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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

ALEXANDER M. DEHAAN and CHRISTINE J. CARLSON,
Plaintiffs/Appellants,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,
Defendant/Respondent.

BRIEF OF RESPONDENT

COLE, WATHEN, LEID & HALL, P.C.
Mark S. Cole, WSBA #6583
Kimberly L. Rider, WSBA #42736
Attorneys for Defendant/Respondent

1000 Second Avenue, Suite 1300
Seattle, WA 98104-1972
Telephone: (206) 622-0494
mcole@cwlhlaw.com

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INTRODUCTION

This case arises out of an automobile accident in which appellant Dehaan was driving a Mercedes vehicle. He was struck by a third party, who caused damage to the Mercedes vehicle. The third party, who was at-fault for the accident, had adequate liability insurance to pay for the repairs to appellant's vehicle. Nevertheless, appellant Dehaan made a claim for his damaged vehicle with his own insurer, respondent Farmers, pursuant to the underinsured motorist property damage coverage of the policy. Farmers denied the claim.

The appellants (the insureds, Dehaan and Carlson) filed suit. Respondent Farmers moved for partial summary judgment. That motion was based on the undisputed facts that the at-fault party had liability property damage insurance coverage of \$50,000.00, and that the cost to repair the insured's Mercedes vehicle was \$45,981.31. The trial court granted Farmers' motion for partial summary judgment. The insureds filed their appeal to this Court.

ASSIGNMENTS OF ERROR

Respondent Farmers assigns no error to the decision of the

trial court. The issues to be determined by this Court are as follows:

- A. Where the cost to repair the insured's' vehicle was \$45,981.31, and where the at-fault party had more than enough insurance to pay for the cost to repair said vehicle, are the insureds entitled to recover under the underinsured motorist property damage coverage of their insurance policy with Farmers?
- B. Where the insurance policy of Farmers is unambiguous and consistent with RCW 48.22.030(3), can the insureds recover for loss of use and other nonphysical losses which are outside the requirements of the statute and are outside of the underinsured motorist property damage coverage?

STATEMENT OF THE CASE

A. Lease of Subject Vehicle

On or about March 31, 2006, Appellant Dehaan entered into a contract to lease a 2007 Mercedes S550 vehicle (subject vehicle). The monthly lease payments were \$1,744.81. The lease ended on June 30, 2009. CP 53, Plaintiff's Lease.

B. Farmers Policy

At the time of the subject accident, there was in force a policy of insurance issued by Respondent Farmers. The policy named Christine J. Carlson and Alex M. Dehaan as the named insureds. The vehicle identified in the policy was a 2007 Mercedes Benz S550, the subject vehicle. CP 23, Farmers Policy.

C. Farmers Policy Endorsement

The Farmers' policy contained an endorsement entitled "ENDORSEMENT ADDING PROPERTY DAMAGE TO UNDERINSURED MOTORIST COVERAGE", hereinafter referred to as UIMPD Endorsement. CP 48. Pursuant to the policy, the amount of property damage applicable to the UIMPD Endorsement was \$100,000. CP 23, CP 48. (This figure was incorrectly stated as \$50,000 in the summary judgment motion.)

D. Accident

On or about August 21, 2006, Mr. Dehaan was driving the subject vehicle. He was hit by a third party, Jessica D. Toney, who was at fault for the accident. Ms. Toney was insured by State Farm. The accident caused damage to the subject vehicle. CP 18, Plaintiff's Complaint, page 2, paragraph 2.3.

The cost to repair the damage to the subject vehicle was \$45,981.31. CP 50, Plaintiff's Complaint, page 3, paragraph 2.8.

E. Toney Policy with State Farm

The State Farm policy provided liability insurance coverage for Ms. Toney. The property damage liability policy limits were \$50,000. CP 73, Dehaan Declaration page 2, lines 3 through 6. CP 106, Certificate of Coverage from State Farm.

F. State Farm Offer to Settle

State Farm offered to settle Mr. Dehaan's property damage claim by payment to Mr. Dehaan in the amount of \$50,000.00. This offer was made on October 25, 2006. CP 108, letter from State Farm to Mr. Dehaan dated May 4, 2007.

