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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN -4 PM 3:19

No. 63198-5-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

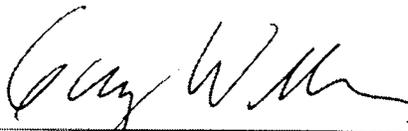
EDWARD S. JOHNSON,
Appellant,
vs.

METROPOLITAN PROPERTY AND CASUALTY
INSURANCE COMPANY,
Respondent.

BRIEF OF APPELLANT

Signed at Quilcene, Washington,
this 3 day of June, 2009.

Signed at Bellevue, Washington,
this 3 day of June, 2009,



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III. ASSIGNMENTS OF ERROR

Assignment of Error No. 1. The Trial Court Erred in Declaring No Coverage for Plaintiff Johnson under the Metlife Policy Where:

A. Mr. Johnson Qualified for Coverage Because He Met the Policy Definition of "YOU."

B. Neither Mr. Johnson nor Ms. Collins Rejected UIM Coverage.

C. Metlife's Interpretation of its Policy Violates Public Policy Because it Discriminates Against Unmarried Persons.

Assignment of Error No. 2. The Trial Court Erred in Failing to Award *Olympic Steamship* Reasonable Attorney Fees and Costs.

**IV. ISSUES PERTAINING
TO ASSIGNMENTS OF ERROR**

Issues Pertaining to Assignment of Error No. 1:

- A. Whether the Special Rules of Insurance Policy Interpretation and Construction Require a Finding that Mr. Johnson Met the Policy Definition of “YOU.”
- B. Whether RCW 48.22.030, the Underinsured Motorist Statute, Requires Coverage Absent a Written Rejection by the Insured.
- C. Whether Interpreting the Policy to Discriminate Against Unmarried Persons is Contrary to Public Policy.

Issue Pertaining to Assignment of Error No. 2:

Whether the Trial Court Erred in Failing to Award *Olympic Steamship* Reasonable Attorney Fees and Costs

V. STATEMENT OF THE CASE

A. Procedural History:

Edward D. Johnson sued Metropolitan Property and Casualty Insurance Company (“Metlife”) for coverage and extracontractual damages when it refused to pay his claim. On cross motions for summary judgment on coverage, the trial court granted Metlife’s Motion, denied Johnson’s Motion, and dismissed plaintiff’s Complaint with prejudice on March 13, 2009. CP 202. This appeal timely followed.

B. Statement of Facts:

Mr. Johnson was driving a rental car when he was injured in a collision. He submitted claims to his auto insurer, Metlife. Although Metlife paid Mr. Johnson’s Personal Injury Protection (“PIP”) claim, his claim for underinsured motorist coverage (“UIM”) benefits was denied. CP 124, CP 122. This lawsuit followed.

Mr. Johnson had been added to Carol Collins’ Metlife policy prior to the accident. Ms. Collins and Mr. Johnson were an unmarried couple who were engaged, had a child, and lived together. She owned a 2002 Honda and they owned a 1975 Ford van together. Mr. Johnson needed auto insurance, so Ms. Collins researched their options. She had a Metlife

auto policy already in force. They decided to add Mr. Johnson to her policy because it was less expensive to insure both of them on one policy, rather than separately. CP 72, *Declaration of Carol S. Collins*.

Ms. Collins explained to Metlife¹ that she and Mr. Johnson wanted him added to the policy, and covered "... to the same extent I was." *Id.* Metlife added him to the policy. Mr. Johnson was explicitly named on the policy, along with Carol Collins, as "Household Drivers." CP 73-74, *Policy Declarations*. Both Ms. Collins and Mr. Johnson were named on written communications from Metlife. They were each named on proof of insurance forms. There was no signed waiver or limitation of UIM coverage. CP 72, *Declaration of Carol S. Collins*. CP 77-120, *Metlife Policy*.

On January 21, 2006, Mr. Johnson was driving a rental car when he was involved in an accident. He was injured, and submitted UIM and PIP claims to Metlife. Metlife paid the PIP claim. CP 124. Metlife denied the UIM claim alleging that Mr. Johnson had no UIM coverage. Metlife wrote:

Edward Johnson is a listed driver on Ms. Collins' policy, but

1. Her dealings with Metlife were through a call center, rather than an independent insurance agent. CP 72.

he is not a named insured and he is not married to Ms. Collins, so he does not qualify as “you or a relative.” He would only be covered for underinsured motorist bodily injury coverage if he was occupying a covered automobile at the time of the injury.

