

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| ALEXANDER M. DEHAAN and |) | NO. 66877-3-I |
| CHRISTINE J. CARLSON, |) | |
| |) | DIVISION ONE |
| Appellants, |) | |
| |) | |
| v. |) | |
| |) | UNPUBLISHED OPINION |
| FARMERS INSURANCE COMPANY |) | |
| OF WASHINGTON, |) | |
| |) | |
| Respondent. |) | FILED: January 22, 2013 |
| |) | |

Leach, C.J. — Alexander Dehaan and Christine Carlson appeal the summary dismissal of their breach of contract action against their insurer, Farmers Insurance Company of Washington. They argue that the trial court erred by finding that a third party tortfeasor had adequate property damage liability insurance, which precluded their claim under Farmers’ underinsured motorist property damage endorsement. Because Dehaan raised a genuine issue of material fact about the adequacy of the tortfeasor’s property damage liability limit, we reverse and remand.

FACTS

Alexander Dehaan and Christine Carlson insured a 2007 Mercedes S550 with Farmers. They also purchased an optional endorsement to protect against property damage caused by an underinsured motorist (the UIMPD

Endorsement). On August 21, 2006, another driver caused a collision in which the Mercedes suffered extensive front-end damage. The at-fault party had liability insurance through State Farm Insurance Co. In October 2006, State Farm offered to settle for its property damage policy limit of \$50,000. Almost two years later, in September 2008, Dehaan accepted the offer and released State Farm and its insured from any further liability for all claims “on account of and resulting from damage to property.”

In January 2009, Dehaan took the vehicle to Metro Auto Rebuild for repair. The repairs took about four months and cost \$45,981. Dehaan submitted a UIMPD claim to Farmers for the cost of repairs as well as other damages, including \$56,914 for loss of use, \$4,358 in insurance payments, \$947 in taxes, and \$388 in “miscellaneous expenses” related to his satellite radio subscription. After Farmers denied the claim, Dehaan sued for breach of contract and violation of the Consumer Protection Act (CPA), chapter 19.86 RCW. Farmers moved for partial summary judgment on two issues: (1) Farmers’ UIMPD Endorsement “does not cover loss of use, storage, or other non-physical damage to the subject vehicle” and (2) Dehaan was not entitled to recover repair costs under UIM coverage because the tortfeasor was not underinsured.¹ The court granted the motion, and Dehaan appeals the second

¹ Farmers did not move for summary judgment on the CPA claim, but Dehaan conceded that dismissal of the breach of contract action would moot that

issue only. He does not contest the trial court's determination that he cannot recover for loss of use, insurance, taxes, and miscellaneous expenses under the UIMPD Endorsement.

STANDARD OF REVIEW

We review a trial court's decision to grant summary judgment de novo.² Summary judgment is proper only when the evidence presented shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.³ We resolve all facts and reasonable inferences in favor of the nonmoving party and affirm summary judgment only if reasonable minds could reach but one conclusion from the evidence.⁴

ANALYSIS

Dehaan makes two challenges to the trial court's decision. First, he claims that the trial court should have allocated the settlement proceeds paid by State Farm among all of his claims, resulting in the tortfeasor being underinsured for his property damage claim. Second, for the first time in his reply brief, he claims that an issue of fact exists about the meaning of property damage. Because we agree that Dehaan has demonstrated a genuine issue of fact whether the tortfeasor was underinsured, we reverse and remand without claim.

² Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

³ CR 56(c); Wilson, 98 Wn.2d at 437.

⁴ Wilson, 98 Wn.2d at 437.

reaching the second issue.

The interpretation of an insurance policy presents a question of law, which a court answers by construing the policy as a whole and giving each clause force and effect.⁵ Courts interpret insurance contracts the way an average insurance purchaser would understand them.⁶ Defined terms should be interpreted in accordance with the policy definition, while undefined terms are interpreted according to their ordinary meanings.⁷ When policy language is clear and unambiguous, a court should enforce the policy language as written.⁸ If a policy provision is ambiguous, the interpretation most favorable to the insured applies.⁹ “An ambiguity exists only ‘if the language on its face is fairly susceptible to two different but reasonable interpretations.’”¹⁰

Washington requires that any automobile policy issued to satisfy financial responsibility requirements include “a limit of not less than ten thousand dollars because of injury to or destruction of property of others in any one accident.”¹¹

⁵ Overton v. Consol. Ins. Co., 145 Wn.2d 417, 424, 38 P.3d 322 (2002).

⁶ Daley v. Allstate Ins. Co., 135 Wn.2d 777, 784, 958 P.2d 990 (1998). (quoting Kish v. Ins. Co. of N. Am., 125 Wn.2d 164, 170, 883 P.2d 308 (1994)).

⁷ S&K Motors, Inc. v. Harco Nat’l Ins. Co., 151 Wn. App. 633, 639, 213 P.3d 630 (2009).

⁸ Jacoby v. Grays Harbor Chair & Mfg. Co., 77 Wn.2d 911, 917, 468 P.2d 666 (1970).

⁹ Daley, 135 Wn.2d at 784.

¹⁰ Daley, 135 Wn.2d at 784 (internal quotation marks omitted) (quoting Kish, 125 Wn.2d at 171).

¹¹ RCW 46.29.090(1); see also RCW 46.29.080.

This mandatory coverage applies generally to damages proximately caused by injury or destruction of property and is not limited to physical damage to a motor vehicle.

Washington also requires that insurance carriers in this state offer protection against underinsured motorists. RCW 48.22.030(2) provides, in relevant part,

No [policy] insuring against loss . . . suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle 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, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death, or property damage, resulting therefrom.

When adopted in 1980, this statute shifted public policy from one of full compensation for an injured party to that of providing a second layer of floating protection.¹²

RCW 48.22.030(3) defines the minimum scope of property damage coverage required to be included in a UIM endorsement:

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.

