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No. 69554-1-I

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

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STATE OF WASHINGTON
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FIROZ IBRAHIM,

Appellant,

v.

AIU INSURANCE COMPANY, A FOREIGN INSURER,

Respondent.

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

This case presents a question of contract interpretation: whether AIU INSURANCE COMPANY (“AIU”) elects to pay to repair an insured’s vehicle under its policy’s underinsured motorists property damage coverage, and if so, whether AIU must then indemnify its insured for any loss in the vehicle’s market value (“diminished value”) resulting from the damage to the vehicle that the insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle.

It is well settled as a matter of tort law that diminished value is recoverable in these circumstances. *See, e.g.*, Washington Pattern Instructions §§ 30.10 and 30.12. The issue in this case is whether AIU has expressly *excluded* diminished value from its property damage limit of liability under the policy it drafted of “the amount needed to restore the covered auto to its pre-loss condition, reduced by the applicable deductible” when under the same section of the policy *and by its own admission*, it agrees to “pay for property damage caused by an auto accident which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle.”

Since the trial court ignored key disputed issues of fact before it (AIU’S February 22, 2008, diminished value denial letter to FIROZ IBRAHIM (“IBRAHIM”)) acknowledging that IBRAHIM was entitled to diminished value under the underinsured motorist property damage coverage of the policy upon proof and IBRAHIM’S subsequent *unrefuted proof* that his vehicle sustained \$16,961.00 in diminished value as a result

of a collision with an underinsured motorist), the trial court erroneously found that diminished value was not a covered loss under the policy. Having found no coverage, the trial court also dismissed the Washington Consumer Protection Act (CPA) claim for misstating Washington law regarding diminished value, essentially denying payment of diminished value to all of its insureds who receive benefits under the underinsured motorist property damage coverage of AIU'S policy.

In reaching its policy interpretation that AIU was limited to the amount needed to restore the covered auto to its pre-loss condition, reduced by the applicable deductible, the trial court committed four errors of law:

(1) It disregarded the coverage clause "we will pay for property damage caused by an auto accident which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle;"

(2) It ignored AIU'S letter of February 22, 2008, wherein AIU clearly acknowledges that even by its own interpretation of its policy language regarding underinsured motorists property damage coverage, an insured is legally entitled to payment of diminished value upon proof of loss;

(3) It improperly disregarded an undisputed issue of fact – proof of \$16,961.00 in diminished value to IBRAHIM'S vehicle – by IBRAHIM'S property damage expert, JOHN WALKER; and

(4) By incorrectly finding no coverage, it also found AIU'S denial of coverage for diminished value was not in bad faith, and therefore, not a CPA violation.

Each of these errors is reviewed *de novo*. As discussed below, properly construed and by its own admission, AIU'S policy under the underinsured motorist property damage coverage does not exclude coverage for diminished value.

II. STATEMENT OF THE CASE

IBRAHIM entered into a contract for automobile insurance with AIU, Policy No. 703 69 39. CP 17. IBRAHIM'S 2007 Lexus ES 350 ("the vehicle") was listed as a covered vehicle on the policy. CP 17. On April 25, 2007, the vehicle was substantially damaged in a collision. CP 1, 17. The vehicle was subsequently repaired at a cost of \$18,908.62. CP 17.

In February 2008, IBRAHIM presented a claim for diminished value of the vehicle to AIU under the Underinsured Motorist Coverage provision of the insurance contract. CP 1, 17. In a letter dated February 22, 2008, AIU advised IBRAHIM that diminished value is covered under the policy, but only to the extent that it can be proven. CP 12. In response to AIU'S letter dated February 22, 2008, IBRAHIM provided to AIU a diminished value appraisal by JOHN WALKER ("WALKER") of FRONTIER ADJUSTERS of the diminished value the vehicle sustained as a result of the collision on April 25, 2007. CP 12, 17.

WALKER determined that the vehicle sustained diminished value in the amount of \$16,961.00. CP 12, 17. AIU did not dispute the amount of diminished value suffered by the vehicle as determined by IBRAHIM'S expert, WALKER. CP 17.

