

FILED: August 1, 2007

## IN THE COURT OF APPEALS OF THE STATE OF OREGON

KARA DAY-TOWNE,

Plaintiff-Appellant,

v.

PROGRESSIVE HALCYON INSURANCE COMPANY,

Defendant-Respondent.

Jackson County Circuit Court  
034378L2; A129849

G. Philip Arnold, Judge.

Argued and submitted January 12, 2007.

Kathryn H. Clarke argued the cause for appellant. With her on the briefs was Michael Brian.

Michael A. Lehner argued the cause for respondent. With him on the brief was Lehner &amp; Rodrigues PC.

Thomas M. Christ and Cosgrave Vergeer Kester LLP filed the brief *amicus curiae* for Farmers Insurance Company.

Before Edmonds, Presiding Judge, and Wollheim and Sercombe,\* Judges.

SERCOMBE, J.

Affirmed.

\*Sercombe, J., *vice* Riggs, S. J.

SERCOMBE, J.

This case concerns the scope of underinsured motorist (UIM) coverage of an automobile liability insurance policy issued to plaintiff Kara Day-Towne by defendant Progressive Halcyon Insurance Company. Plaintiff asserts that the trial court erred in concluding that no further payments were owed under the UIM coverage of the policy and in granting summary judgment to defendant. Plaintiff argues that the UIM coverage of the policy required payment of all damages incurred in a motor vehicle collision with another person's automobile and not otherwise paid by that third party and his or her insurer. Plaintiff also contends that principles of estoppel and waiver obligated defendant to pay some part of her UIM claim because defendant earlier agreed to arbitrate issues of the third party's liability and plaintiff's damages and because an arbitration occurred. Defendant responds that the UIM coverage issue was recently decided against plaintiff's contention in [Mid-Century Ins.](#)

*Co. v. Perkins*, 209 Or App 613, 149 P3d 265 (2006), *rev allowed*, 343 Or 33 (2007), and that there is no evidence to support plaintiff's waiver and estoppel arguments. We agree with defendant, albeit for different reasons, and affirm.

On March 1, 2002, while insured by defendant, plaintiff was injured in an automobile accident caused by the negligence of William Moore. Plaintiff made a UIM claim under the automobile liability insurance policy issued by defendant. On April 17, 2003, defendant's representative sent a letter to plaintiff's attorney acknowledging that claim and further stating:

"Please also provide confirmation of Allstate's [Moore's insurer's] liability limits as well as confirmation of their policy limits offer if and when it is made. At this time, your client does not have [defendant's] permission to settle her underlying bodily injury claim.

"Lastly, pursuant to ORS 742.061(3)(a) and (b), please be advised that [defendant] has accepted coverage for the above captioned matter and the only issues are the liability of the uninsured or underinsured motorist and the damages.

"[Defendant] consents to submit this case to binding arbitration if we cannot resolve this matter."

On December 31, 2003, plaintiff filed a complaint against defendant alleging breach of the insurance contract by failing to pay benefits under the UIM coverage of the policy, and seeking damages and attorney fees. Defendant answered and alleged that plaintiff "does not have an uninsured/underinsured motorist claim as Mr. Moore's liability policy equaled the limits of [the policy issued by defendant]." Defendant also asserted that plaintiff "is not entitled to attorney fees as [defendant] has agreed to resolve this dispute through binding arbitration."

In the proceedings below, the core dispute between the parties was whether Moore was an underinsured motorist under the policy. Defendant contended that Moore was not underinsured because the \$100,000 liability coverage limits of Moore's automobile liability insurance policy were the same as the limits of plaintiff's UIM coverage under her policy. For that reason, defendant sought summary judgment that it was not liable under the policy.

Plaintiff's position was that the policy required payment if Moore's insurance was insufficient to pay all of her damages from the accident. She later alleged that defendant had elected to accept "coverage" under the policy by consenting to arbitration of Moore's liability and her damages, or, alternatively, was estopped or had waived its right to deny that "coverage."

Defendant filed its summary judgment motion on November 16, 2004. For reasons not apparent from the record, the parties contemporaneously proceeded to arbitration. An arbitration hearing was held on November 22, 2004. Neither party requested a stay of the trial court proceedings pending arbitration. The record does not reveal the scope of the arbitration. The only clue in the summary judgment record is a November 30, 2004, letter announcing the decision of the arbitration panel, as an "arbitration award" on a "UM/UIM Claim" in "*Kara Day-Towne v. Progressive Halcyon Insurance Company, Jackson Co. Circuit Court Case No. 034378L2*." The letter provided:











