

STATE OF MICHIGAN
COURT OF APPEALS

WESTFIELD INSURANCE COMPANY,

Plaintiff-Appellant,

UNPUBLISHED
June 21, 2012

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

No. 295486
Macomb Circuit Court
LC No. 08-005353-CK

Before: MURRAY, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

This appeal concerns a dispute between two insurers regarding the amount to be reimbursed for litigation costs incurred in providing a defense to an insured. Although the trial court determined that plaintiff Westfield Insurance Company (Westfield) was entitled to reimbursement for defense costs expended, it limited Westfield's right of recovery against defendant Allstate Insurance Company (Allstate) for the costs incurred stemming from the litigation of the motor vehicle accident to "whatever amount remains in the Allstate policy up to its maximum of \$100,000." We affirm in part, reverse in part, and remand to the trial court for further proceedings.

Certain facts in this matter are undisputed. Kenneth Harthen was an employee of Alta Lift Truck (Alta). Harthen insured his personal motor vehicle with Allstate and maintained liability limits of \$100,000 under his policy. Alta had a commercial automobile policy with Westfield, which provided \$1 million in liability coverage for each accident. Alta also maintained a commercial umbrella policy with Westfield to provide coverage up to \$10 million, for incidents including auto-related accidents.

In 2005, Harthen was driving his personal vehicle while on business for Alta. Harthen is diabetic and, while driving, lost consciousness and collided with another vehicle, struck a curb and pole, and then hit a vehicle containing Linda Kalabat, her husband, and children before finally coming to rest. Purportedly, Harthen lost consciousness after having concluded a meeting on behalf of Alta and the accident occurred while he was en route to procure a meal to address his low blood sugar. Harthen immediately reported the accident to his employer and to his insurer, Allstate. Alta reported the incident to Westfield.

Kalabat initiated a lawsuit in 2006. In her initial lawsuit, Kalabat's claim against Alta was premised on owner liability. Subsequently, Kalabat amended her complaint, dismissing the

owner liability claim against Alta and proceeding against the employer solely on the theory of its vicarious liability for Harthen. Westfield undertook the defense in the trial court. The trial court entered a directed verdict against Alta on its “frolic and detour” defense and determined, as a matter of law, that Harthen was acting within the scope of his employment at the time of the accident. Ultimately, Kalabat was awarded \$2 million in damages.

Following entry of a verdict in the Kalabat litigation, Westfield initiated a cause of action for declaratory judgment and breach of contract and sought reimbursement of defense costs incurred in the amount of approximately \$530,000. Westfield brought a motion for summary disposition pursuant to MCR 2.116(C)(10). Westfield asserted that it was entitled to reimbursement for defense costs incurred because Allstate, by the wording of its policy, was the primary insurer for Alta. Allstate responded that it was not required to defend due to lack of the receipt of an explicit formal request to provide a defense and also requested summary disposition be granted in its favor pursuant to MCR 2.116(B)(1). Ultimately, Westfield contended that its status as the excess insurer entitled it to recover costs incurred for the defense of Alta from Allstate as the primary insurer.

The trial court granted Westfield’s motion for summary disposition “to the extent that it shall receive whatever amount remains in the Allstate policy up to its maximum \$100,000.” The trial court also granted Allstate’s motion for summary disposition “to the extent that it is not required to pay Westfield’s costs of litigation in the underlying case.”

This Court reviews a trial court’s decision on a motion for summary disposition de novo. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008). A court’s review of a summary disposition motion brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint and permits consideration of all evidence submitted by the litigants in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A court should only grant disposition if the evidence fails to establish the existence of a genuine issue of material fact. *Id.* at 120. Similarly, appellate review pertaining to the proper interpretation of an insurance policy comprises of question of law that this Court also reviews de novo. *Klapp v United Ins Group Agency*, 468 Mich 459, 463, 469; 663 NW2d 447 (2003). This Court reviews for clear error a trial court’s decision to award attorney fees. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997). In turn, this Court reviews for an abuse of discretion the actual award of fees. *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008).

Contrary to the parties’ extensive arguments, in accordance with the actual statement of the issue on appeal, the question to be resolved by this Court does not encompass the obligation of Allstate to provide a defense for Alta. Rather, the issue on appeal pertains to the trial court’s limitation of the amount to be reimbursed to Westfield for provision of a defense. Westfield only challenges the trial court’s determination that reimbursement of defense costs is restricted to Allstate’s policy limit of \$100,000, which Allstate primarily expanded on behalf of Harthen. Rather, Westfield contends that Allstate’s liability limit does not impact its obligation to remit reimbursement for defense costs incurred on behalf of Alta.