G. Settlement with State Farm

In September of 2008, Mr. Dehaan accepted the policy limits offer from State Farm. CP 18, Plaintiff's Complaint, page 2, paragraph 2.6.

H. Repair of Vehicle

Repair work on the subject vehicle commenced in January of 2009, more than two years after the accident. CP 19, Plaintiff's Complaint, page 3, paragraph 2.8. The repair work was performed

by Metro Auto Rebuild. The work was completed in April of 2009. Metro Auto Rebuild charged \$45,981.31 for the repairs. CP 19, Plaintiff's Complaint, page 3, paragraph 2.8.

I. Repair Shop

The shop that performed the repairs, Metro Auto Rebuild, was selected by Mr. Dehaan, not by Farmers. The shop was a certified Mercedes repair shop. CP 73, Declaration of Dehaan, page 2, lines 14-15.

J. Claim with Farmers

After the accident, the insureds (Dehaan and Carlson) made a claim to Farmers for payment pursuant to the underinsured motorist coverage. CP 20, Plaintiff's Complaint, page 4, paragraph 3.1.5.

K. Damages Claimed By Insureds.

The insureds submitted to Farmers a claim for the following damages:

Damages to subject vehicle -

Costs to repair:	\$45,981.31
Loss of use:	\$56,914.00;
Insurance paid on vehicle:	\$4,358.60;

Taxes paid on vehicle:	\$947.33;
Misc. Car expenses:	\$388.03;
Attorneys fees and costs:	\$

CP 51-52, Plaintiff's Response to Defendant's Request for Statement of Damages.

In their response to the motion for summary judgment, the insureds claim that the loss of use figure is \$57,453.00. CP 64, Response to motion for summary judgment, page 3, line 25.

L. Loss of Use Claim

Plaintiff's loss of use figure was determined by simply taking the monthly lease payment for the subject vehicle (\$1744.81 per month) and multiplying by 28 months. CP 74, Declaration of Dehaan, lines 14-18. The monthly lease payment was an obligation that was in force prior to the accident. Plaintiff did not actually rent a vehicle and pay \$56,914.00 in rental expense. CP 74, Declaration of Dehaan, page 3, lines 3-4, lines 14-18.

M. Farmers Policy Provisions

The Farmers insurance policy provides for four types of coverage: Liability, Underinsured Motorist, No-Fault (Personal Injury Protection), and Damage To Your Car (providing

comprehensive and collision damage for the subject vehicle). CP 25.

The insureds' claim is for underinsured motorist coverage. CP 20, Plaintiff's Complaint, page 4, paragraph 3.1.5.

The underinsured motorist coverage of the policy states 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 **insured person**. The **bodily injury** must be caused by accident and arise out of the ownership, maintenance or use of the **underinsured motor vehicle**.

CP 30

The main policy form contains the following definitions:

DEFINITIONS

Throughout this policy, "you" and "your" mean the "named insured" shown in the Declarations and spouse if a resident of the same household. "We," "us" and "our" mean the Company named in the Declarations which provides this insurance. In addition, certain words appear in bold type. They are defined as follows:

Accident or **occurrence** means a sudden event,

including continuous or repeated exposure to the same conditions, resulting in **bodily injury** or **property damage** neither expected nor intended by the **insured person**.

Bodily injury means bodily injury to or sickness, disease or death of any person.

Damages are the cost of compensating those who suffer **bodily injury** or **property damage** from an **accident**.

....

Property damage means physical injury to or destruction of tangible property, including loss of its use.

CP 27.

The main policy form contains a definition for “underinsured motor vehicle” which states as follows:

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.

CP 31.

The main policy form provides UIM coverage for bodily injuries sustained by the insured person. There is no coverage for property damage. CP 30.

However, the policy contains an endorsement (UIMPD Endorsement) amending the underinsured motorist coverage to add limited property damage coverage. CP 48. That endorsement contains the following language:

For an additional premium, **Underinsured Motorist Coverage** is amended to include the following:

We will pay **damages** for **property damage** which an **insured person** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle**. The **property damage** must be caused by **accident** and arise out of the ownership, maintenance, or use of the **underinsured motor vehicle**.

