

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KIM A. HANN, individually,

Appellant,

v.

PROGRESSIVE NORTHWESTERN
INSURANCE COMPANY.,

Respondent.

No. 39881-8-II

UNPUBLISHED OPINION

Penoyar, C.J. — Kim A. Hann appeals a summary judgment order dismissing her claim against Progressive Northwestern Insurance Company for underinsured motorist coverage. She claims marital status discrimination. We affirm.

FACTS

On September 9, 2005, Hann was a passenger and John Combs was driving Hann’s vehicle westbound on 6th Avenue in Tacoma. Combs turned right on a green light onto Jackson Avenue when Richard Squire, an uninsured driver, failed to stop at the red light and struck Hann’s vehicle. Hann sustained serious personal injuries.¹

Hann made an uninsured motorist claim to Metropolitan Insurance Company, with which she had personal injury protection (PIP) and uninsured motorist coverage (UIM). Combs had vehicles of his own that he insured through Progressive; he also had UIM coverage. Progressive paid personal injury protection benefits (PIP) to Combs but denied Hann’s request for such benefits, explaining that she was not insured under Combs’s policy.

¹ Without citation to the record, Hann claims that Combs received a \$409,000.00 arbitration award and that she obtained a default judgment against Squire for \$733,483.71.

In October 2008, Hann sued Progressive, seeking UIM benefits because her own UIM coverage was insufficient to fully compensate her for her injuries. Progressive denied her request, explaining that she was not an insured person under Combs's policy. On July 10, 2009, Progressive moved for summary judgment. Hann responded, claiming that Progressive's policy discriminated against her on the basis of marriage (she and Combs lived together but were not married). The trial court granted Progressive's motion. Hann appeals.

ANALYSIS

I. Standards of Review

A. Summary Judgment

We review a summary judgment order de novo, making the same inquiry as the trial court; summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue about any material fact and, assuming facts most favorable to the nonmoving party, establish that the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Interpretation of an insurance contract is a question of law subject to de novo review. *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 424, 38 P.3d 322 (2002).

B. Insurance Policies

The criteria for interpreting insurance contracts in Washington are well settled. We construe insurance policies as contracts. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665, 15 P.3d 115 (2000). We consider the policy as a whole, and we give it a “ ‘ ‘fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.” ’ ’ ” *Id.* at 666 (quoting *Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 134 Wn.2d 413, 427-28, 951 P.2d 250 (1998) (quoting *Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn.2d 618, 627, 881 P.2d 201 (1994))). Most importantly, if the policy language is clear and unambiguous, we must enforce it as written; we may not modify it or create

ambiguity where none exists. *See id.*

We will hold that a clause is ambiguous only “when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable.” *Id.* (quoting *B & L Trucking*, 134 Wn.2d at 427-28). If a clause is ambiguous, we may rely on extrinsic evidence of the intent of the parties to resolve the ambiguity. *Id.* Any ambiguity remaining after examination of the applicable extrinsic evidence is resolved against the insurer and in favor of the insured. *Id.* But while exclusions should be strictly construed against the drafter, a strict application should not trump the plain, clear language of an exclusion such that a strained or forced construction results. *See Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 374, 379, 917 P.2d 116 (1996); *Transcon. Ins. Co. v. Wash. Pub. Utils. Dists. Util. Sys.*, 111 Wn.2d 452, 457, 760 P.2d 337 (1988). Finally, in Washington the expectations of the insured cannot override the plain language of the contract. *See Findlay*, 129 Wn.2d at 378.

Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 171-172, 110 P.3d 733 (2005).

C. Washington Law Against Discrimination

The Legislature has mandated that the Washington Law Against Discrimination, Chapter 49.60 RCW, be liberally construed to eliminate and prevent discrimination. RCW 49.60.020. Additionally, any exceptions to the chapter are to be narrowly confined. *Phillips v. City of Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989).

D. UIM Statute

In the underinsured motorist context, the statutes reflect a strong public policy of protecting innocent victims of automobile accidents from underinsured and uninsured drivers. *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 794 P.2d 1259 (1990).

II. The Policy

Hann seeks UIM benefits under Combs’s Progressive insurance policy because her own UIM coverage with Metropolitan was insufficient to fully compensate her for her injuries. Hann is not covered under the terms of Combs’s policy because (A) she is not listed as an “insured

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person” and (B) her vehicle was not listed as a “covered vehicle.”

