

65644-9

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No. 656449

THE COURT OF APPEALS
STATE OF WASHINGTON, DIVISION I

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.

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BRIEF OF RESPONDENT

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I. COUNTER-STATEMENT OF ISSUE

1. Whether the trial court properly determined that Underinsured Motorist coverage does not apply to a motor vehicle accident that was not caused by an underinsured motorist and did not involve an underinsured motor vehicle?

II. STATEMENT OF THE CASE

On or about August 8, 2005, Appellant Javier Rodriguez (“Rodriguez”) took his 1994 Ford Explorer to Northgate Automotive, Inc. (“Northgate”) for service on the Explorer’s front brakes. Northgate replaced the inner and outer front wheel bearings, machined the front brake rotors, and replaced the front brake pads. (CP 1-11) The following day, Rodriguez was driving his Explorer when the left front wheel, including the rotor, detached from the vehicle. When the wheel and rotor detached, the Explorer fell onto the underbody of the car, allegedly causing injury to Rodriguez and damaging the vehicle. *Id.* Rodriguez’s

vehicle was towed to Les Schwab Tire Center, which determined that the pin designed to hold the spindle nut on the spindle was missing, and the accident thus resulted from negligent repairs performed by Northgate. *Id.*

At the time of the above set forth events, Rodriguez's 1994 Ford Explorer was insured by Respondent Farmers Insurance Company of Washington ("Farmers") under a Your E-Z Reader Car Policy (3rd Edition), Policy No. 0161337288, which provides in pertinent part as follows:

PART II - UNDERINSURED MOTORIST

Coverage C - Underinsured Motorist Coverage

We will pay 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 **injured person**. The **bodily injury** must be caused by **accident** and arise out of the ownership, maintenance or use of the **underinsured motor vehicle**.

* * *

Additional Definitions Used In This Part Only

As used in this part:

* * *

3. **Underinsured motor vehicle** means:

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

(underline added). (CP 24-56)

Rodriguez presented a claim to Farmers for Underinsured Motorist (“UIM”) coverage, contending that his Farmers policy provides UIM coverage for the subject accident. Farmers determined that Rodriguez’s alleged injuries and damages were not caused by an underinsured motorist and did not arise from the

ownership, maintenance or use of an underinsured motor vehicle, and disclaimed coverage. (CP 12-16)

Rodriguez sued Northgate and others for his injuries and damages allegedly resulting from the accident. Via a second amended complaint, Rodriguez sued Farmers, claiming that Farmers erroneously determined that UIM coverage does not apply to the accident. (CP 1-11)

Farmers brought a motion for summary judgment dismissal of Rodriguez's claims, and Rodriguez responded with a cross-motion for summary judgment. (CP 17-23, 57-77) Following briefing and oral argument by counsel for the parties, the trial court granted Farmers' motion for summary judgment, denied Rodriguez's motion for summary judgment, and dismissed Rodriguez's complaint against Farmers. (CP 232-34) Rodriguez then filed a Notice of Appeal. (CP 235-41)

III. ARGUMENT

Rodriguez contends that UIM coverage should apply to his

single-car accident, which occurred due to mechanical failure. Farmers determined coverage does not apply because the accident did not arise out of the ownership, maintenance or use of an underinsured motor vehicle, and the owner or operator of an underinsured vehicle was not responsible for Rodriguez's claimed damages. Rodriguez contends that Farmers' decision in that regard is incorrect, constitutes breach of contract, negligence, bad faith, violation of the Insurance Fair Conduct Act, RCW 48.30.015, and violation of the Consumer Protection Act, RCW 19.86, *et seq.* The trial court ruled that Farmers' decision is consistent with well-settled Washington law, and the court dismissed Rodriguez's claims.

A. Standard of Review.

An order of summary judgment is reviewed *de novo*, and the appellate court performs the same inquiry as the trial court. *E.g., Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). The court considers all facts and factual inferences in the

light most favorable to the non-moving party. Summary judgment is appropriately granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.* at 300-01.