CP 122, *Denial Letter*.

The policy refers to “you” as the policyholder, but Metlife said Mr. Johnson did not fit the definition of “you.” Thus he would only be covered for UIM if he were married to Ms. Collins, or if he were driving one of the two described vehicles. *Id.* This was the situation Carol Collins intended to prevent when she purchased the coverage. CP 72, *Declaration of Carol S. Collins*.

VI. ARGUMENT

A. The Court Should Review This Summary Judgment De Novo.

The standard of review of an order of summary judgment is de novo; the appellate court performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002); *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to prevail as a matter of law. CR 56(c); *Public Employees Mutual Ins. Co. v. Fitzgerald*, 65 Wn. App. 307, 828 P.2d 63 (1992). The purpose of summary judgment is to avoid a useless trial. *Moore v. Pac. NW Bell*, 34 Wn.App. 448, 662 P.2d 398 (1983). If any genuine fact issue exists, there must be a trial. *Klossner v. San Juan County*, 21 Wn. App. 689, 586 P.2d 899 (1978), *aff'd*, 93 Wn.2d 42 (1979). A material issue precluding summary judgment is one upon which the outcome of the litigation depends, in whole or part. *Vacova v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (1991).

**B. Mr. Johnson Qualified for Coverage
Because He Met the Policy Definition of "YOU."**

Metlife says only persons defined as "YOU" are covered when driving a car not specifically listed on the policy. Since the rental car driven by Mr. Johnson was not listed on the policy, Metlife says he has no coverage for UIM.

1. A named insured? Metlife claims Mr. Johnson is not a "YOU," because he is not a named insured. The policy says:

"YOU" and **"YOUR"** mean the person(s) named in the Declarations of this policy as named insured and the spouse of such person or persons if a resident of the same household.

CP 83. *Metlife Policy*, p. 2 of 24. The entire policy is at CP 77-120.

So, if Mr. Johnson is "named in the Declarations ...as named insured..." he is covered. We know he is named, because he is a named household driver, as is Ms. Collins, on page 2 of the Declarations. CP 78. Is Mr. Johnson "... named ... as named insured?" Or is he named as something else?

Why did Mr. Johnson's name appear in the Declarations? He was

2. In the policy, words in bold face are defined in the policy. Undefined terms are given their "plain, ordinary, and popular" meaning, as found in standard dictionaries. *Daley v. Allstate*, 135 Wn.2d 777, 784, 958 P.2d 990 (1998).

certainly not named as an excluded driver, or as a person with limited or no coverage. He was named as a person who was added to the policy, a household driver, a person insured by the policy, a person who was covered by the policy. If he was not named as an excluded person, he must be named as an insured person. He must be a named insured.

2. Statutory definition of “named insured.” The Metlife policy does not define “named insured” but the Legislature has done so.

“Named insured” means the individual named in the declarations of the policy and includes his or her spouse if a resident of the same household.

RCW 48.22.005(9). Mr. Johnson was, “...named in the declarations of the policy...” By statute, he was a named insured. Metlife is bound by the statutory definition of “named insured.” Notice how RCW 48.22.005(9) and the policy definition of YOU are nearly identical. The statute says :

“Named insured” means the individual named in the declarations of the policy...

The policy says:

YOU ... mean the persons(s) named in the Declarations of this policy as named insured...”

CP 83.

A named insured is named in the declarations of the policy. Mr.

Johnson was “named in the Declarations of this policy as named insured.” CP 83, *Policy*. If he were named in the declarations as an excluded driver, he would not be named as a named insured. He would be named as an excluded driver. Otherwise, he certainly was a named insured. He was either named because he was covered, or named because he was specifically excluded. Here, he was named because he was covered, named as a named insured. He was, therefore, a **YOU** in this Metlife policy. He was covered while driving a rental car.

The “Household Drivers” heading means little or nothing. CP 78. The policy does not define the term, or even suggest what a Household Driver might be. There is no middle ground between covered and excluded.

3. Extrinsic evidence. Mr. Johnson’s coverage must be as broad as that of Ms. Collins. This reading of the policy comports with what Ms. Collins was told and intended when she purchased the policy. CP 72.

Declaration of Collins. One court pointed out:

If a clause is ambiguous, we may look to extrinsic evidence to determine the parties' intent and resolve the ambiguity. *Quadrant*, 154 Wn.2d at 171-72. We construe any ambiguity strictly against the insurer and in favor of the insured. *Quadrant*, 154 Wn.2d at 172. But "a strict application should not trump the plain, clear language of an

exclusion such that a strained or forced construction results." *Quadrant*, 154 Wn.2d at 172. And the insured's expectations do not override the contract's plain language. *Quadrant*, 154 Wn.2d at 172.