Any analysis of this matter must initiate with basic premises of contract law. “An insurance policy is much the same as any other contract. It is an agreement between the parties

in which a court will determine what the agreement was and effectuate the intent of the parties.” *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). “The policy application, declarations page of the policy, and the policy itself construed together constitute the contract.” *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). As with any other contract, we are required to read an insurance contract as a whole and attribute meaning to all of its terms. *Id.* We are also required to enforce clear and unambiguous contractual provisions as written. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). “Clear and unambiguous language may not be rewritten under the guise of interpretation[.]” *South Macomb Disposal Auth v American Ins Co. (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997). “Courts must be careful not to read an ambiguity into a policy where none exists.” *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996). “[I]f a contract, even an inartfully worded or clumsily arranged contract, fairly admits of but one interpretation, it may not be said to be ambiguous or fatally unclear.” *Mich Twp Participating Plan v Pavolich*, 232 Mich App 378, 382; 591 NW2d 325 (1998). An insurance contract is deemed to be ambiguous when the language contained within the contract is subject to more than one reasonable interpretation. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 418; 668 NW2d 199 (2003), citing *Klapp*, 468 Mich at 467.

The importance of the foregoing is evident because the duty of an insurance company to defend an insured “arise[s] from the policy language.” *Oakland Co Bd of Co Rd Comm’rs v Mich Prop & Cas Guaranty Ass’n*, 456 Mich 590, 600 n 6; 575 NW2d 751 (1998). Specifically:

The duty to defend is essentially tied to the availability of coverage. The duty to defend arises in instances in which coverage is even arguable, though the claim may be groundless or frivolous. Consistent with this premise, any analysis of an insurer’s duty to defend must begin with an examination of whether coverage is possible. If coverage is not possible, then the insurer is not obliged to offer a defense. [*Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 315; 575 NW2d 324 (1998), rev’d in part on other grounds 474 Mich 1119 (2006) (internal citations omitted).]

Further, “the duty to defend is broader than the duty to indemnify.” *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450-451; 550 NW2d 475 (1996); *Radenbaugh v Farm Bur Gen Ins Co of Mich*, 240 Mich App 134, 138; 610 NW2d 272 (2000). As discussed in detail by this Court, the duty of an insurer to defend encompasses all allegations even arguably contained in the policy coverage:

The duty of the insurer to defend the insured depends upon the allegations in the complaint of the third party in his or her action against the insured. This duty is not limited to meritorious suits and may even extend to actions which are groundless, false, or fraudulent, so long as the allegations against the insured even arguably come within the policy coverage. An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third party’s allegations to analyze whether coverage is possible. In a case of doubt as to whether or not the

complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor. [*Detroit Edison Co v Mich Mut Ins Co*, 102 Mich App 136, 141-142; 301 NW2d 832 (1980) (internal citations omitted).]

In *Radenbaugh*, 240 Mich App at 138, this Court provided instruction regarding the manner by which courts are to determine whether a duty to defend exists. Specifically:

In order to determine whether an insurer has a duty to defend its insured, this Court must look to the language of the insurance policy and construe its terms to find the scope of the coverage of the policy. Generally, an insurance policy is a contract between the insurer and the insured. If a trial court is presented with a dispute between these parties over the meaning of the policy, the trial court must determine what the agreement is and enforce it. When determining what the parties' agreement is, the trial court should read the contract as a whole and give meaning to all the terms contained within the policy. The trial court shall give the language contained within the policy its ordinary and plain meaning so that technical and strained constructions are avoided. A policy is ambiguous when, after reading the entire document, its language can be reasonably understood in different ways. If the trial court determines that the policy is ambiguous, the policy will be construed against the insurer and in favor of coverage. However, if the contract is unambiguous, the trial court must enforce it as written. [*Id.* at 138-139 (internal citations omitted).]

Indicating the existence of a duty to defend, the Allstate policy at issue in this matter provides, in relevant part:

We will defend an insured person sued as the result of an auto accident, even if the suit is groundless or false. We will choose the counsel. We may settle any claim or suit if we believe it is proper. We will not defend an insured person sued for damages which are not covered by this policy. *Our obligation to defend an insured person may be terminated upon our payment of policy limits.* [Emphasis added.]

