

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAVIER RODRIGUEZ,	)	
	)	No. 65644-9
Appellant,	)	
	)	DIVISION ONE
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 and GREENLAKE	)	UNPUBLISHED OPINION
AUTO SERVICE,	)	
	)	FILED: June 6, 2011
Defendants,	)	
	)	
FARMERS INSURANCE COMPANY	)	
OF WASHINGTON, a domestic	)	
insurance company,	)	
	)	
Respondent.	)	
_____	)	

Becker, J. – Javier Rodriguez seeks to recover underinsured motorist (UIM) benefits under his insurance policy with Farmers Insurance Company. Rodriguez's policy provides for UIM coverage if he is entitled to recover damages from an "owner or operator of an underinsured motor vehicle" in compensation for bodily injuries sustained in an accident. Here, it is undisputed that the accident was caused by the alleged negligent repairs performed by

Northgate Automotive, a codefendant in this lawsuit. Because Northgate Automotive was neither an owner nor an operator of an underinsured motor vehicle, the trial court correctly concluded that Rodriguez's losses were not covered under the UIM provisions of his policy. We affirm the trial court's order granting summary judgment and dismissing Rodriguez's claims against Farmers.

### FACTS

According to his complaint, Rodriguez took his 1994 Ford Explorer to a repair shop, Northgate Automotive, Inc., for service on the Explorer's front brakes on August 8, 2005. The next day, the left front wheel detached from the car while he was driving. Rodriguez sustained physical injuries, and the car was damaged. His car was towed to another repair shop, where it was discovered that the brakes had not been properly reassembled.

Rodriguez's insurance policy with Farmers provided collision coverage for the damages to the Explorer. Because Northgate Automotive did not have liability insurance, Rodriguez also sought to recover UIM benefits under his policy with Farmers for his bodily injuries resulting from the accident. Farmers determined that Rodriguez's losses were not covered under the UIM provisions of his policy and denied coverage.

Rodriguez filed suit against Farmers.<sup>1</sup> He alleged that Farmers wrongly

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<sup>1</sup> Rodriguez also sued Northgate Automotive. The summary judgment order at issue dismissed only his claims against Farmers.

denied UIM coverage. He also asserted various claims against Farmers, including claims under the Consumer Protection Act, chapter 19.86 RCW, and the Insurance Fair Conduct Act, chapter 48.30 RCW, based on its handling of his claim. Farmers and Rodriguez filed cross motions for summary judgment. The trial court granted Farmer's motion and dismissed Rodriguez's claims against the insurer. Rodriguez appeals.

### ANALYSIS

On appeal, Rodriguez challenges the summary judgment ruling only with respect to the dismissal of his coverage claim.

We review an order on summary judgment de novo and engage in the same inquiry as the trial court. Butzberger v. Foster, 151 Wn.2d 396, 401, 89 P.3d 689 (2004). Summary judgment is appropriate only when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); Butzberger, 151 Wn.2d at 401. We consider all facts and reasonable inferences in the light most favorable to the nonmoving party. N. Pac. Ins. Co. v. Christensen, 143 Wn.2d 43, 47, 17 P.3d 596 (2001). Summary judgment is appropriate in this case because there are no disputed facts, and coverage depends solely on the insurance policy language. Allstate Ins. Co. v. Peasley, 131 Wn.2d 420, 423-24, 932 P.2d 1244 (1997).

Rodriguez's policy provides UIM coverage as follows:

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**.

Clerk's Papers at 36.

The policy further 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.

Clerk's Papers at 37. This policy language mirrors the underinsured motorist statute, RCW 48.22.303(1).

Rodriguez argues that the policy provides coverage for his losses because Northgate Automotive qualifies as an "operator" from whom he is legally entitled to recover damages. Relying on Christensen, he contends that the definition of "operator" is broader than driver and, in this case, extends to the "hand of Northgate Automotive." Appellant's Br. at 9. In Christensen, a passenger seized control of the steering wheel, causing the vehicle to cross the centerline and collide with an oncoming vehicle. The Supreme Court concluded that the passenger who grabbed the steering wheel "became the operator of the

vehicle in which he had been a passenger.” Christensen, 143 Wn.2d at 50.

Rodriguez asserts that Northgate Automotive likewise had “actual physical control” of the vehicle by setting into motion, through its negligent repair, the chain of events that led to the accident. Appellant’s Br. at 9. We are not persuaded by this analogy and cannot conclude that Northgate Automotive assumed physical control of Rodriguez’s vehicle to the degree necessary to be considered an operator for purposes of UIM coverage.

Rodriguez also claims that because “no liability insurance applied” at the time of the accident with respect to the damages flowing from the negligent maintenance of his vehicle, his vehicle was an “underinsured motor vehicle” under the policy. Appellant’s Br. at 6. But even if we were to agree that Rodriguez’s vehicle satisfied the policy’s definition of “underinsured,” as explained, he has not established the existence of an owner or operator of such an underinsured vehicle from whom he is legally entitled to recover damages. Moreover, it appears to be incorrect as a factual matter that no liability insurance applied at the time of the accident. Under the policy, liability insurance applied to any claims for damages against Rodriguez arising from the negligent maintenance of his vehicle.

Finally, Rodriguez argues that in light of public policy considerations, we should construe the policy to provide UIM coverage under these circumstances. He points out that the UIM statute should be liberally construed in favor of

coverage. See Diaz v. Nat'l Car Rental Sys., Inc., 143 Wn.2d 57, 61, 17 P.3d 603 (2001); Clements v. Travelers Indem. Co., 121 Wn.2d 243, 251, 850 P.2d 1298 (1993); see also RCW 48.22.030(12) (The purpose of the UIM statute is to “protect innocent victims of motorists or underinsured motor vehicles.”). While our courts have recognized the public policy behind the UIM statute, at the same time, they have also “emphasized the rights of the parties to enter into binding contracts.” Daley v. Allstate Ins. Co., 135 Wn.2d 777, 789, 958 P.2d 990 (1998). To find UIM coverage applicable here would require that we ignore the “owner or operator” language in Rodriguez’s policy. This we may not do because we may not create ambiguity where none exists and must enforce clear policy language as written. See Mid-Century Ins. Co. v. Henault, 128 Wn.2d 207, 213, 905 P.2d 379 (1995).

We deny Rodriguez’s request for costs and attorney fees on appeal.

Affirmed.

Becker, J.

WE CONCUR:

Spencer, J.

Elington, J