A. “Insured Person”

Under Combs’s Progressive policy, an “insured person” is “you.” Clerk’s Papers (CP) at 81. “You” is yourself, anyone else declared on the policy, and the spouse of an insured, and a relative. CP at 81. Hann is not the insured, is not declared on the policy, is not Combs’s spouse, and is not a relative. Thus Hann is not an “insured person” under the express language of Combs’s policy.

B. “Covered Vehicle”

A “covered vehicle” is any vehicle declared on Combs’s policy or a replacement vehicle. Hann’s vehicle is not declared in the policy. CP at 80.

Combs could have declared Hann on his policy but apparently chose not to do so. And Hann, who insured herself through Metropolitan, could have purchased higher UIM limits but chose not to; she also could have chosen to insure with Progressive, but did not. Reading the four corners of Combs’s policy, Progressive did not err in refusing UIM coverage to Hann.

III. Discrimination

Hann argues that had she been married to Combs, she would have been covered under his insurance policy with Progressive and that the policy therefore discriminates against her as an unmarried person. We need not analyze this claim because there was no coverage for Hann or her vehicle under Combs’s policy regardless of her marital status. Combs’s policy contained an “owned vehicle” exclusion. Such exclusions “prevent an insured from receiving coverage on another household car by merely purchasing a single policy.” *Barth v. Allstate Ins. Co.*, 95 Wn. App. 552, 560, 977 P.2d 6 (1999) (quoting *Brown v. United Pac. Ins. Co.*, 42 Wn. App. 503, 507, 711 P.2d 1105 (1986)).

RCW 48.22.030 specifically authorizes these exclusions, and courts have repeatedly held them not to contravene public policy. *Barth*, 95 Wn. App. at 560. *Schelinski v. Midwest Mut. Ins. Co.* 71 Wn. App. 783, 790, 863 P.2d 564 (1993); *Anderson v. Am. Econ. Ins. Co.*, 43 Wn. App. 852, 856, 719 P.2d 1345 (1986). *Schelinski* involved an insured driving his wife's vehicle, which was insured by another insurer. The court applied the exclusion and affirmed that it did not violate public policy. *Brown* involved a passenger-husband who had insurance through a different insurance provider on two other vehicles. The court affirmed the denial of coverage and held that the provision was neither ambiguous nor contrary to public policy.

Hann's vehicle was not a covered vehicle under Combs's Progressive policy in that it was not listed on his policy nor was it a replacement or newly-acquired vehicle under his policy. It made no difference if they were married. Part III, the UIM coverage, included the following exclusions:

Coverage under this Part III is not provided for **bodily injury** sustained by any person while using or **occupying**:

.....
d. a motorized vehicle or devise of any type designed to be operated on the public roads that is **owned** by **you** or a **relative**, other than a **covered vehicle**.

CP at 89. Thus even if Hann was treated as an insured spouse under Combs's policy, she would be excluded from UIM coverage as a relative who owned the non-covered vehicle involved in the accident.

Nonetheless, Hann argues that the policy exclusion is discriminatory because Combs rarely used her vehicle and if he had simply borrowed a vehicle for an errand of a non-household member, the exclusion would not have applied. Hann relies on *Ross v. State Farm Mut. Auto. Ins. Co.*, 82 Wn. App. 787, 919 P.2d 1268 (1996). This reliance is unfounded for two reasons.

One, the Supreme Court overruled this case at 132 Wn.2d 507, 940 P.2d 252 (1997). Two, the policy at issue in *Ross* included a clause extending liability coverage for a temporary substitute car, with the following limitation: “**Your car** has to be out of use due to its breakdown, repair, servicing, damage or **loss**.” 82 Wn. App. at 793. Here, the issue is in the UIM portion of the policy, not the liability portion, and because no such clause exists in the Progressive policy issued to Combs, Hann’s vehicle, unlike the vehicle in *Ross*, cannot be treated as a covered substitute vehicle.

Hann is wrong that Combs’s Progressive policy is discriminatory of her marital status. The policy’s exclusion applies because Hann is a member of the household and her vehicle was not listed on the policy’s declaration of covered vehicles. Progressive did not deny her coverage because of her marital status. Hann simply cannot show that marital status is the reason the Progressive policy does not provide UIM coverage to her.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Hunt, J.

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Johanson, J.