In its February 22, 2008, letter to IBRAHIM, AIU stated that diminished value "...can only be determined at the time the vehicle is sold to see what if any deduction for diminished value is taken. As the vehicle age wears on, the amount of perceived diminished value reduces." CP 12. IBRAHIM argued before the trial court on AIU'S motion for summary judgment that AIU'S position regarding diminished value is contrary to Washington law in that Washington law does not require a vehicle to be sold to prove diminished value, nor does diminished value of a vehicle reduce over time – the diminished value of a vehicle is concerned only with two points in time – pre-loss (immediately before the collision) and post-repair (immediately after the collision and subsequent repairs); not an arbitrary date as the "vehicle age[s]." CP 12, 17.

In interpreting the language of the policy, the trial court ruled that AIU's insurance contract limited its liability to IBRAHIM to "the amount needed to restore the covered auto to its pre-loss condition, reduced by the applicable deductible" and granted AIU'S motion for summary judgment with respect to all of IBRAHIM'S claims. CP 29, 30, 33. The trial court denied IBRAHIM'S motion for reconsideration. CP 30, 33.

III. STANDARD OF REVIEW

“Summary judgment is available only if the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Mercer Place Condo. Assoc. v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 601, 17 P.3d 626 (2001) (citing CR 56(c)). Review of a summary judgment motion is *de novo*. *Id.* (citing *Mountain Park Homeowners Ass’n, Inc. v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1984)). Similarly, construction of an insurance policy provision is a question of law, and therefore reviewed *de novo*. *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 95, 776 P.2d 123 (1989) (citing *Sears v. Grange Ins. Ass’n*, 111 Wn.2d 636, 638, 762 P.2d 1141 (1988)); *Mercer Place Condo Assoc.*, 104 Wn. App. at 601.

The first rule of policy construction is that “the insurance contract must be viewed in its entirety, a phrase cannot be interpreted in isolation.” *Allstate Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997) (citing *Hess v. North Pac. Ins. Co.*, 122 Wn.2d 180, 186, 859 P.2d 586 (1983)). Therefore, “when construing the policy, the Court should attempt to give effect to each provision of the policy.” *Id.*

As noted in *McDonald v. State Farm Fire and Cas. Co.*, 119 Wn.2d 724, 733, 837 P.2d 1000 (1992):

“Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning.” *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990) (quoting Restatement (Second) of Contracts § 200 (1981)). Insurance policy language must be interpreted in accord with the way it would be understood by the

average person. *National Union Fire Ins. Co. v. Zuver*, 110 Wn.2d 207, 210, 750 P.2d 1247 (1988). An insurance policy provision is ambiguous when it is fairly susceptible to two different interpretations, both of which are reasonable.

Also as noted in *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 569, 919 P.2d 594 (1996), in ascertaining [a promise or agreement's] meaning, extrinsic evidence (such as the statements of AIU'S employees) are admissible:

In order to aid courts in ascertaining the intent of the parties to a contract, we adopted the "context rule" in *Berg*. *Berg*, 115 Wn.2d at 667, 801 P.2d 222. Under that rule, extrinsic evidence is admissible in order to assist the court in ascertaining the intent of the parties and in interpreting the contract. *Berg*, 115 Wn.2d at 667, 801 P.2d 222. Such evidence is admissible regardless of whether or not the contract language is deemed ambiguous. *Berg*, 115 Wn.2d at 669, 801 P.2d 222.

When two different interpretations of a policy provision are offered, the analysis then differs based upon whether an inclusionary or exclusionary clause is at issue:

"An inclusionary clause in insurance contracts should be liberally construed to provide coverage whenever possible." *Riley v. Viking Ins. Co.*, 46 Wn. App. 828, 829, 733 P.2d 556 (1987) (citing *Pierce v. Aetna Cas. & Sur. Co.*, 29 Wn. App. 32, 627 P.2d 152 (1981)). "[E]xclusionary clauses are to be construed strictly against the insurer." *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 340, 738 P.2d 251 (1987) (citing *Farmers Ins. Co. v. Clure*, 41 Wn. App. 212, 215, 702 P.2d 1247 (1985)).

Mercer Place Condo Assoc., 104 Wn. App. at 602-03.

