples, which as a matter of law cannot be married, could be afforded either greater or less protection than single, heterosexual non-married couples.

Such construction would result in absurd and unjust results, and would render the words “single” and “heterosexual” superfluous, and would literally write such terms out of the statute.

As Justice Talmadge’s concurrence suggests, if one accepts the *Waggoner* opinion, the law affords no protection to those who are unmarried and single, even though clearly, unmarried persons otherwise are afforded protection under RCW 49.60, “for example, an unmarried person has a claim against an employer who refused any divorced person, or hires only married people.” *Waggoner v. Ace Hardware*, 134 Wn.2d at 759, n. 2.

In sum, when marital status was initially recognized as amongst those characteristics protected by RCW 49.60 et seq, the Court had little difficulty in the *Loveland* case finding that being “single” was amongst those aspects of “marital status” worthy of protection. Such a notion was codified in the 1993 amendment to the definition of “marital status.” Yet, for inexplicable reasons, in a number of instances the Courts have simply ignored the existence of such a

characteristic (“single”) within the definition. It is suggested now that the legislature, in its wisdom, has included protection based on “sexual orientation” which includes not only protection for homosexuals but also for heterosexuals. The implications of such protection cannot be avoided. This is particularly so when in the area of insurance contracts, which are discussed in more detail below.

D. Washington law precludes provisions that discriminate against single persons within automobile insurance contracts.

Disparate treatment occurs while similarly situated individuals within protected groups are subject to dissimilar treatment. See generally, *Shannon v. Pay N Save Corp.*, 140 Wn.2d 722, 726, 709 P.2d 799 (1985).

When dealing with discrimination in insurance transactions, it is suggested that the beginning point is an examination of the case of *Edwards v. Farmers Insurance Co.*, 111 Wn.2d 710, 763 P.2d 1226 (1988). In the *Edwards* case, Kenneth Edwards was killed by an uninsured motorist while driving his wife’s vehicle. Both had separate policies of automobile insurance with Farmers, which contained UIM coverages. Kenneth, who was driving his wife’s truck, also had another car insured in his name.

Within the Farmers' policy at issue therein, despite the fact that Kenneth was a named driver on both policies, Farmers refused to pay under the provisions of Kenneth's policy, arguing that the "other insurance" provision within the policy precluded what Farmers characterized as a "double recovery." Under the terms of the Farmers' policy, the stacking of coverages was precluded, if the coverages involved a named insured, or the named insured's spouse, residing in the same household. In *Edwards*, the Court found that such provision discriminated against married couples because the anti-stacking provision would be inapplicable if the coverages applied to the driver of the vehicle and the owner of the car had been unmarried.

The Supreme Court found that such provision was violative of RCW 48.30.300 because it discriminated on the basis of "marital status." However, since the parties had failed to adequately address whether or not such a policy provision was predicated upon a "bona fide statistical difference in risk or exposure," the case was remanded to make a determination as to whether Farmers could establish such a defense. See, *Brown v. Superior Underwriters*, 30 Wn.App 303, 632 P.2d 877 (1980) (addressing such issues).

As noted above, "marital status" includes the status of being "single." Here, Ms. Hann clearly is being denied the benefits that otherwise would be available to a married couple. (CP 71, lines 10 to

19). She is being denied such benefits solely on the basis of the fact that she is not married to Mr. Combs. To find otherwise would be rendering the term “single” within the definition of “marital status” superfluous in the context of insurance transactions. See generally, *Loveland, supra*. See also, *Swanner v. Anchorage Equal Rights Comm.*, 874 P.2d 274 (1994) (refusing to rent to unmarried couples is discrimination based on “marital status,” and finding that “to co-habitate” almost means by definition “to live together in a sexual relationship when they are not legally married.” In order for one to be a co-habitant, one must be unmarried, i.e., “single”).

In this case, like the *Edwards* matter, Progressive had failed to provide any justification for its denial of coverage to Ms. Hann beyond marital status, despite the fact that during the relevant time, she co-habitated (resided) with Mr. Combs. (CP 143) Absent such evidence, it must be presumed that coverage was being denied unlawfully because of Ms. Hann’s status of being “single.” (See, CP 71, LINES 10 TO 19).

Again, to hold otherwise would render the word “single” within the definition of marital status, absolutely meaningless and superfluous in the context of insurance transactions. If such a word does not protect Ms. Hann, under the circumstances of this case, the Court literally through judicial interpretation would be eliminating this statutory term.

Again, as noted, the opinions generated by our Appellate Courts, other than the *Loveland* opinion, have never truly addressed the word “single” meaning within the context of prohibitions against marital discrimination.

Generally, when dealing with discrimination issues, all of that we have established is that “a substantial factor” in an adverse determination was a protected characteristic. See, *Macky v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995).

In this case, there is at least a question of fact as to whether or not a “substantial factor” in the denial of coverage to Ms. Hann was her marital status, i.e., that of being single, and the fact that she was involved in a heterosexual relationship with Mr. Combs. The easier case, frankly, would be if Mr. Combs and Ms. Hann were instead of a heterosexual couple, were a same sex couple. Under such circumstances, the Court would have little difficulty in finding that denial of coverages in this instance would be directly related to the fact that they are a same sex couple, who as a matter of law cannot marry. See, *Anderson v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006).

