STATE OF MICHIGAN

COURT OF APPEALS

ALLIED PROPERTY AND CASUALTY INSURANCE COMPANY,

Plaintiff/Counter-Defendant-Appellant,

v

DOUGLAS M. ELLINGER, Independent Personal Representative of the Estate of DOROTHY A. BLANCHARD, Deceased,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
August 31, 2006

No. 267924
Kent Circuit Court
LC No. 05-005372-NF

Before: Zahra, P.J., and Neff and Owens, JJ.

PER CURIAM.

In this declaratory action concerning entitlement to underinsurance benefits under an automobile policy, plaintiff appeals as of right from the circuit court's order granting defendant summary disposition. We affirm in part, reverse in part, and remand for further proceedings.

I. Facts

Defendant's decedent was killed while a passenger in a car driven by David Gorman, which collided with a car driven by Lawrence DeHaan. Defendant brought a wrongful death action against both drivers and eventually settled with their respective insurers. Gorman was insured by a policy providing an upward limit of $500,000 in coverage for bodily injury, and an "umbrella policy" with a limit of $1,000,000. Defendant settled with Gorman's insurer for $50,000, well below the policy limits. DeHaan's policy provided an upward limit of $100,000 in coverage for bodily injury. Defendant and DeHaan's insurer settled at the policy limit. Defendant then sought underinsurance benefits from the decedent's insurer, plaintiff. Plaintiff brought suit seeking a declaration that it was not liable for underinsurance benefits or, alternatively, that its share of liability was limited to a percentage of underinsurance benefits due. Defendant counterclaimed for a declaration that the estate was entitled to underinsurance coverage plus damages. The trial court granted defendant summary disposition and ordered plaintiff to pay $100,000 in underinsurance benefits.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Contract interpretation is likewise subject to review de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

II. Underinsurance Liability

Plaintiff first argues that, because defendant settled with Gorman for well below his policy's limit, the settlement left an abundant source of insurance unexhausted and, as a result, no underinsurance benefits were due. Defendant argues that DeHaan was the only underinsured driver, and because DeHaan settled for his insurer's policy's limits, plaintiff was liable for underinsurance benefits up to its own policy limit without regard to what defendant obtained from Gorman's insurer. We conclude that defendant correctly identified DeHaan as the only underinsured driver in this situation, but this fact alone did not necessarily establish defendant's entitlement to recover the full policy limit from plaintiff.

Insurance policies are construed according to principles of contract construction. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 417; 668 NW2d 199 (2003). The terms in an insurance policy are given their common meanings unless defined in the policy. *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 534; 676 NW2d 616 (2004). The decedent's insurance policy with plaintiff included underinsured motorist coverage up to $250,000, guaranteeing "compensatory damages which an 'insured' is legally entitled to recover from the owner or operator of an 'underinsured motor vehicle' because of 'bodily injury'" resulting from an accident. The policy defined "underinsured motor vehicle" as an insured vehicle whose coverage for bodily injury liability was "less than the limit of liability for this coverage." Accordingly, Gorman's vehicle, covered at $500,000 for bodily injury liability, was not an underinsured vehicle, leaving DeHaan's vehicle, with its $100,000 limit for bodily injury liability, as the only underinsured vehicle for present purposes.

The policy specified that underinsurance benefits were payable when "[t]he limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements . . . ." The settlement with DeHaan for the limits of his policy did indeed exhaust available insurance from the only underinsured driver. The decedent's underinsurance endorsement with plaintiff further provided that "the limit of liability shall be reduced by all sums paid because of the 'bodily injury' by or on behalf of persons or organizations who may be legally responsible." Because the decedent's policy with plaintiff had a limit of $250,000, and her estate received $50,000 from Gorman's insurer and $100,000 from DeHaan's insurer, the potential liability limit under plaintiff's policy was reduced to $100,000.

However, whether DeHaan was responsible for damages beyond what his own insurance covered, thus triggering plaintiff's actual liability for underinsurance benefits, depends on the extent of DeHaan's responsibility for the decedent's death. MCL 600.2956 provides that, but for exceptions not applicable here,[1] in actions "seeking damages for personal injury, property

[1] There is no suggestion that any of the conditions for which joint and several liability has been
(continued…)

damage, or wrongful death, the liability of each defendant for damages is several only and is not joint." See also MCL 600.2957(1) and MCL 600.6304(1), (4). Accordingly, each tortfeasor incurred liability to the decedent's estate only to the extent of his respective share of responsibility. There was no indication in the record of a judicial determination or stipulation concerning actual total damages or percentages of fault. Although plaintiff was liable for underinsurance benefits in connection with DeHaan, this liability existed only to the extent to which the settlement at the policy limit from DeHaan's insurer fell short of DeHaan's actual share of responsibility for actual total damages. Remand is thus necessary for these determinations.

III. The "Other Insurance" Clause

The underinsurance endorsement of the decedent's policy with plaintiff includes the following provision, under the heading "OTHER INSURANCE":

> If there is other applicable insurance available under one or more policies or provisions of coverage:
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> * * *
>
> 2. Any insurance we provide with respect to a vehicle you do not own shall be excess over any collectible insurance providing coverage on a primary basis.