IV. ARGUMENTS

A. Diminished Value is a Covered Loss Under AIU'S Policy

Under AIU'S insurance policy with IBRAHIM, AIU "...will pay for *property damage* caused by an *automobile accident* which an

insured is legally entitled to recover from the *owner* or operator of an *underinsured motor vehicle.*” CP12. An insured is “legally entitled” to be compensated for damages based upon diminution of value to personal property. CP 17. Washington courts have recognized the entitlement to recover the loss of value to one’s property for almost a century. For example, in *Kane v. Nakamoto*, 113 Wn. 476, 481, 194 P. 381 (1920), the Washington State Supreme Court held that the measure of damages for injury to a car was the decrease in fair market value. This holding was reaffirmed in *Madden v. Nippon Auto Co.*, 119 Wn. 618, 206 P. 569 (1922); *Knudson v. Bockwinkle*, 120 Wn. 527, 208 P. 59 (1922) (holding that the repair bill plus diminished value were proper damages); *Rowell v. Johnson*, 147 Wn. 607, 610-11, 266 P. 733 (1928) (“that a good job was done and that the car was fixed up all right, does not go to the extent of establishing that there was no depreciation in value of the car over and above the cost of the repair”); *McCurdy v. Union Pac. R.R. Co.*, 68 Wn.2d 457, 467, 413 P.2d 617 (1966) (if property is damaged but not destroyed, the measure of damages is the difference between the market value of the property before the injury and its market value after the injury).

More recently, Washington courts have adopted §928 of the Restatement (2d) of Torts, which recognizes the concept of diminution or loss in value. *State v. Ratcliff*, 46 Wn. App. 325, 329, 730 P.2d 716 (1986). The relevant portion of §928 provides as follows:

When one is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include

compensation for

(a) the difference between the value of the chattel before the harm and the value after the harm or, at his election in the appropriate case, the reasonable cost of repair or restoration, *with due allowance for any difference between the original value and the value after repairs.*

Id. (emphasis added). This measure of damages is also reflected in the Pattern Jury Instructions adopted by the Washington Supreme Court:

WPI 30.12 MEASURE OF DAMAGES—DAMAGE TO PERSONAL PROPERTY—COST OF REPAIRS AND DEPRECIATION OF REPAIRED PROPERTY

The reasonable value of necessary repairs to any property which was damaged plus the difference between the fair cash market value of the property immediately before the occurrence and its fair cash market value after it is repaired.

Here, AIU elected to pay to repair IBRAHIM’S vehicle under the underinsured motorist coverage section of the insurance policy.

Accordingly, IBRAHIM is “legally entitled” to the cost of repairs *and* “the difference between the fair cash market value of the property immediately before the occurrence and its fair cash market value after it is repaired.”

Id. AIU contractually obligated itself to pay “damages which an insured is legally entitled to recover...” and it acknowledged this obligation to pay for diminished value under the insurance policy in its February 22, 2008, letter to IBRAHIM. CP 12.

In the court below, AIU attempted to characterize IBRAHIM’S claim for diminished value as a claim for “stigma damages” and it relied upon *Moeller v. Farmers Ins.* 155 Wn. App. 133, 142, 229 P.3d 857 (2010) to dismiss IBRAHIM’S claim for diminished value. CP 12.

Moeller is distinguishable from this action. The instant action involves a covered loss an insured is “legally entitled” to recover under the Underinsured Motorists Coverage section of the policy. CP 1, 12, 30. *Moeller* involved a covered loss under the collision and comprehensive portion of an insurance policy. At issue in *Moeller* was whether the language of the policy under the collision and comprehensive portion of the policy covered diminished value. In examining the “direct and accidental loss” coverage clause in the collision and comprehensive portion of the policy, the court concluded that the policy did cover diminished value if the loss was proximately caused by a collision. *Id.* at 143-44.¹ Even if *Moeller* was applicable to this action, the IBRAHIM’S claim for diminished value would still stand because even after repairs to the vehicle, “...the vehicle’s capacity and *value* should be similar to its capacity and *value* preloss.” *Id.* at 145-46 (emphasis added).²

Furthermore, AIU acknowledged in its February 22, 2008, letter to IBRAHIM that diminished value is a covered loss, upon proof, under the underinsured motorist section of the policy. Based upon the foregoing

¹ In affirming the Court of Appeals in *Moeller*, the Supreme Court held that under the terms of the policy at issue, Farmers’ policy provided coverage for diminished value after a vehicle is repaired. *Moeller v. Farmers Ins. Co. of Washington*, 173 Wn.2d 264, 267, 277 P.3d 998 (2011).

