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No. 65644-9-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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JAVIER RODRIGUEZ,

Plaintiff/Appellant

v.

NORTHGATE AUTOMOTIVE, INC., a Washington corporation; JOE MAGAZINE
and "JANE DOE" MAGAZINE, a Washington sole proprietor d/b/a NORTHGATE
AUTOMOTIVE, INC. and GREENLAKE AUTO SERVICE

Defendants

FARMERS INSURANCE COMPANY OF WASHINGTON, a domestic insurance
company,

Defendant/Respondent

Appeal from the Superior Court for King County
The Honorable Richard D. Eadie

REPLY BRIEF OF APPELLANT JAVIER RODRIGUEZ

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North Pacific Ins. Co. v. Christensen,
143 Wn.2d 43, 17 P.3d 596 (2001)

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I. SUMMARY OF REPLY

Rodriguez seeks neither an expansion of existing law nor the creation of new law. Instead, Rodriguez respectfully asks the Court to apply existing law and the insurance policy language to the undisputed facts to hold that Rodriguez is entitled to underinsured motorist (“UIM”) coverage for his injuries and other damages.

II. ARGUMENTS IN REPLY

A. **By the Farmers policy definition, the Rodriguez vehicle is an “underinsured motor vehicle.”**

The relevant Farmers policy language defines an “underinsured motor vehicle” as follows:

A motor vehicle with respect to the maintenance of which either no bodily injury or property damage liability bond or insurance policy applies at the time of an accident.

It is undisputed by Farmers that, at the time of the accident, no liability insurance applied with respect to the maintenance of the motor vehicle. Thus, it cannot be disputed that Rodriguez’s vehicle fits the Farmers’ policy definition of an “underinsured motor vehicle.”

In its brief to the Court, Farmers does not apply the relevant policy language to the undisputed facts of Rodriguez’s claim. Instead, Farmers shifts the focus away from the relevant policy

language to an argument that UIM coverage cannot arise from a one-vehicle accident. However, Farmers cites no policy language requirement of more than one vehicle. Moreover, this argument flies in the face of case law in favor of coverage following a one-car accident. See *North Pacific Ins. Co. v. Christensen*, 143 Wn.2d 43, 48-50, 17 P.3d 596 (2001) (a case Farmers dismisses for having “nothing to offer this analysis” (Brief of Respondent at 15)). In *Christensen*, the Supreme Court clearly holds that UIM coverage arises from a one-vehicle crash. *Christensen*, 143 Wn.2d at 53.

B. Northgate Automotive was an “operator” of the underinsured motor vehicle.

Farmers agrees with the Supreme Court that an “operator” is anyone in actual physical control of a vehicle. *Christensen*, 143 Wn.2d at 53; Brief of Respondent at 15. However, without citation to any legal authority or policy language, Farmers further narrows the definition of “operator” to require human touch. Narrowing the UIM coverage consideration to Farmers’ human touch requirement is inconsistent with letter and spirit of *Christensen*:

From a practical standpoint, narrowing the scope of “operator” to a single person who is in sole command of all the controls of a vehicle does not sufficiently address the real-life situations that arise while driving. Auto mishaps rarely result when drivers are in total control of all the functions of their cars. Instead,

accidents occur when there are failures to maintain complete control, including when a passenger unexpectedly grabs the steering wheel. Accidents can happen almost instantaneously when only one of the car's critical controls is compromised.

Christensen, 143 Wn.2d at 50.

Similar to the facts of *Christensen*, Rodriguez lost his ability to maintain control of the critical functions of his vehicle. At the moment the left front wheel and brake assembly detached from the vehicle, by and through its maintenance on the vehicle, Northgate Automotive unexpectedly exerted actual physical control over the braking and steering functions sufficient to cause an accident. Therefore, Northgate Automotive fits the definition of "operator" adopted by the Supreme Court in *Christensen*.

Moreover, the Farmers policy contained explicit language providing coverage for accidents arising from the "maintenance" of an underinsured motor vehicle. In the real-life situations that arise while driving, one who maintains a vehicle is not likely to be behind the wheel of that vehicle at the time of an accident caused by their maintenance. Thus, the term "operator" must be broad enough to include the unexpected consequences arising from the "maintenance" of an underinsured motor vehicle.

C. The words “underinsured motorist” do not appear in any coverage language.

Farmers’ argument attempts to add the words “underinsured motorist” to the coverage language of the policy. The words appear together in the name of the coverage, but do not appear anywhere within the relevant policy coverage language:

We will pay for all sums which an insured person is legally entitled to recover as damages from the owner or operator of an underinsured motor vehicle because of bodily injury sustained by the insured person. The bodily injury must be caused by accident and arise out of the ownership, maintenance or use of the underinsured motor vehicle.

Accordingly, the words play no part in determining whether Rodriguez is entitled to UIM coverage under the Farmers policy.

In any event, if the phrase “underinsured motorist” was included in the Farmers policy language it would be an undefined term and the undefined terms of a policy must be understood in their plain, ordinary, and popular sense. *Christensen*, 143 Wn.2d at 48. “Underinsured” plainly means having too little insurance coverage. “Motorist” plainly means an operator of a motor vehicle. Again, Northgate Automotive is an “operator” as defined by the Supreme Court in *Christensen* and underinsured. Therefore, by

definition, Northgate Automotive is an underinsured motorist and Rodriguez is entitled to coverage.

D. The Court should remand this case for further determination on all issues.

Farmers argues that Rodriguez has, somehow, waived his right to an adjudication on the merits of his “bad-faith type claims” for failing to assign error to the decision of the trial court to dismiss these claims. Brief of Respondent at 6. As pointed out by Farmers, a finding of no coverage by the trial court caused all of Rodriguez’s “bad-faith type claims,” including violations of Washington’s Insurance Fair Conduct Act, to fail and terminated the matter. Thus, the trial court was not required to make a decision with respect to Rodriguez’s “bad-faith type claims” on the merits. Since it is inappropriate to seek appellate review of a matter that was not decided by a lower court, it follows that Rodriguez was correct to not ask this Court to do so. Accordingly, on remand, this Court should instruct the trial court to make determinations on the “bad-faith type claims” consistent with the decision of this Court.

III. CONCLUSION

To reiterate, Rodriguez respectfully requests that this Court find that Rodriguez is entitled to UIM coverage and reverse the

order of the trial court granting summary judgment in favor of Farmers. Rodriguez further requests that this Court remand the case to the trial court for adjudication on the remaining issues consistent with the decision of this Court, including Rodriguez's "bad-faith type claims." Costs on appeal, including reasonable attorney fees, should be awarded to Rodriguez. RAP 18.1.

Respectfully submitted this 27th day of October, 2010.

THE ADEE LAW FIRM, PLLC

A handwritten signature in black ink, appearing to read "Aaron L. Adee", written in a cursive style.

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