As used in this endorsement, **property damage** means physical injury or destruction of: 1) **your insured car** or 2) property contained in **your insured car** which is owned by an **insured person**.

CP 48.

This UIMPD Endorsement makes two significant changes to the UIM coverage. First, property damage is added to the UIM coverage.

Second, the definition of “property damage” is changed to

mean “physical injury or destruction of: 1) **your insured car**” (Emphasis original.) The definition of “property damage” in the UIMPD endorsement does not include the phrase “loss of use.” CP 48.

ARGUMENT

A. Policy Interpretation

Insurance policies are to be construed as contracts. *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 378, 917 P.2d 116 (1996). The interpretation of an insurance policy is a question of law, in which the policy is construed as a whole and each clause is given force and effect. *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 424, 38 P.2d 322 (2002). The Court should view an insurance contract in its entirety and should not interpret a phrase in isolation. *Allstate Insurance Company v. Peasley*, 131 Wn.2d 420, 423-24, 932 P.2d 1244 (1997). The Court should attempt to give effect to each provision in the policy. *Id.*

The terms of a policy should be given a fair, reasonable, and sensible construction, as would be given to the contract by the average person purchasing insurance. *Overton, supra*. Courts

interpreting insurance policies should be bound by the definitions provided therein. *Overton, supra*, at page 427 of 145 Wn.2d.

Undefined terms in an insurance contract are given plain, ordinary, and popular meaning as set forth in standard English language dictionaries. *Overton, supra*, at page 428 of 145 Wn.2d.

When policy language is clear and unambiguous, a Court should enforce the policy language as written. *Jacoby v. Grays Harbor Chair & Mfg. Company*, 77 Wn.2d 911, 917, 468 P.2d 666, 670 (1970); *National Merit Insurance Co. v. Yost*, 101 Wn. App. 236, 239, 3 P.3d 203 (2000).

An ambiguity exists only if the language in the policy, on its face, is fairly susceptible to two different, but reasonable, interpretations. *Daley v. Allstate Insurance Company*, 135 Wn.2d 777, 784, 958 P.2d 990 (1998). Simply because the policy is confusing or difficult to read does not render the policy ambiguous. *McDonald v. State Farm*, 119 Wn.2d 724, 737, 837 P.2d 1000 (1992).

B. UIM Coverage For Property Damage is Limited

The UIM coverage contained in the main policy form limits recovery to damages because of bodily injury. CP 30.

The UIMPD endorsement to the policy amends UIM coverage to include limited property damage to the insured vehicle. That endorsement sets forth a definition of “property damage” to be used for the purposes of the endorsement. CP 48.

In the main policy form, the words “property damage” are defined to mean “physical injury to or destruction of tangible property, including loss of its use.” CP 27. In contrast, the UIMPD endorsement states that, for use in the endorsement, “property damage” means “physical injury or destruction of: 1) **your insured car. . .**” (Emphasis original.) The phrase “loss of its use” is not included in the definition used in the UIMPD Endorsement. CP 48.

In addition to repair costs, the insureds made claim for loss of use of the subject vehicle and for other nonphysical loss or damage. These nonphysical elements of damage are not covered under the UIM coverage in the main policy form, for the reason that the UIM coverage there is limited to damages for bodily injury.

These nonphysical elements of damage are not covered under the UIMPD endorsement. That endorsement is limited to physical injury or destruction of the insured car.

C. The Policy Is Consistent with the UIM Statute

1. Washington's UIM Statute Permits Insurers to Limit Coverage for Property Damage to "Physical Injury" to the Insured Car

"[T]he source of the obligation to offer UIM coverage is statutory." *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 245, 961 P.2d 350, 353 (1998). Washington's UIM statute, RCW 48.22.030, was designed for the protection of people injured in accidents with financially irresponsible, underinsured drivers. *Britton v. Safeco Ins. Co. Of Am.*, 104 Wn.2d 518, 522, 707 P.2d 125, 129 (1985). After the passage of the statute, insurers were not permitted to issue or renew auto insurance policies unless they offered UIM coverage. RCW 48.22.030(2). If they did not wish to buy UIM coverage, insureds could "reject, in writing, underinsured coverage for bodily injury or death, or property damage." RCW 48.22.030(4).