¹² Greengo v. Pub. Emps. Mut. Ins. Co., 135 Wn.2d 799, 808-09, 959 P.2d 657 (1998).

(Emphasis added.) Unlike the financial responsibility statute, the UIM statute requires only coverage for the physical damage to the insured vehicle and does not require coverage for a vehicle owner's other losses caused by property damage.

This difference between the risks insured under the tortfeasor's liability coverage and Farmers' underinsured motorist coverage provides the basis for the parties' coverage dispute. Consistent with RCW 48.22.030, Farmers' UIMPD Endorsement provides,

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.

(Emphasis added.) The record does not contain a copy of the tortfeasor's policy, but we assume that it satisfied the requirements of RCW 46.29.090(1). This means the property damage liability provisions of the tortfeasor's policy covered all losses proximately caused by the damage to Dehaan's vehicle, including loss of use, up to \$50,000. In contrast, as agreed by the parties, Farmers' UIMPD Endorsement covers only the cost of repairing the Dehaan vehicle.

An examination of the definition of an underinsured motor vehicle

illustrates the interpretation problem created by this difference in coverage scope. Consistent with RCW 48.22.030(1), Farmers' policy defines an underinsured motor vehicle as

[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.

Thus, UIM coverage applies when the sum of the limits of applicable property damage liability policies is less than the damages which the covered person is entitled to recover from the tortfeasor.¹³ In other words, to determine whether a vehicle is underinsured, one compares the limits of the applicable property damage liability insurance with the amount of damages proximately caused by property damage legally recoverable by the insured.¹⁴

As illustrated by Daley v. Allstate Insurance Co.,¹⁵ whether a vehicle is underinsured presents a question answered with a different analysis than the question whether a particular loss is covered by UIM insurance. In Daley, the court considered whether an Allstate UIM policy providing coverage for

¹³ Hamilton v. Farmers Ins. Co. of Wash., 107 Wn.2d 721,727, 733 P.2d 213 (1987).

¹⁴ Hamilton, 107 Wn.2d at 727-28.

¹⁵ 135 Wn.2d 777, 958 P.2d 990 (1998).

“damages for bodily injury” covered emotional or psychological damages unrelated to the insured’s physical injuries.¹⁶ Allstate conceded the tortfeasor’s vehicle was uninsured and that its insured could recover for his emotional or psychological damages related to his physical injuries. Focusing on the unambiguous language of Allstate’s UIM coverage, the court held that coverage for bodily injury did not include recovery for unrelated emotional or psychological damages.¹⁷ The court expressly rejected the argument that UIM coverage included all damages recoverable from the tortfeasor.¹⁸

Dehaan argues that the tortfeasor’s vehicle was underinsured because total damages that he was entitled to recover proximately caused by damage to his vehicle exceeded the tortfeasor’s property damage liability limit. Relying primarily upon Thiringer v. American Motors Insurance Co.,¹⁹ he further argues that the limits settlement should first be allocated to his property loss damages not covered by Farmers’ UIMPD Endorsement, leaving him not fully compensated for repair costs. Farmers asserts that the tortfeasor’s vehicle is not an underinsured vehicle because the tortfeasor’s property damage liability limit exceeded the cost of repairing Dehaan’s vehicle. Farmers distinguishes Thiringer on the basis that it embraces a public policy that no longer applies to

¹⁶ Daley, 135 Wn.2d at 780.

¹⁷ Daley, 135 Wn.2d at 793-94.

¹⁸ Daley, 135 Wn.2d at 789-91.

¹⁹ 91 Wn.2d 215, 222, 588 P.2d 191 (1978).

UIM cases and relies upon a rule of equity that does not apply to the interpretation of an insurance policy. We need not resolve the Thiringer issues to decide the single issue presented by this appeal.

We conclude that Dehaan has presented evidence sufficient to create a genuine issue of fact as to whether the tortfeasor's vehicle was underinsured. To do this, Dehaan had to show that the applicable property damage liability limits totaled less than the damages proximately caused by damage to his car legally recoverable by Dehaan from the tortfeasor. The parties agree that the applicable policy limit is \$50,000. Dehaan identified in his responsive declaration total damages of \$108,588 legally recoverable from the tortfeasor proximately caused by the damage to his vehicle.

We reject the argument implicit in Farmers' position; to determine if a vehicle is underinsured, one compares only the amount of damages legally recoverable under the restricted coverage scope of its UIMPD Endorsement with the limits of the underlying property damage liability coverage. Neither the Farmers' policy definition of an underinsured vehicle nor the case law applying the identical language of RCW 48.22.030 supports Farmers' position. Both expressly and unambiguously require a comparison between the damages legally recoverable from the tortfeasor and the applicable liability limits. The Washington Supreme Court described this to be the proper comparison in

Hamilton v. Farmers Insurance Co. of Washington.²⁰ Because the underlying coverage has a different, broader scope than the UIMPD Endorsement, Farmers' position produces the wrong answer in this case.

We caution that we are not holding Dehaan is entitled to a recovery under the UIMPD Endorsement, only that his right of recovery cannot be resolved on summary judgment on the record before the trial court. On remand, Dehaan must prove the amount of his property damages, the proper allocation of the State Farm settlement proceeds, and the extent, if any, to which he has not recovered the cost of repairing his vehicle.

CONCLUSION

Viewing the facts in the light most favorable to Dehaan, he raised a genuine issue of material fact whether the tortfeasor's vehicle was underinsured. We reverse and remand for further proceedings consistent with this opinion.

WE CONCUR:

Spears, J.

Leach, C. J.

Cox, J.

²⁰ 107 Wn.2d 721, 727, 733 P.2d 213 (1987).