Hall v. State Farm Mut. Auto. Ins. Co., 133 Wn. App. 394, 399-400 (2006). Ms. Collins' intent was to purchase equally full coverage for herself and Mr. Johnson. CP 72. *Declaration of Collins*. What was Metlife's intent when it made the contract? The intent expressed to Ms. Johnson by Metlife was the same – equal coverage for both insureds. *Id.* These facts are undisputed.

4. Strict construction of limiting language. The rules of insurance policy interpretation and construction mandate coverage. Exclusionary or limiting clauses "are to be 'most strictly' construed against the insurer in view of the fact that the purpose of insurance is to insure, and the contract should be construed so as to make it operative rather than inoperative." *Aetna v. M&S Industries*, 64 Wn. App. 916, 923, 827 P.2d 321 (1992). This is true because:

...exclusions from coverage are contrary to the fundamental protective purpose of insurance and will not be extended beyond their clear and unequivocal meaning. *McDonald Indus., Inc. v. Rollins Leasing Corp.*, 95 Wn.2d 909, 915, 631 P.2d 947 (1981). Exclusions are strictly construed against the insurer. *Mid-Century Ins. Co. v. Henault*, 128 Wn.2d 207, 213, 905 P.2d 379, 59 A.L.R.5th

789 (1995).

Torgerson v. North Pacific Insurance Co., 109 Wn. App. 131, 137, 34 P.3d 830 (2001).

The strict construction rule is more than just word salad. It is a guidepost, a clear direction. Here, the trial court failed to apply strict construction to the key potentially limiting/covering terms in the policy. The term "as named insured" must be construed to favor coverage, not destroy it.

5. Inconsistent, conflicting, or ambiguous policy terms. When the policy contains inconsistent or conflicting terms, the conflict must be resolved in favor of the insured. *American Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 134 Wn.2d 413, 951 P.2d 250 (1998); *DePhelps v. Safeco*, 116 Wn. App. 441, 65 P.3d 1234 (2003). The same principle extends to ambiguous words or phrases . "A clause in a policy is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable." *Vadheim v. Continental Ins. Co.*, 107 Wn.2d 836 , 840-41, 734 P.2d 17 (1987). An insured is entitled to favorable construction of ambiguous policy language – it must be read to provide rather than to deny coverage. *Queen City Farms, Inc. v.*

Central National Ins. Co., 126 Wn.2d 50, 86, 882 P.2d 703, 891 P.2d 718 (1994). Metlife said in the denial letter that Mr. Johnson was a listed driver rather than a named insured. CP 122. *Denial Letter*. Listed and named, however, are obvious synonyms. Any ambiguity is resolved in favor of coverage. If Mr. Johnson was listed, he was named. If he was a listed insured, he was a named insured. Application of these principles mandates a finding that Mr. Johnson fits under the policy definition of **YOU** and is thus covered in full.

6. Capitalization and its effect on meaning. The conclusion that Mr. Johnson was a named insured is proven by the manner in which key policy terms were drafted by Metlife. The policy requires one to be “named in the Declarations of this policy as named insured” to fit the definition of **YOU**. CP 83. At the top of Page 1 of the Declarations, we find the term “Named Insured” under Ms. Collins’ name. CP 77.

Is “Named Insured” different or the same as “named insured?” What does capitalization, or the lack thereof, add to the meaning of these terms? If they mean exactly the same thing, why is one capitalized and one not?

These terms cannot mean exactly the same thing, and common

sense says they do not. Carol Collins may be the only “Named Insured;” both Collins and Johnson are “named insureds.” This resolution makes sense because we capitalize proper nouns. A proper noun is a noun which names a specific person, place, or thing.³

Capitalization can alter the meaning of words. For example, when Americans write about the “Civil War,” we know exactly which war we are reading about. We know who was President; we know the uniforms were blue and gray. Without the capitalization, however, it’s a different story. If we write about “civil war,” we mean war between citizens of the same country.

“Named Insured” means Carol Collins, and “named insured” means Carol Collins and/or Edward Johnson. Carol Collins may be the sole Named Insured, but she is not the only named insured. The definition of **YOU** says “as named insured,” not “as Named Insured.” Once again, we see that Mr. Johnson is **YOU**. He is covered.