RCW 48.22.030(3) limits the scope of UIM coverage for property damage which insurers are required to offer:

Coverage for property damage need only be issued in conjunction with coverage for bodily injury or death. **Property damage** coverage required under subsection (2) of this section **shall mean physical damage** to the insured motor vehicle unless the policy specifically provides coverage for the contents thereof or other forms of property damage.

(Emphasis added). By defining “property damage” to mean “physical damage,” the Legislature chose not to require insurers to offer coverage for anything other than physical damage to the insured car. The Legislature could have required insurers to cover nonphysical damage, but did not do so.

2. UIMPD Endorsement is Consistent With the UIM Statute by Limiting Property Damage to “Physical Injury” to the Insured Car

In the context of UIM insurance, “the court must consider the contractual relationship between the insurer and the insured when deciding UIM issues.” *Fisher*, 136 Wn.2d 240, 244, 961 P.2d 350 (1998). *See also Daley*, 135 Wn.2d 777, 789, 958 P.2d 999 (1998) “[U]ninsured and underinsured motorist coverages are most appropriately characterized as 2-party contractual relationships between the insurer and the insured.”) (citation omitted).

The UIMPD endorsement is consistent with RCW 48.22.030(3). The endorsement explicitly limits UIM coverage for property damage to physical injury or destruction of the insured car.

D. Property Damage is Limited to Physical Injury

When the term “property damage” is qualified by the

adjective “physical”, it is a narrow concept that excludes intangible components. *See Prudential Prop. & Cas. Ins. Co. v. Lawrence*, 45 Wn. App. 111, 115-16, 724 P.2d 418, 421 (1986), rejecting the insured’s claim that the obstruction of his view was covered as “property damage” under the homeowner’s policy. In *Lawrence*, the Prudential policy defined “property damage” as “physical injury to or destruction of tangible property. . .” *Id.* at 115, 724 P.2d at 421. The court joined the prevailing view that this definition does not allow the plaintiff to recover for losses that are nonphysical in nature:

. . . The present policy defines property damage as “**physical** injury to . . . tangible property” . . . The inclusion of this word negates any possibility that the policy was intended to include “consequential or intangible damage,” such as depreciation in value, within the term “property damage.” The intention to exclude such coverage can be the only reason for the addition of the word. As a result . . . plaintiff cannot recover.

Id. at 116, 724 P.2d at 421 (emphasis added); *see also id.* at 117, 724 P.2d at 421 (noting that “physical harm” is used throughout the Restatement “to denote the physical impairment of . . . land or chattels”).

See also Wash. Pub. Util. Dist. Utils. Sys. v. Pub. Utility Dist.

No. 1, 112 Wn.2d 1, 14 n.3, 771 P.2d 701, 709 n.3 (1989) (en banc) (the loss resulting from the securities investment “is not damage to tangible property” “. . . as the term is used in insurance policies”); *Scottsdale Ins. Co. v. Int’l Protective Agency, U.S.*, 105 Wn. App. 244, 249-50, 19 P.3d 1058, 1061 (2001) (loss of a liquor license is not property damage defined as “physical injury to tangible property”); *Gen. Ins. Co. of Am. v. Chopot*, 28 Wn. App. 383, 384-86, 623 P.2d 730, 731-32 (1981) (injury to a trademark was economic in nature and not included within the definition of “physical injury”); *Guelich v. Am. Protection Ins. Co.*, 54 Wn. App. 117, 121, 772 P.2d 536, 538 (1989) (loss of use of view is an intangible loss and thus was not included within the definition of “physical injury”).

E. No Coverage for Repair Cost

The insureds assert that the cost to repair the subject vehicle was \$45,981.31. CP 19, Plaintiff’s Complaint, page 3, paragraph 2.8 and paragraph 2.12.

In order to recover under the UIMPD endorsement, the insureds must show that these repairs were caused by an accident with an underinsured motor vehicle. CP 48.

