STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

RICHARD R. GEER,

Plaintiff,

v

File No. 03-22889-CK
HON. PHILIP E. RODGERS, JR.

WOLVERINE MUTUAL INSURANCE COMPANY,

Defendant.
/

L. Kent Walton (P25123)
Attorney for Plaintiff

John W. Sharp (P33961)
Attorney for Defendant

DECISION AND ORDER DENYING
DEFENDANT WOLVERINE'S MOTION FOR SUMMARY
DISPOSITION AND GRANTING SUMMARY DISPOSITION TO THE PLAINTIFF

This declaratory judgment action arises out of an automobile accident that occurred on July 14, 2001. The driver of the vehicle, Larry Kinney, was killed while driving his employer's truck. The Plaintiff in this action, Richard Geer, was a passenger in the vehicle driven by Kinney and he was seriously injured.

The employer had auto insurance with a $1,000,000 limit through AIG Insurance Company ("AIG"). Pursuant to an arbitration proceeding, AIG paid $980,000 in benefits to Kinney's estate and $20,000 to Plaintiff Geer under its underinsured motorist coverage provisions. The at-fault driver was insured under a liability policy with $20,000/$40,000 limits by Oak Casualty Insurance Company ("OCIC"). OCIC was declared insolvent and has not paid any insurance benefits.

The driver Kinney had an insurance policy issued by Auto-Owners Insurance Company on his personal vehicle with both underinsured and uninsured motorist coverage limits of $250,000 per person and $500,000 per occurrence. Kinney's estate made claims under both provisions which were

denied. Kinney's estate brought an action to recover benefits. That case was File No. 03-22876-CZ in the Circuit Court for Grand Traverse County. A final decision and order was entered in that case on November 24, 2003. The Court held that the policy at issue was clear and unambiguous. The policy contained a pro-rata clause, an anti-stacking clause and an excess clause. Therefore, since there was other applicable insurance, the coverage was proportionate and the damages were limited to the single highest limit of liability which was the $1,000,000 under the AIG policy. Therefore, Kinney's estate, which had received $980,000 under the AIG policy, was only entitled to an additional $20,000 under his Auto-Owners policy.

The passenger, Plaintiff Geer, brought this action against his personal insurer, Defendant Wolverine Mutual Insurance Company ("Wolverine"), for excess underinsurance benefits. He seeks to recover policy limits of $250,000, less the $20,000 already received from the AIG policy, plus other applicable deductions.

The Defendant filed a motion for summary disposition, pursuant to MCR 2.116(C)(10), seeking a ruling from the Court that Wolverine's underinsurance coverage is excess to the entire $1 million policy limit of the primary AIG underinsurance policy and not excess to only the $20,000 that Plaintiff Geer actually received in benefits under the AIG policy.

On June 14, 2004, the Court heard the arguments of counsel. The Court took under advisement the issue of whether the "other insurance" clause, specifically the "excess insurance" clause, of the Wolverine policy is excess to the entire $1 million AIG policy limit or excess to the $20,000 Plaintiff received in benefits under the AIG policy. The Court now issues this written decision and order and, for the reasons stated herein, denies the Defendant's motion and grants summary disposition on this issue for the Plaintiff.

STANDARD OF REVIEW

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was set forth in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

> This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):
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> > In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> > In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

"OTHER INSURANCE"

The "other insurance" clause in the Wolverine Policy states:

OTHER INSURANCE

If there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to

a vehicle you do not own shall be excess over *any other collectible insurance.* [Emphasis added.]

The Defendant contends that its liability is excess to the AIG policy limits of $1 million and not just the $20,000 which was actually paid to Plaintiff Geer under the AIG policy. The Plaintiff, on the other hand, contends that the Defendant's liability is excess over the $20,000 Plaintiff actually received from AIG.

In order to resolve this matter, the Court must first determine the nature of the coverage provided by the Wolverine policy.

Broadly defined, insurance is a contract by which one party, for a consideration, assumes particular risks of the other party. 44 C.J.S. Insurance, § 1, p 73. The parties have the right to employ whatever terms they wish, and the courts will not rewrite them as long as the terms do not conflict with pertinent statutes or public policy. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566-567; 489 NW2d 431 (1992). See also *Group Ins Co of Michigan v Czopek*, 440 Mich 590, 595-596; 489 NW2d 444 (1992); *Michigan Mutual Ins Co v Allstate Ins Co*, 426 Mich 346; 395 NW2d 192 (1986).

Included in many insurance contracts are "other insurance" clauses. These clauses originated in the area of property insurance and were designed to protect the insurer from the moral hazards of fraud and carelessness incident to the over-insurance of property. See, generally, 7 Couch, Insurance, 2d (rev ed), §§ 37:397 to 37:418, pp 987-1007 and 9 Couch, Insurance, 2d (rev ed), §§ 37B:1 to 37B:130, pp. 14-130. "Other insurance" clauses are provisions inserted in insurance policies to vary or limit the insurer's liability when additional insurance coverage can be established to cover the same loss. See, generally, 44 Am Jur 2d, Insurance, §§ 1270-1276, pp 209-216.