Metlife ignores the rules of policy interpretation and construction which are unique to insurance contracts. The trial court made the same mistake. Close reading of policy terms and application of the special rules

3. See, e.g., <http://englishplus.com/grammar/00000045.htm>

of insurance policy construction require a finding of coverage.

**C. Neither Mr. Johnson nor Ms. Collins Rejected UIM Coverage;
Metlife Must Provide the Coverage Required by Statute.**

Nobody signed a UIM coverage rejection or limitation form. CP 72, *Declaration of Collins*. This is important in the context of UIM coverage because full UIM coverage is required by statute, unless it is rejected in writing by the insured. RCW 48.22.030. The statute carefully describes the required coverage, and clearly sets out the allowed exclusions. Those exclusions do not apply here.

Metlife said Mr. Johnson was only entitled to partial UIM coverage, only covered if he were driving one of the cars described as a “covered auto” in the policy, or if he were married to Ms. Collins. She, however, gets all the coverage mandated by the statute. In short, Metlife says Ms. Collins would have been covered if she were driving a rental car, but Mr. Johnson is not.

This analysis ignores an important fact – *anyone* driving a “covered auto” with permission is covered for UIM benefits. According to Metlife, Mr. Johnson had no more UIM coverage than their next door neighbor. Metlife says, “... Mr. Johnson is simply not insured under Carol Collins’ insurance policy with Metlife, other than as another permissive driver for

Ms. Collins' vehicles." CP 186.

If true, why did Metlife list Mr. Johnson by name on the declaration page of the policy? Why not list everyone in the neighborhood? Why charge a premium to list Mr. Johnson?

If Mr. Johnson has no more coverage than a stranger to the policy, he has no UIM coverage at all. Metlife has sold Mr. Johnson an illusory contract, which seems to provide UIM coverage but does not. This restrictive view of UIM coverage is simply impossible for any court to support.

Mr. Johnson has liability coverage; he has PIP coverage; but Metlife says he has no UIM coverage. This cannot happen. RCW 48.22.030 absolutely forbids it, unless the named insured signs a rejection. The statute does not contemplate a piecemeal whittling away of liability for injuries caused by uninsured motorists. *Finney v. Farmers Ins. Co.*, 92 Wn.2d 748, 752, 600 P.2d 1272 (1979).

RCW 48.22.030 contains various UIM coverage and condition requirements. The statute becomes a part of and should be read into the insurance policy. *Touchette v. Northwestern Mut. Ins.*, 80 Wn.2d 327, 494 P.2d 479 (1972). The UIM statute is "liberally construed in order to

provide broad protection against financially irresponsible motorists."

Clements v. Travelers Indem. Co., 121 Wn.2d 243, 251, 850 P.2d 1298

(1993).

The statute provides, in relevant part with emphasis added:

48.22.030 Underinsured, hit-and-run, phantom vehicle coverage to be provided -- Purpose -- Definitions -- Exceptions -- Conditions -- Deductibles -- Information on motorcycle or motor-driven cycle coverage -- Intended victims.

(2) **No new policy** or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage, suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle **shall be issued** with respect to any motor vehicle registered or principally garaged in this state **unless coverage is provided** therein or supplemental thereto **for the protection of persons insured thereunder** who are legally entitled to recover damages from owners or operators of **underinsured motor vehicles**, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death, or property damage, resulting therefrom, except while operating or occupying a motorcycle or motor-driven cycle, and except while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member, and which is not insured under the liability coverage of the policy. ...

UIM coverage is a mandatory coverage on an automobile liability policy. It must be offered to "persons insured thereunder." Mr. Johnson is a "person insured thereunder" because he is insured for liability and PIP on the Metlife policy. Metlife must provide UIM coverage to Mr. Johnson, unless

the coverage was rejected in writing:

(3) Except as to property damage, coverage required under subsection (2) of this section shall be in the same amount as the insured's third party liability coverage unless the insured rejects all or part of the coverage as provided in subsection (4) of this section. ...

(4) A named insured or spouse may reject, in writing, underinsured coverage for bodily injury or death, or property damage, and the requirements of subsections (2) and (3) of this section shall not apply. ...

Here, there was no written rejection. Mr. Johnson is covered. Metlife's attempt to provide no UIM coverage to some insureds and full coverage to others is directly contrary to the statute. Any doubt as to the application or construction of the statute is resolved by subsection 12:

(12) The purpose of this section is to protect innocent victims of motorists of underinsured motor vehicles.

RCW 48.22.030(12).