In this case, at-fault party had automobile liability insurance with State Farm. The State Farm policy had liability property damage limits of \$50,000. This was more than the cost to repair the subject vehicle (\$45,981.31). There was adequate insurance on the at-fault vehicle. Ms. Toney's vehicle was not underinsured. Therefore, the insureds cannot recover for the cost to repair the subject vehicle pursuant to the UIMPD Endorsement.

F. No Coverage for Nonphysical Damage

The insureds' claim for loss of use of their vehicle and for other items of nonphysical damage ignores the unambiguous definition of "property damage" contained in the UIMPD endorsement. Pursuant to the clear language of the endorsement, which limits property damage to physical injury of the insured car, there is no coverage for the insureds' claim for nonphysical damage.

To hold otherwise would create additional coverage that the insureds never paid for. *See Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 155-56, 43 P.3d 1223, 1227-28 (2002) (en banc) ("The central objective behind the system of contract remedies is compensatory' [A] contract confers no greater rights on a

party than it bargains for.”) (quoting Restatement (Second) of Contracts § 356 cmt a (1981)). The insureds are entitled only to the coverage which they paid for. *See Panorama Vill. Condo. Owners Ass’n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 137, 26 P.3d 910, 914 (2001) (en banc), quoting *Chaffee v. Chaffee*, 19 Wn.2d 607, 625, 145 P.2d 244, 252 (1943) (It “is elemental law, universally accepted, that the courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves.” (citation omitted)).

G. Tort Principles are Not Applicable

The insureds argue that the recovery under the UIMPD endorsement should be co-extensive with the damages that they could recover in tort against the at-fault party. This argument was rejected in *Daley v. Allstate Ins. Co.*, 135 Wn.2d 777, 958 P.2d 990 (1998).

The plaintiff in *Daley* sought to recover for emotional distress unrelated to his physical injuries under his UIM policy, even though the policy covered only “damages for bodily injury or property damage. . . .” *Daley*, 135 Wn.2d at 781, 958 P.2d at 992.

Notwithstanding the clear language of his UIM policy, Daley argued that he should be able to recover under his UIM policy “to the extent that he had an action in tort against the underinsured driver.” 135 Wn.2d at 784, 958 P.2d at 993.

The Court rejected Daley’s argument because he sought tort-oriented remedies rather than the contractual remedies available under the UIM policy. The *Daley* Court explained that the purpose of the UIM statute is *not* “to place the UIM carrier in the shoes of the tort-feasor.” *Daley*, 135 Wn.2d at 789, 958 P.2d at 996. Rather, the insurer’s duty under the UIM insurance policy is strictly contractual:

The plaintiff essentially argues that the purpose and public policy of the UIM statute is to place the UIM carrier in the shoes of the tort-feasor.

Allstate, however, is not required to pay all damages incurred by the plaintiff as the result of an act of a tort-feasor, as the literal language of the UIM statute and the policy limit Allstate’s obligation to pay for only those damages for “bodily injury” or “property damage.” This court has recognized the public policy behind the statute, but it has emphasized the rights of the parties to enter into binding contracts. Thus, this court has stated that “[n]otwithstanding its tort-oriented appearance, uninsured and underinsured motorist coverages are most appropriately characterized as 2-party contractual relationships between the insurer

and the insured.”

Id. (emphasis added) (citation omitted).

Therefore, Daley could recover for his emotional injuries “only if they constitute[d] ‘bodily injury’ pursuant to the terms of the policy.” *Id.* at 784, 958 P.2d at 993. Neither the UIM statute (which allowed UIM coverage to be limited to damages for “bodily injury”) nor the policy language (which courts uniformly interpreted to exclude damages for purely emotional distress) supported Daley’s position. Daley’s argument would “create coverage where none existed.” *Id.* at 793.

The methodology outlined in *Daley* is controlling. The Washington Legislature specifically allowed UIM coverage to be limited to “***physical*** damage to the insured motor vehicle.” RCW 48.22.030(3). (Emphasis added.)