B. Issue On Appeal is Limited.

Rodriguez defines the issue on appeal as follows: “The sole issue before the Court is whether Rodriguez’s injuries and other damages flowing from the maintenance by an uninsured gives rise to UIM coverage under Rodriguez’s policy.” Appellant Javier Rodriguez’s Appeal Brief and Assignment of Error, p. 1. Rodriguez repeats this declaration later in his brief. *Id.*, p. 4. Rodriguez did not assign error to, nor did he submit authority regarding, the trial court’s dismissal of his bad-faith type claims. Accordingly, the dismissal of those claims should be deemed waived.

Moreover, because Farmers correctly determined that UIM coverage does not apply in this instance, each and all of

Rodriguez's claims against Farmers fail. They are all based on Rodriguez's contention that coverage was wrongfully denied.¹

C. UIM Coverage Does Not Apply to These Facts.

RCW 48.22.030 governs UIM coverage and states in relevant part as follows:

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

(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

¹Although an incorrect denial of coverage does not constitute bad faith or a violation of statutes governing insurer conduct, so long as the insurer's conduct is reasonable and justified, *e.g.*, *James E. Torina Fine Homes, Inc., v. Mutual of Enumclaw Ins. Co.*, 118 Wn.App. 12, 21, 74 P.3d 648 (2003), *rev. denied*, 151 Wn.2d 1010, 89 P.3d 717 (2004); *Roberts v. Allied Group Ins. Co.*, 79 Wn.App. 323, 324, 901 P.2d 317 (1995), where the denial of coverage was correct, and all claims are based on that determination, all claims must be dismissed.

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 .

...

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

(underline added). Thus, the statutory purpose is to provide insurance protection for individuals who are injured due to the fault of the owner or operator of a vehicle for which there is either no automobile liability insurance or insufficient automobile liability insurance. The language of Rodriguez's Farmers automobile insurance policy is consistent with the UIM statute.

As stated by the Washington Supreme Court:

An underinsured motorist is one causing injury whose coverage is insufficient to meet the damages inflicted. RCW 48.22.030(1). When an underinsured motorist causes injury, the insurance company of the injured party carrying UIM steps

into the shoes of the negligent underinsured and supplements his policy. See *Briton v. Safeco Ins. Co. of America*, 104 Wn.2d 518, 531, 707 P.2d 125 (1985) (UIM is designed to protect people injured on the roadways by drivers whose vehicle are underinsured).

Jain v. State Farm Mut. Auto. Ins. Co., 130 Wn.2d 688, 692, 926 P.2d 923 (1996) (underline added). Thus, for UIM coverage to apply, an underinsured motor vehicle must be involved in the accident, the owner or operator of *that* vehicle must be legally responsible for the claimed injuries and damages, and the injuries and damages must arise out of the ownership, maintenance or use of *that* underinsured motor vehicle.

Here, Rodriguez admits that his accident was caused by negligent repairs performed by Northgate. Not only was there no underinsured motor vehicle involved in the accident, there was no other motorist who was responsible for the accident. Instead, this was a one-vehicle accident, the involved vehicle was fully insured, and Rodriguez was the driver. The accident was caused

not by an underinsured motorist, but rather by a vehicle repair business. Rodriguez simply cannot state a claim for UIM coverage.

D. UIM Coverage Should Not Be Extended to Non-Motorist Tortfeasors.

Rodriguez seeks to stretch the reach of the UIM statute to cover damages caused by non-motorist tortfeasors. Washington's UIM statute, however, clearly applies only to accidents caused by underinsured and uninsured motorists. Rodriguez seeks an expansion of Washington Underinsured Motorist law, something that should be left to the legislature should it be deemed advisable. Rodriguez's effort to create new law here should be rejected.

The only motorist involved in the subject accident was plaintiff. Northgate was not a "motorist" at the time of the accident. Indeed, the basis for Northgate's liability has nothing to do with driving or operating the vehicle, but rather with

negligent repairs performed on the vehicle. Thus, the very purpose of UIM coverage would not be served by extension of such coverage to the facts of this case.

E. Rodriguez's Vehicle Was Insured.

Rodriguez argues that his own vehicle was uninsured with regard to the maintenance performed by Northgate. That, however, is not the proper analysis. Rodriguez's vehicle *was* insured while Northgate performed repairs. No underinsured motor vehicle was involved in the subject accident. The vehicle driven by plaintiff was insured by Farmers at the time the repairs were made and at the time of the accident.

Plaintiff relies on *Tissell v. Liberty Mut. Ins. Co.*, 115 Wn.2d 107, 795 P.2d 126 (1990), for the proposition that his vehicle could be both insured and uninsured at the same time. *Tissell* does not support that theory. Instead, *Tissell* addresses the situation where a family member passenger who qualifies as an "insured" under the driver's policy may assert a claim both for

liability coverage against the driver and UIM coverage under the policy. Specifically, in *Tissell*, Tissell was the named insured under an automobile policy issued by Liberty Mutual, and was riding as a passenger in the family car while the vehicle was being driven by Tissell's husband. Tissell's husband accidentally drove the car off the road and into the Green River, and Tissell sustained significant injuries and ultimately died. Liberty Mutual paid the liability limits available under the policy, and Tissell made a claim for UIM coverage. *Id.* at 109-10. Liberty Mutual denied coverage based on a "family member" exclusion contained in the policy, which excluded UIM coverage arising out of accidents to which the liability coverage of the policy applied. *Id.* at 110. The *Tissell* court ruled that the family member exclusion violated public policy, because unlike other non-family member passengers, a family member passenger has no other opportunity to purchase UIM coverage. *Id.* at 110-11.

If plaintiff had been a passenger in his vehicle, which at the time was being driven by someone other than plaintiff, then the *Tissell* case might be instructive. Here, however, plaintiff was the driver of the vehicle, and a family member exclusion does not even come into play. In *Tissell*, the driver of the automobile was an at-fault motorist who had insufficient liability limits to compensate the passenger claimant. Here, there is no at-fault motorist, whether insured or underinsured.

Plaintiff would like to rewrite the UIM governing statute to cover damages caused by *any* underinsured person or entity – as opposed to only an underinsured motorist. Such is not allowed by the statutory language, the legislative purpose, or the applicable insurance policy. This case simply does not present a scenario covered by UIM insurance.

F. Northgate Was Not “Operating” the Vehicle.

Rodriguez argues that Northgate was the “operator” of his car at the time of the accident, despite the fact that *he* was driving

the vehicle, and Northgate was nowhere in sight at the time of the accident. Rodriguez argues that somehow Northgate operated the vehicle from afar. There is absolutely no Washington legal authority to support this argument. *Indeed, legal research revealed no Washington decision in which UIM coverage was extended to an accident that was not caused by a person driving or otherwise in direct physical control of a motor vehicle at the time of the accident.*

RCW 46.04.070 defines “operator or driver” to mean “every person who drives or is in actual physical control of a vehicle.” Northgate was not in physical control of Rodriguez’s vehicle at the time of the accident; instead, Rodriguez was the only individual in physical control of his vehicle.

Plaintiff relies on *North Pacific Ins. Co. v. Christensen*, 143 Wn.2d 43, 17 P.3d 596 (2001), for the proposition that Northgate was the operator of plaintiff’s vehicle at the time of the accident. *Christensen*, however, addressed whether an individual in the

front passenger seat who grabbed the steering wheel while the vehicle was being driven, was an “operator” of the vehicle at the time of the accident. *Id.* at 45. The *Christensen* court determined that the operator of the vehicle is the person who is in actual physical control of the vehicle, having the power to guide the vehicle. *Id.* at 49. There can be little doubt that one who grabs a steering wheel and turns the wheels in one direction or another is, at least in part, in physical control of the vehicle at the time such action occurs.

Here, however, Northgate was not operating the vehicle in any manner whatsoever at the time of the accident. Northgate did not grab the steering wheel, push the accelerator, or take any other action with regard to the operation of the vehicle. Accordingly, *Christensen* really has nothing to offer to this analysis. Even construing the term “operator” liberally would not allow the conclusion that Northgate was operating Rodriguez’s vehicle at the time of the accident.

IV. CONCLUSION

For the reasons set forth above, the trial court's ruling was correct and should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of September, 2010.

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