"Other insurance" clauses fall into three general categories. The effect of each in the event of concurrent coverage is to reduce the insurer's loss. They are:

1. A pro-rata clause, which purports to limit the insurer's liability to a proportionate percentage of all insurance covering the event;

2. An escape or no-liability clause, which provides that there shall be no liability if the risk is covered by other insurance; and

3. An excess clause, which limits the insurer's liability to the amount of loss in excess of the coverage provided by the other insurance. *Federal Kemper Ins Co, Inc v Health Ins Administration Co, Inc*, 424 Mich 537, 542; 383 NW2d 590 (1986).

The Wolverine policy contains a pro-rata clause and an excess clause. Unlike the policy in the Kinney case, it does not contain an anti-stacking provision.

St. Paul Fire & Marine Ins Co v American Home Assurance Co, 444 Mich 560, 570; 514 NW2d 113 (1994) involved three primary policies, two with pro-rata other insurance clauses and one with an excess other insurance clause. The Court adopted the majority rule and reasoned that pro-rata and excess "other insurance" clauses can be reconciled by assigning primary liability to the insurers whose policies contain pro-rata clauses and excusing the insurer whose policy contains an excess clause, unless liability exceeds the pro-rata insurer's limits. *Id* at 563.

In *Bosco v Bauermeister*, 456 Mich 279; 571 NW2d 509 (1997), our Supreme Court had the opportunity to determine the priority of coverage of several insurance policies. One of those policies, the Frankenmuth policy, contained a pro-rata clause and an excess clause. The Court determined that this type of policy was a primary policy with an excess clause that becomes operative in certain limited circumstances. *Id* at 290. This type of "coincidental" excess other insurance clause is only effective when other primary insurance exists. Otherwise, the policy is primary, even if a nonowned vehicle is involved. *Id* 293. The effect of such an excess clause is to allocate liability among the primary insurers, not to eradicate the primary nature of the policy when a nonowned or substitute vehicle is involved. *Id* at 297. The Court concluded in *Bosco* that Frankenmuth's liability should be prorated on the basis of the ratio of its limits of liability to the total of *available* coverage on the loss.

In *Frankenmuth Mut Ins Co, Inc v Continental Ins Co*, 450 Mich 429; 537 NW2d 879 (1995), the Court characterized a primary insurance policy that also contains provision for excess other insurance coverage as "coincidental" excess coverage. The distinction between "true" excess and "coincidental" excess insurance coverage is "rooted in the fundamental differences in the nature and scope of the risks which the policies intend to cover. Those differences are reflected both in the language of the policies . . . and in the premiums charged for the risk." *Bosco, supra.* The effect of a "coincidental" excess clause is to allocate liability among the primary insurers, not to magically

remove the primary nature of the policy when a nonowned or substitute vehicle is involved. An insurer's liability should be prorated on the basis of the ratio of the insurer's limits of liability to the total limits of available coverage on the loss within its tier of priority. See, *St Paul, supra* at 565.

In the instant case, AIG and Wolverine both provide primary coverage. The Wolverine policy contains a pro-rata clause and an excess insurance clause. The critical clause is the excess insurance provision which states: ". . . any insurance we provide with respect to a vehicle you do not own shall be *excess over any other collectible insurance*." The question presented is whether the $1 million AIG insurance policy is "other collectible insurance" or whether the $20,000 Geer actually received from AIG is "other collectible insurance."

This is a question of first impression. To date, the case law has dealt with "available insurance." *Wilkie v Auto-Owners Ins Co*, 467 Mich 868; 651 NW2d 918 (2003). The relationship between "available" and "collectible" insurance has not yet been addressed by a Michigan appellate court.

The Plaintiff argues that they are not the same; that "collectible" insurance is insurance that can actually be collected. In this case, the Plaintiff actually collected $20,000 from AIG. The Plaintiff cites numerous dictionary definitions in support of his position and argues the ordinary meaning of the word "collectible." The Defendant, on the other hand, argues that the $1 million AIG insurance policy is "other collectible insurance," regardless of how much of that insurance the Plaintiff actually collects. The Defendant relies upon the *Wilkie* case.

The Court agrees with the Plaintiff. The dictionary and common sense meaning of the word "collectible" is "able to be collected." It is incongruous for the Defendant to argue that insurance proceeds that the Plaintiff cannot collect are "collectible." The Plaintiff was not able to collect $1 million under the AIG policy. He was only able to collect $20,000. Thus, $20,000 was "other collectible insurance" within the meaning of the Wolverine policy. The Defendant Wolverine is liable to the Plaintiff Geer for excess over the $20,000 Geer collected from AIG,[1] up to its limit of $250,000.

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[1]The Court understands that there may be other deductions as well, e.g. worker's compensation benefits.

The Defendant's motion for summary disposition is denied. Summary disposition is granted for the Plaintiff, pursuant to MCR 2.116(I)(2).

IT IS SO ORDERED.

This Decision and Order disposes of the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 6/23/04