Currently, almost by definition, homosexuals/same sex couples, while not having the right to marry are otherwise afforded a wide variety of protection under our anti-discrimination statutes due to their inclusion within those subject to protection. Clearly, under such

circumstances, the legislature was providing substantial indication that unmarried individuals should be provided a wide variety of protections under the law, including in insurance transactions, employment, real estate transactions, and in public accommodations. It is suggested that given the addition of gender orientation and the ambit of the anti-discrimination laws, is indication that the legislature has little difficulty in requiring the Courts to protect what the Supreme Court has previously characterized as “social relationships” or “dating relationships” or the like. Given the fact that same sex couples cannot marry, it seems only logical that all that is left for them (beyond domestic partnership contracts, and the like) are dating relationships that otherwise should be afforded protection under the law.

It is hard to see the circumstances here any different than that which would be applicable in a real estate transaction, or a rental transaction, as discussed in the *Loveland* and *Swanner* cases. Had Mr. Combs and Ms. Hann been married, they would have had the benefit of insurance coverage. The simple fact that they are not denies them of that benefit. It is suggested that under the current state of Washington law, such an outcome is illegal.

As such, the decision of the Trial Court granting summary judgment should be reversed and remanded with a direction to find in Plaintiff's favor on this issue, or to hold a hearing to make a

determination of factual issues with respect to any ambiguity within Progressive's intent (even though there appears to be none).

F. The Trial Court erred in finding that the owned vehicle exclusion was applicable in this matter.

In this case, the Trial Court granted its undifferentiated order of summary judgment, even though it appears likely that the Court did find potentially that the subject provisions were discriminatory based on marital status. Ultimately, it appears that, based on Progressive's eleventh hour argument relating to the "owned vehicle" exclusion, that was the predicate for the Trial Court's dismissal order.

The Court's reliance on such exclusion was error given that factual issues existed as to whether or not the factual circumstances of the Hann/Combs' relationship, and their vehicle usage, would squarely fit into such an exception.

Ms. Hann submitted a declaration that succinctly provided the following:

Very rarely did John Combs drive my 1998 Ford Expedition, which was totaled on September 9, 2005. On that particular day, I requested John drive, as I thought it would be safe if he drove. Thinking back over the last six years, John has driven my vehicle(s) maybe 8 to 12 times. On those rare occasions John needed to drive my vehicle, he would ask me first and I would give him

my keys. For example, if he could not drive his vehicle in the snow and he could not miss work, he would ask to drive my four-wheel drive.

(CP 221)

In other words, the factual reality of Mr. Combs' usage of Ms. Hann's vehicle was more akin of someone borrowing a friend's truck so they could do a dump run vs. a vehicle that was readily available to any member in a particular household.

The purpose of the exclusion raised by Progressive at the "eleventh hour" is to "prevent an insured from receiving coverage on another household car by merely purchasing a single policy..." See, *Barth v. Allstate Insurance Co.*, 95 Wn.App 552, 560, 977 P.2d 6 (1999). However, such a permissible policy provision does not preclude coverage when someone is "temporarily using someone else's vehicle." See, *Ross v. State Farm*, 82 Wn.App 787, 919 P.2d 1268 (1996). That is in fact exactly what was occurring here, i.e., Ms. Hann's Expedition was only being utilized by Mr. Combs ad hoc on an occasional basis, thus it could not and can not reasonably be argued that it was a vehicle available for "regular use by the named insured or any family member" within the meaning of RCW 48.22.030 (2), which otherwise authorizes this exclusion/exception.

In addition, such an exclusion **also** implicates marital status and sexual orientation discrimination. The reason why is because as the

Court is aware, one stereotypical aspect of being two single individuals who co-habitate is the fact that they will maintain their own property, accounts and the like, including car ownership. To deny coverage, under circumstances where there is clearly no proof that the arrangements were for the purposes of evading payment of additional insurance premiums, would be to deny coverage based on the characteristics of being “single” where acquired property is not community property, and the maintenance of separate financial lives is the norm, rather than the exception.

In sum, the other owned vehicle exception, or the suggestion that this was just simply another household vehicle which was intentionally not subject to insurance coverage, at most creates a factual issue. Further, given the undisputed evidence provided by Ms. Hann as to the use of her vehicle by Mr. Combs, it should have been found as a matter of law that this exclusion/exception does not apply.

VI. CONCLUSION

For the reasons stated above, the decision of the Trial Court should be reversed, and the Court should find that Mr. Combs’ UIM coverage is applicable to the claims of Ms. Hann. To hold otherwise would endorse an insurance policy, which discriminates based on marital status, which also implicates the sexual orientation of Mr. Combs and Ms. Hann.

Finally, the exclusion relied on the Trial Court relating to “other owned vehicles,” is factually inapplicable in this case, and the Trial Court should be reversed for finding otherwise. It is requested that this matter be reversed and remanded with the determination of coverage and an entry of judgment in favor of Ms. Hann.

DATED this 22 day of March, 2010.

A handwritten signature in black ink, appearing to read 'P. Lindenmuth', written over a horizontal line.

Paul A. Lindenmuth, WSBA# 15817
Attorney for Appellant/Plaintiff