

No. 66877-3-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

ALEXANDER M. DEHAAN AND CHRISTINE J. CARLSON,

Appellants,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Respondent.

BRIEF OF APPELLANTS

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and Christine J. Carlson:

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COURT OF APPEALS
 DIVISION I
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I. INTRODUCTION

Appellants, Alexander M. Dehaan and Christine J. Carlson, purchased an automobile policy from Respondents, Farmers Insurance Company of Washington, effective June 16, 2006. The policy included various endorsements, including an underinsured motorist coverage endorsement (CP 75-102).

II. ASSIGNMENT OF ERROR

a. Assignment of Error

The trial court erred when it granted summary judgment in favor of defendant and dismissed plaintiffs' claims for damages pursuant to the underinsured motorist provisions of the insurance policy. Specifically, the trial court improperly applied the funds received from a third party's insurance company to only property damages, ignoring additional damages of plaintiffs.

b. Issues Pertaining to Assignment of Error

1. Whether the trial court erred in concluding that funds received from a third party insurance company shall only apply to the property damages of plaintiffs?

III. STATEMENT OF THE CASE AND PROCEDURE

RELEVANT TO REVIEW

a. Factual Background

In June, 2006, Appellants negotiated with Respondents for Respondents to provide an automobile insurance policy. As part of

the negotiations, Appellants paid Respondents to include an endorsement to add "property damage" to underinsured motorist coverage, which included "physical injury or destruction of: 1) your insured car" (CP 104).

On August 21, 2006, Appellant, Alexander Dehaan, was involved in an automobile accident involving a third party. The third party was liable for the accident and had an automobile liability insurance policy for \$50,000.00. The third parties insurance eventually offered and paid the policy limits to Appellants in September, 2008 (CP 121-122). The payment was for release of all property damage including "loss of use, storage, and towing, and any and all other related property damages" (CP 121).

When the work was finally completed in April, 2009, the total repair costs for the vehicle was \$45,981.31 (CP 146). Obtaining accurate estimates, ordering the proper parts from out of the country, negotiating with the third party insurance company, negotiating with the repair shop to waive storage fees, and time to actually complete the work all contributed towards the extensive time period to complete the work (CP 72-74).

During the time period it took to complete the repair work, Appellants suffered additional damages as a result of the accident, which included loss of use (\$1,741.00 per month, based upon

monthly lease payments) (CP 53), insurance paid on the vehicle (\$4,358.60) (CP 74), taxes paid on the vehicle (\$947.33) (CP 74), and miscellaneous car expenses (\$388.03) (CP 74).

b. Procedural History

Appellants filed this lawsuit for breach of contract against respondent on August 20, 2009 (CP 144-148). Respondent moved for summary judgment asserting that Appellants' claims for damages to the subject vehicle are not covered under the "Endorsement Adding Property Damage To Underinsured Motorist Coverage" of the policy (CP 1-58). Respondent also claimed that funds received cover the cost to repair, so no further "property damages" exist (CP 14). Appellants responded to the motion which raised an issue of allocation of funds (CP 62-71).

On February 24, 2011, the trial court granted Respondent's motion for summary judgment (CP 136-138). The trial court's ruling essentially held that the damages for loss of use, insurance, taxes, and miscellaneous expenses were not "property damage," as defined within the endorsement of the policy. Therefore, these damages were not covered by the endorsement of the underinsured motorists provision of the policy. Appellants do not raise issue with this ruling as the policy speaks for itself in defining "property damage."

The trial court further ruled that since the \$50,000.00

received from the third party covered the total “property damages,” no further “property damages” existed for Respondent to pay towards (CP 137). Appellants had argued in its response to the motion for summary judgment that a proper allocation of funds was necessary because the proceeds from a third party was for all damages of Appellants and not just “property damages” (CP 68-70).

IV. LEGAL AUTHORITY AND ARGUMENT

a. Policy in Washington

The issue in this matter appears to be a new issue in the State of Washington. The issue is how are proceeds allocated when an injured party has paid out of pocket expenses, only a portion from a third party is received to reimburse those expenses, and an underinsured motorist policy exists to potentially pay towards a portion of the damages?

In this matter, the issue specifically is how \$50,000.00 received from a third party should be allocated? With the ruling of the trial court, the \$50,000.00 is paid for the benefit of Respondent by applying the funds to “property damages” first and ignoring all remaining damages of Appellants.

Washington courts have continuously held that “the general rule is that, while an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss from a tortfeasor responsible

for the damage, it can recover only the excess which the insured has received from the wrongdoer, remaining **after the insured is fully compensated for his loss.**” (emphasis added) *Thiringer v. American Motors Ins. Co.*, 91 Wash.2d 215, 219, 588 P.2d 191 (1978). The key part of this ruling is that the insured is to be compensated for their loss first.