Farmers’ UIMPD endorsement is consistent with the UIM statute by defining the term “property damage” as “***physical injury*** or destruction of . . .” the insured car. (Emphasis added.) Courts in Washington and elsewhere have construed this term, as a matter of law, to exclude claims for intangible harms. See *Lawrence*, 45 Wn. App. At 116, 724 P.2d at 421 (“The inclusion of

[the] word [physical] negates any possibility that the policy was intended to include . . . 'intangible damage[s]' such as depreciation in value . . ."). Therefore, the insureds' claim for loss of use seeks a tort-oriented remedy from respondent Farmers that the insureds do not have under the plain and unambiguous terms of the policy. The insureds' claim for loss of use and other nonphysical loss or damage fail, as a matter of law.

H. The Insureds' Authorities are in Inapposite

The insureds rely upon *Sherry vs. Financial Indemnity Co.*, 160 Wn.2d 611, 160 P.3d 31 (2007). In that case, Sherry's injuries came within the coverage of the UIM policy. There was no attempt by Sherry to recover for injuries or property damage which fell outside of the UIM coverage. Rather, the issue in *Sherry* was whether offsets should be applied to the UIM arbitration award obtained by Sherry.

The *Sherry* court acknowledged that its jurisprudence in the area of offsets and reimbursement of the insurer was based largely on public policy and principles of equity.

In the case of bar, there has been no showing that the Farmers insurance policy violated public policy. The insureds

have cited no cases stating that construction of an insurance policy is guided by principles of equity.

The insureds cite *Cammel v. State Farm Mutual Ins. Co.*, 86 Wn.2d 264, 543 P.2d 634 (1975). In that case, the insureds' injuries came within the coverage of the UIM policy. There was no attempt by the *Cammel* insureds to recover for injuries or property damage which fell outside of the UIM coverage. Rather, the issue in *Cammel* was the validity of a clause in the policy which sought to avoid "stacking" of multiple UIM policies.

The court in *Cammel* permitted stacking based, in part, on the public policy of "full compensation".

Cammel was subsequently overruled by statute. In 1980, the legislature amended the UIM statute. The amended statute permitted "antistacking" provisions in a UIM policy. *Miller's Cas. Ins. Co. v. Briggs*, 100 Wn.1, 4, 665 P.2d 891 (1993).

Further, the Washington Supreme Court overruled *Cammel*'s "full compensation" public policy language. In *Greengo v. PEMCO*, 135 Wn.2d 799, 959 P.2d 657 (1998), the Supreme Court stated as follows:

We begin by addressing the nature of UIM and

its underlying public policy. Originally we declared the public policy underlying the predecessor uninsured motorist statute to be full compensation. See, e.g., *Cammel v. State Farm Mut. Auto. Ins. Co.*, 86 Wn.2d 264, 543 P.2d 634 (1975), overruled by statute as stated in *Millers Cas. Ins. Co. V. Briggs*, 100 Wn.2d 1, 4, 665 P.2d 891 (1983). However, in 1980 the Legislature overruled *Cammel* by statutory amendment adding underinsured motorist coverage. LAWS OF 1998, ch. 117, § 1. In so doing the policy shifted from full compensation to provision of a second layer of floating protection. Indeed, the newly added RCW 48.22.030(5) and (6), which allow antistacking to take effect before full compensation is effectuated, would clearly be at odds with an alleged policy of providing full compensation. Since the 1980 amendments we have most consistently adhered to the statement that the policy underlying UIM is the creation of a second layer of floating protection, not full compensation. See, e.g., *Millers Cas. Ins. Co. V. Briggs*, 100 Wn.2d 1, 8, 665 (P.2d 891 (1983)); *Elovich v. Nationwide Ins. Co.*, 104 Wn.2d 543, 549, 707 P.2d 1319 (1985); *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 87, 794 P.2d 1259 (1990).

In the case of bar, the insureds' reliance on the public policy of "full compensation" is misplaced. Our state's highest court has clearly indicated that the public policy underlying UIM coverage is no longer "full compensation". As the Court indicated in *Greengo*, Washington courts have repeatedly upheld UIM exclusions that are not expressly authorized by the UIM statute. *Greengo*, at p. 808 of 135 Wn.2d, footnote 2. These exclusions have the effect of

affording less than “full compensation” to the insured.