² In *Moeller*, the Supreme Court stated, “We must read an insurance contract as an average person would read it. *Eurick*, 108 Wash.2d at 341, 738 P.2d 251. Thus, the lens through which we view this question is from the point of view of the consumer. From this point of view, the bargain of the contract is **to return the consumer to his preaccident position with respect to the value of his car**. Strictly construing the limiting language of Farmers’ policy, as we must, it does not convey to the average policyholder that the value of coverage may be less if Farmers repairs a vehicle rather than replacing or “totaling” it. Rather, the reasonable expectation is that, following repairs, the insured will be in the same position he or she enjoyed before the accident.” *Id.* at 275 (emphasis added).

letter, IBRAHIM provided AIU with proof by way of a diminished value report prepared by WALKER of FRONTIER ADJUSTERS of his vehicle's pre-loss value and its post-repair value. The difference in value was \$16,961.00. CP 12. AIU did not dispute the diminished value determined by WALKER, nor did it provide any evidence to refute WALKER'S determination that the vehicle sustained diminished value in the amount of \$16,961.00. CP 17. Instead, in the court below, AIU argued that its limits of liability excluded diminished value, even though it had already advised IBRAHIM that he was entitled to such a claim upon proof in its letter to him dated February 22, 2008. CP 12, 30. Under the terms of the insurance policy, which AIU acknowledged in its February 22, 2008 letter, IBRAHIM was entitled to diminished value upon proof, which he provided, and AIU unreasonably breached the terms of the insurance policy by forcing him to institute litigation to recover an amount due under the policy. It is "bad faith" to compel an insured to initiate or to submit to litigation to recover amounts due under an insurance policy. WAC 284-30-330(7).

The trial court erred when it determined that diminished value was excluded by the limits of liability clause without interpreting what IBRAHIM was "legally entitled" to under the same section of the policy, particularly when AIU admitted in its letter to IBRAHIM that despite the limits of liability clause, he was entitled to diminished value upon proof, which was subsequently provided to AIU by way of a diminished value

report prepared by IBRAHIM'S property damage appraiser, WALKER.³

B. After the Policy is Properly Construed, Summary Judgment on the CPA Claim Must Also be Reversed

In the court below, AIU presented no evidence that its claims handling and denial of the claim was "reasonable," especially in light of the fact that AIU readily acknowledge in a letter that under the underinsured motorist section of the policy, IBRAHIM was entitled to diminished value upon proof, which he provided and AIU did not dispute the existence of or the loss in value sustained by IBRAHIM'S vehicle in a covered collision. Instead, it argued that the limits of liability clause in the policy excluded a claim for diminished value when it had already conceded in a letter that by its own interpretation of its policy includes such a claim, upon proof. CP 12.

Viewed in a light most favorable to IBRAHIM, the foregoing conduct is a clear *per se* violation of §284-30-330, and therefore an "unfair method of competition and unfair or deceptive acts or practices in the business of insurance," *id.*, to:

- (1) Misrepresenting pertinent facts or insurance policy provisions...; and
- (7) Compelling insureds to institute or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.

Id. Even a *single* violation by an insurer of any WAC provision is a *per se*

³ Claimed exclusionary clauses are strictly construed against the insurer. *Eurick*, 108 Wn.2d at 340; *Mercer Place Condo Assoc.*, 104 Wn. App. at 602-03.

violation of the CPA. *Leingang v. Pierce County Med. Bur. Inc.*, 131 Wn.2d 133, 151, 930 P.2d 288, 297 (1997).

V. CONCLUSION

For the foregoing reasons, this Court should find diminished value to be a covered, non-excluded loss under AIG'S policy and reverse the grant of summary judgment.

RESPECTFULLY submitted this 14th day of March, 2013.

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CERTIFICATE OF SERVICE

I certify that on March 14, 2013, I caused a true and correct copy of this Brief of Appellant to be served on the following by U.S. First Class Mail, postage prepaid.

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

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