This clause makes the underinsured motorist coverage secondary to the insurance coverage available through David Gorman. David Gorman did, indeed, have an insurance policy that applied to the incident giving rise to the insured's claim. However, the above-quoted policy provision does not extinguish plaintiff's liability under its underinsured motorist coverage merely because Gorman's policy limits exceed the limits of the underinsured motorist coverage issued by plaintiff.

The underinsured motorist coverage is triggered under the decedent's policy with plaintiff because the decedent was involved in a motor vehicle accident with Lawrence DeHaan—a person who is clearly an underinsured motorist as that term is defined in plaintiff's policy. The "other insurance" provision merely reduces plaintiff's liability under its underinsured motorist coverage to the extent that defendant collects from Gorman's insurance. The express and clear language of the decedent's policy with plaintiff provides that the underinsured motorist coverage shall be excess over "any collectable insurance providing insurance on a primary basis."

Contrary to plaintiff's claim, Gorman's insurance is not collectable up to $500,000 merely because he has a $500,000 policy limit. Rather, Gorman's insurance is only collectable to the extent of Gorman's liability. Here, defendant settled with Gorman's insurer for $50,000. Nothing in the record or presented on appeal suggests that this settlement was made against the

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preserved exist in this case. See MCL 500.6312.

terms of the decedent's policy with plaintiff, was made in bad faith, or otherwise failed to reflect the extent of Gorman's liability to the decedent's estate. The "other insurance" provision provides nothing more than a set-off of the Gorman settlement against the potential liability plaintiff owed the decedent's estate under the underinsured motorist coverage.

IV. Extent of Liability

Because the decedent did not own either vehicle involved in the accident, ¶ 2 of the "other insurance" provision incontestably characterizes any obligation to the decedent's estate under the policy as excess. Plaintiff argues that, if that is the applicable characterization, then its liability should have been calculated by adding its policy limits to Gorman's "excess umbrella policy" of $1,000,000 and noting the proportion of plaintiff's policy limits to the total damages awarded in this instance.

The "other insurance" section of the policy also includes the following provision:

> If there is other applicable insurance available under one or more policies or provisions of coverage:
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> * * *
>
> 3. If the coverage under this policy is provided:
>
> * * *
>
> b. On an excess basis, we will pay only our share of the loss that must be paid under insurance providing coverage on an excess basis. Our share is the proportion that our limit of liability bears to the total of all applicable limits of liability for coverage provided on an excess basis.

Setting aside the propriety or accuracy of the numbers plaintiff provides for its calculations,[2] we conclude that plaintiff's argument is flawed to the extent it presumes to bring Gorman's $1,000,000 umbrella coverage to bear for purposes of calculating plaintiff's obligations to provide underinsurance benefits. The policy between Gorman and his insurer did not entitle the decedent to receive underinsurance benefits from Gorman's insurer. Gorman's "excess" coverage accordingly did not come to bear. Hence, the trial court did not err in rejecting plaintiff's argument in this regard.

V. The Insured's Duties Under the Policy

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[2] Plaintiff adds to Gorman's $1,000,000 umbrella policy just $100,000, not the $250,000 set forth as its own policy limit. Plaintiff thus asserts that the total excess coverage was $1,100,000, its own share of which is 9.1 percent. Plaintiff then apparently presumes that the $100,000 it was ordered pay constitutes all due uncompensated damages, and declares that its share of that total is $9,100.

Plaintiff maintains that, because defendant declined to allow a court to first decide whether plaintiff was obligated to pay underinsured motorist benefits before settling with Gorman and DeHaan, defendant failed to satisfy his duties under the policy. This argument is not germane to the two issues presented in the statement of questions presented, and we are not required to review it. See MCR 7.212(C)(7); *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995). Regardless, this argument is fully set forth in plaintiff's brief, and we choose to address it. We find no merit in plaintiff's position.

Part E of plaintiff's policy, which is entitled "Duties After An Accident or Loss," provides in pertinent part:

> We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:
>
> * * *
>
> B.1. Cooperate with us in the investigation, settlement or defense of any claim or suit.

The insured must cooperate throughout the claims process. Still, this duty to cooperate does not require an insured to put at risk other claims it may have outside those it has made with the insurer. Plaintiff placed defendant in the position of having to decline or defer to some unknown date settlement offers from two culpable parties willing to resolve their disputes with the insured in order to allow plaintiff the opportunity to determine whether it was legally bound to pay benefits to decedent's estate. Stated more simply, plaintiff wanted defendant to pass up two settlement offers to allow it time to establish that it was not liable to decedent's estate. Plaintiff's policy clearly set forth the obligations of the insured relating to the acceptance of settlement offers impacting the underinsured motorist coverage. Plaintiff's underinsured motorist coverage provision merely required defendant to give plaintiff 30 days' notice of his intent to accept a tentative settlement offer, thereby allowing plaintiff the opportunity to advance payment to decedent's estate in an amount equal to the tentative settlement amount in exchange for an assignment of decedent's estate's rights in the underlying claim. There is no indication that the insured failed to meet its obligations under the policy. Accordingly, we reject plaintiff's claim that the insured failed to satisfy its duties under the policy.

VI. Conclusion

The trial court correctly recognized that plaintiff was potentially liable for underinsurance benefits and that no other policy operated to reduce its share of such liability, but it erred in ordering plaintiff to provide those benefits to the extent of its policy's limits, without determining the only underinsured driver's share of responsibility for actual damages. Accordingly, we remand this case for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Donald S. Owens