The insureds cite *Thiringer v. American Motors Ins. Co.*, 91 Wn.2d 215, 588 P.2d 191 (1978). *Thiringer* was not a UIM case. Rather, the insured recovered from his insurer under the PIP coverage of the policy. Thereafter, the insured recovered a settlement from the tortfeasor. The issue was the priority between the insured’s right to recover for his injuries and the insurer’s subrogation rights. In that case, the Court looked to the public policy of “full compensation” and looked to principles of equity applying to subrogation.

Thiringer has no application to the case of bar. The public policy embraced in *Thiringer* is not the public policy which applies to UIM cases. Further, the principles of equity do not apply in cases involving construction and interpretation of insurance policy language.

Of the cases cited by plaintiff, two were decided prior to *Daley v. Allstate Ins. Co.*, 135 Wn.2d 777, 958 P.2d 990 (1998). The third case, *Sherry*, was decided nine years after *Daley*. *Sherry* does not discuss *Daley*, nor does *Sherry* contain language or holdings which contradict *Daley*. Indeed, in *Sherry*, the Court

acknowledged that:

. . . It is important to remember that UIM is unique among insurance. Its purpose and focus are very narrow. Rather than full compensation, UIM coverage simply provides additional insurance to cover any judgment that might be entered in favor of the insured against an underinsured motorist (citations omitted) . . . UIM insurance simply insures a driver against someone else not having enough insurance to pay a judgment, rather than insuring for full compensation in the case of an accident.

See *Sherry*, at page 622 of 160 Wn.2d.

CONCLUSION

The insureds made claim to Farmers, under the UIMPD endorsement, for the cost to repair their vehicle, in the amount of \$45,981.31. However, the at-fault party had a liability insurance policy. That policy provided liability property damage limits in the amount of \$50,000. Plaintiff recovered the \$50,000 from the liability carrier. Thus, the amount of liability insurance, and, in particular, the amount actually recovered from the liability carrier, was in excess of the amount of the physical injury to the subject vehicle. Thus, there was no underinsured vehicle. The insureds' claim for repairs to the subject vehicle under the UIM coverage of

the Farmers policy, and in particular the UIMPD endorsement, must therefore fail.

The insureds also made claim for loss of use and other nonphysical loss and damage. However, the UIMPD endorsement limits recovery to physical injury or destruction of the insured car. The UIMPD endorsement, and the case law, clearly indicate that nonphysical damage to the vehicle, such as loss of use, does not come within the definition of property damage contained in the endorsement. Therefore, the insureds' claims for loss of use, insurance, taxes, and other nonphysical items of damage, are not covered by the UIMPD endorsement.

Respondent Farmers respectfully requests that this Court affirm the ruling of the trial court, dismissing the insureds' claims under the policy issued by Farmers.

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Farmers also requests that this Court determine that all of appellants' claims be dismissed with prejudice.

DATED this 17th day of January, 2012.

COLE, WATHEN, LEID & HALL, P.C.

Mark S. Cole

Mark S. Cole, WSBA #6583

Kimberly L. Rider, WSBA #42736

Attorneys for Respondent Farmers

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NO. 66877-3-I

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

ALEXANDER M. DEHAAN and CHRISTINE J. CARLSON,

Plaintiffs/Appellants,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Defendant/Respondent.

DECLARATION OF SERVICE FOR BRIEF OF RESPONDENT

COLE, WATHEN, LEID & HALL, P.C.
Mark S. Cole, WSBA #6583
Kimberly L. Rider, WSBA #42736
Attorneys for Defendant/Respondent

1000 Second Avenue, Suite 1300
Seattle, WA 98104
Telephone: (206) 622-0494

I, Marla Thomas, the undersigned, certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct.

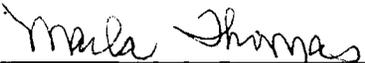
1. I am over the age of eighteen (18) years and not a party to the aforementioned action.

2. I certify that on January 17, 2012, I gave to ABC Legal Messengers for filing the original and one copy of the Brief of Respondent; and a copy of the same document for service by ABC Legal Messengers to:

Brian Hanis
6703 S. 234th Street, Ste. 300
Kent, WA 98032

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

DATED this 17th day of January, 2012, at Seattle, WA.



Marla Thomas