In addition, Mr. Johnson need not be a named insured to be covered. He needs only to be a "person insured" under the policy:

(2) No ... policy insuring against loss resulting from liability ... shall be issued ... unless coverage is provided ... for the protection of *persons insured thereunder* who are legally entitled to recover damages from owners or operators of underinsured motor vehicles...

RCW 48.22.030(2). (Emphasis added). Because Mr. Johnson is a "person

insured thereunder” he is covered for UIM.

We know he is insured thereunder because Metlife paid his \$20,400 PIP claim. CP 124. Metlife issued a proof of insurance card with Mr. Johnson’s name on it. CP 72, *Declaration of Collins*. Metlife impermissibly tries to limit UIM coverage to named insureds when the statute requires coverage for all persons insured for liability on the policy.

Mr. Johnson had all the benefits of the policy except for UIM. Mr. Johnson was listed, named, covered, insured. He was covered for PIP. He was covered for liability. He had a proof of insurance card with his name on it. He is “YOU” in the liability coverage, but Metlife says he is not “YOU” in the UIM coverage. This is impossible.

Both coverages use the exact same definition of “YOU.” CP 83, *Policy*, p.2 of 24⁴. How can Mr. Johnson be “YOU” and not “YOU” at the same time? How can Mr. Johnson be covered for liability, but not for UIM? He cannot, either under the policy or under the statute.

As a person insured by Metlife for liability and PIP, Mr. Johnson must receive UIM coverage unless one of two situations exists:

4. “YOU” is found in the General Definitions. These are definitions which apply to all parts of the policy. Any definitions which apply only to certain coverages are found in those coverage parts, not in General Definitions.

1. The UIM coverage is rejected in writing, or
2. Mr. Johnson is excluded as allowed by the statute.⁵

Neither situation existed here, so Metlife must cover the UIM claim.

D. Metlife's Interpretation of its Policy Violates Public Policy Because it Discriminates Against Unmarried Persons.

Metlife interprets its policy to contain limitations which are unlawfully discriminatory. Metlife says it would cover Mr. Johnson if he were married to Ms. Collins, but not if they were only engaged, living together, and raising a child. Metlife is not allowed to discriminate on that basis.

RCW 48.30.300 Unfair discrimination, generally.

Notwithstanding any provision contained in Title 48 RCW to the contrary:

A person or entity engaged in the business of insurance in this state may not refuse to issue any contract of insurance or cancel or decline to renew such contract because of the sex, marital status, or sexual orientation as defined in RCW 49.60.040, or the presence of any sensory, mental, or physical handicap of the insured or prospective insured. The

5. The exceptions are few. (... "except while operating or occupying a motorcycle or motor-driven cycle, and except while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member, and which is not insured under the liability coverage of the policy," RCW 48.22.030(2).) Driving a rental car is not excludable under the statute.

amount of benefits payable, or any term, rate, condition, or type of coverage may not be restricted, modified, excluded, increased, or reduced on the basis of the sex, marital status, or sexual orientation, or be restricted, modified, excluded, or reduced on the basis of the presence of any sensory, mental, or physical handicap of the insured or prospective insured. This subsection does not prohibit fair discrimination on the basis of sex, or marital status, or the presence of any sensory, mental, or physical handicap when bona fide statistical differences in risk or exposure have been substantiated.⁶ (Emphasis added)

The anti-discrimination statute is clear. Metlife cannot discriminate based on marital status. Interpreting the policy to require discrimination is contrary to public policy. The policy must be read with both the UIM statute and the anti-discrimination statute in mind. This is particularly appropriate in the context of UIM coverage, because the public interest is impacted when coverage is mandatory. Metlife's interpretation of its policy is invalid because it violates public policy.

6. Perhaps Metlife can demonstrate that its exposure would drop like a rock on the day after Mr. Johnson and Ms. Collins got married. We doubt it. See, e.g., *Edwards V. Farmers Ins. Co.*, 111 Wn.2d 710, 763 P.2d 1226 (1988) for a discussion of the statute in different circumstances.

**E. Plaintiff Johnson is Entitled to an Award of
Olympic Steamship Reasonable Attorney Fees.**

An insured is entitled to an award of reasonable attorney fees and costs when he is required to litigate to establish first party insurance coverage. *Olympic Steamship Company, Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). This Court should award Mr. Johnson his attorney fees and costs on appeal, as well as his fees and costs in the trial court.

VII. CONCLUSION

This Court should reverse the trial court's March 13, 2009 Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment, declare coverage, and remand this case for trial on the remaining issues.