STATE OF MICHIGAN

COURT OF APPEALS

ALAHIN ALBONAJIM, SATTAR ALI, Personal Representative of the Estate of SALHA RAHAMA, RUDY'S PHYSICAL THERAPY, P.C., HADEEL MOHAMED-ALI and FIRAS AL-KHAYOUN,

Plaintiffs-Appellants,

V

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee,

and

FARMER'S INSURANCE EXCHANGE,

Defendant.

UNPUBLISHED
September 22, 2005

No. 254459
Wayne Circuit Court
LC No. 03-303092-NZ

Before: Bandstra, P.J. and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court order granting summary disposition to defendant. Plaintiffs filed a claim for uninsured motorists benefits under the same insurance policy issued to its insured and from which bodily injury coverage had been extended arising out of the same accident. Plaintiffs sought declaratory relief in the trial court, which was denied. Because the policy of insurance requires that bodily injury coverage benefits paid reduce the uninsured motorist coverage for concomitant claims, we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The claim stems from an accident on March 16, 2002 when a car driven by one of the plaintiffs, the spouse of the insured, was struck by another car, driven by an uninsured motorist. One passenger was killed and the driver and another passenger were injured. The driver, the injured passenger, the estate of the passenger who died and the insured all sought uninsured motorists benefits. The injured passenger and the estate settled with defendant in excess of the policy limits under the bodily injury coverage of the policy.

Plaintiffs argue that the language of the policy requires defendant to pay uninsured motorist coverage. They claim that, while defendant may contract to reduce benefits, even to the point of elimination, the language of the contract must make it clear that what is being reduced is coverage limits not the total amount of damages. Defendant counters that the language is clear and unambiguous and the offset was proper.

This Court reviews the trial court's ruling on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 59; 680 NW2d 50 (2004). Under MCR 2.116(C)(10), the reviewing court considers not only the pleadings, but affidavits, depositions, and any other documentary evidence to determine whether a genuine issue of material fact exists which would require a trial. MCR 2.116(G)(5); *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). Further,

> [t]he reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. [*Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).]

The court should look at evidence submitted in the light most favorable to the party opposing the motion. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 618; 537 NW2d 185 (1995).

Our Supreme Court, in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003), confirmed the law with regard to insurance contracts, holding that the reviewing court must examine the insurance contract and determine whether an ambiguity exists. The contract is read as a whole, giving the language its ordinary and plain meaning. *Id.*, 47; *Auto Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). A contract is ambiguous when its words may be reasonably understood in different ways. *Engle v Zurich-American Ins Group (On Remand)*, 230 Mich App 105, 107; 583 NW2d 484 (1998).

The language of the contract at issue here reads in pertinent part as follows:

> Part V
>
> Uninsured Motorists Insurance–Coverage SS
>
> We will pay damages which an insured person is legally entitled to recover from the owner or operator of an uninsured auto because of bodily injury sustained by an insured person. The bodily injury must be caused by an accident and arise out of the ownership, maintenance or use of an uninsured auto. We will not pay any punitive or exemplary damages.
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> * * *
>
> Limits of Liability

* * *

> The Uninsured Motorists Coverage limits apply to each insured motor vehicle as shown on the declarations page
>
> Damage payable will be reduced by:
>
> 1. all amounts paid by the owner or operator of the vehicle of the uninsured auto or anyone else responsible. This includes all sums paid under the Bodily Injury Liability coverage of this or any other auto policy.
>
> 2. all amounts paid or payable, if for the same elements of loss, under any worker's compensation law, disability benefits, or Automobile No Fault benefits law or any similar automobile medical payments coverage.

The policy limits for bodily injury were $20,000 for each person, with a total of $40,000 for each occurrence. The uninsured motorist coverage was also $20,000 for each person and $40,000 for each occurrence.

In *Mead v Aetna Casualty & Surety Co*, 202 Mich App 553; 509 NW2d 789 (1993), this Court decided the issue of what, if anything, the defendant was entitled to offset against the amount of monies that the plaintiffs received from other sources. The language of the contract in *Mead* is remarkably similar to the contract language here. It read:

> Any amounts otherwise payable for damages under this coverage shall be reduced by :
>
> 1. All sums paid because of bodily injury by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under the Liability Coverage of the policy.

Like plaintiffs in the instant case, the plaintiffs in *Mead* argued that because the damages suffered were more than the insured had actually received in the settlement, the defendant should pay the maximum under the contract, rather than being allowed to deduct the amount already paid by other sources. This Court rejected that argument and held the offset should be against coverage limits, not against the total amount of damages. *Id.*, 555.

When comparing the language in the contract in *Mead* with the language of the contract in this case, it is clear that plaintiffs' argument must fail. "Payable for damages" is substantially the same as "[d]amage payable." We agree with the trial court that to rule in plaintiffs' favor, a person would have to read the phrase "damage payable" in the insurance agreement to mean "damage awarded." The contract clearly states that the amount paid will not be increased because of an increased number of persons injured or claims made. The maximum payable per occurrence is $40,000 reduced by any payments made under the bodily injury coverage of the policy. Because defendant settled claims with two of the plaintiffs in excess of policy limits for bodily injury under the bodily injury coverage, no benefits are available to plaintiffs under the

uninsured coverage portion of the same policy. We decline to adopt plaintiffs' interpretation since the language is clear and unambiguous.

Affirmed.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Pat M. Donofrio