“Washington State has long favored full compensation for those injured in automobile accidents. ‘This rule embodies a policy deemed socially desirable in this state, in that it fosters the adequate indemnification of innocent automobile accident victims.’” *Sherry v. Financial Indem. Co.* 160 Wash.2d 611, 620, 160 P.3d 31 (2007) (citing *Thiringer*, 91 Wash.2d at 220, 588 P.2d 191 *Cammel v. State Farm Mut. Auto. Ins. Co.*, 86 Wash.2d 264, 543 P.2d 634 (1975)). The problem with the case law in Washington is that it appears to only address matters where an insurance provider has paid towards an injured party and now seeks reimbursement.

In this matter, the trial court’s ruling is that the proceeds from a third party more than cover the “property damage,” so Respondent is not liable to pay per the policy. This does not weigh all damages as a whole but rather gives priority to one damage over another. The preferential treatment goes against the policy of indemnifying an innocent automobile accident victim.

Appellants are innocent automobile accident victims. They

suffered extensive damages as a result of the accident. The proceeds from the third parties insurance company were not sufficient to cover all of the damages, making the third party underinsured. Appellants paid to add an endorsement to help make them whole again should such an event occur. With the trial court's ruling, preference is given to one kind of damages over another. This violates established policy in Washington and defeats the purpose of adding underinsured motorist endorsements.

b. How Funds are Allocated

With the policy being that the injured is compensated first, the next question is how are proceeds allocated? The facts to consider in this matter are that Appellants paid all out of pocket expenses and only a portion of those expenses are reimbursed through a third party insurance provider. Also, they paid for an endorsement to add underinsured "property damages" should such an event occur. Sound public policy would be that if insurance is available to reimburse an injured party for specific damages, than those proceeds from that policy should be used for their intended purpose.

In this case, Appellants added a "property damage" endorsement to the policy. This was added for the very situation that Appellants are now in; that should they be in an accident, they would have insurance to cover the underinsured portion, making them whole, or as close to whole, as they can be.

A property damage endorsement is available to cover damages

from an underinsured accident. Failing to allow Appellants to collect against the endorsement would defeat the purpose for why the endorsement was added. Therefore, it should be ruled that those funds be applied towards the damages it was intended to cover.

If the court is reluctant to consider such a rule, then another option would be for reimbursement based upon a time frame. The first damages paid by the injured would be the first damages reimbursed.

When the settlement proceeds were received in September, 2008, Appellants reimbursed their out-of-pocket expenses of \$5,693.96 for taxes, insurance and miscellaneous contractual liabilities that had been paid to date. They next applied the remaining \$44,306.04 towards the monthly lease payments that had been paid through December, 2009, as loss of use. The remaining loss of use damages are not reimbursed as the third party insurance proceeds had been used and the underinsured motorist provision with Respondent does not cover loss of use.

The remaining damages at this point are “property damages.” Respondent, in its brief, stated that these damages would “fall within the meaning of the words ‘property damage’” (CP 14). To not allow Appellants to collect for these damages would defeat the purpose for why they paid to add an underinsured motorist property damage endorsement.

V. CONCLUSION

The issue of how funds are allocated is not one that appears to have been previously before the courts in Washington.

However, the general rule still applies that the injured party is made whole first.

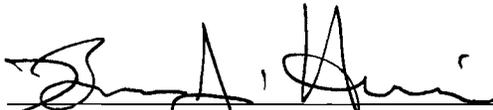
Although not specifically stated, the trial court's ruling went against this general rule, creating new policy that proceeds are applied first towards damages that an insurance company with an underinsured policy could be liable, in this case property damages, then to the injured parties additional damages.

If the trial court's ruling is upheld, Appellants will suffer damages in excess of \$55,000.00 while Respondents would benefit by not having to pay pursuant to the endorsement it entered, and received payment. Policy needs to be established that give a just and equitable distribution taking into account the full damages suffered and not simply the "property damages" only.

In light of the foregoing, Appellants request that this court reverse the dismissal and reinstate this case against Respondents subject to its ruling herein.

DATED this 16th day of November, 2011

HANIS IRVINE PROTHERO, PLLC



Brian J. Hanis, WSBA #35367
Attorney for Appellants Dehaan and Carlson

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2011, copies of the following document:

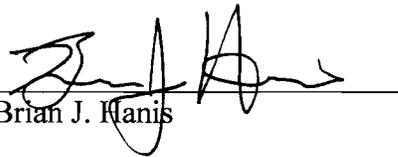
1. Appellants' Brief

was served on counsel at the following address via first class mail and facsimile:

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

DATED this 16th day of November, 2011, at Kent, Washington.


Brian J. Hanis