In this instance, the undisputed Allstate policy limit was \$100,000. The applicable Allstate policy also indicates that Allstate will pay "court costs for defense" without specifying any limitation or condition.

Similarly, the Westfield commercial liability policy (as opposed to the Westfield umbrella policy), provides:

We have the right and duty to defend any "insured" against a "suit" asking for such damages. . . . [W]e have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" . . . to which this insurance does not apply. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the Liability

Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.

Because both Westfield and Allstate acknowledge a “duty” to defend an insured under their respective policies, the question that comprises the focus of this appeal is how to allocate the costs incurred for providing a defense to Alta. The Michigan Supreme Court provided the methodology to make this determination in *Frankenmuth Mut Ins Co, Inc v Continental Ins Co*, 450 Mich 429, 435-439; 537 NW2d 879 (1995).

To determine how defense costs should be allocated, it is first necessary to determine the nature of each insurer's duty to defend its insured in the circumstances at issue. It is not disputed that Continental and MEEMIC, as insurers of the vehicles involved in single vehicle accidents, are the primary insurers in these cases. Nor do these cases involve “true” excess insurers. “True” excess insurance is analogous to umbrella insurance in that a single insured by specific design layers coverage. The logical rule that we adopt in “true” excess insurance cases is that the “true” excess insurer is liable for defense costs only after the primary insurer is excused under the terms of its policy. [*Id.* at 435-436.]

Of initial importance is the designation or categorization of the insurers and their respective policies in this matter as providing “primary” coverage, “coincidental” excess coverage, or “true” excess coverage. Again, the parties do not dispute that Allstate provided primary coverage. Allstate’s policy clearly indicates that when other insurance is available, “[i]f more than one policy applies on a primary basis to an accident involving your insured auto, [Allstate] will bear our proportionate share with other available liability insurance.” This must be viewed in conjunction with the Allstate policy’s definition of an insured person as an individual using their insured automobile under the policy and “[a]ny other person or organization liable for the use of an insured auto provided . . . the auto is not owned or hired by this person or organization.” In turn, Westfield’s commercial liability policy indicates its provision of excess coverage, by stating, in relevant part: “For any covered ‘auto’ you own, this Coverage Form provides primary insurance. For any covered ‘auto’ you don’t own, the insurance provided by this Coverage Form is excess over any other collectible insurance.” This Westfield policy also states:

When this Coverage Form and any other coverage Form or policy covers on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the Limit of Insurance of our Coverage Form bears to the total of the limits of all the Coverage Forms and policies covering on the same basis.

The Court has defined “true excess coverage” as occurring “where a single insured has two policies covering the same loss, but one policy is written with the expectation that the primary will conduct all of the investigation, negotiation and defense of claims until its limits are exhausted. . . .” *Frankenmuth Mut Ins Co, Inc*, 450 Mich at 436 n 4 (internal quotations omitted). An additional distinguishing characteristic of a true excess insurer is that its “rates . . . are ascertain[ed] only after the excess insurer has given due consideration to the terms of the underlying primary policies.” *Id.* The circumstances of this case demonstrate that Westfield’s umbrella policy comprises true excess insurance.

In contrast, “[t]he defining character of a ‘coincidental excess’ policy is that liability attaches immediately upon the occurrence of the insured event.” *Bosco v Bauermeister*, 456 Mich 279, 295-296; 571 NW2d 509 (1997). In this instance, Westfield’s commercial liability policy attached at the time of the accident to defend its insured Alta. Allstate’s obligation with regard to Alta was not triggered until Kalabat amended her complaint to allege vicarious liability rather than owner liability. As noted in *Bosco*, “[a]s soon as the insured experiences the bodily injury or property damage described in the policy language, the carrier’s liability for those losses under the policy attaches.” *Id.* at 296. When Kalabat amended her complaint, Allstate became the primary insurer in this matter, requiring it to “defend to the limits of its policy and be responsible for the accompanying defense costs.” *Frankenmuth Mut Ins Co, Inc*, 450 Mich at 438.

Rejecting a pro-rata approach for allocation of defense costs, our Supreme Court has determined:

Once it is clear that the additional insurers are not “true” excess insurers, our inquiry must proceed to the terms and conditions of the policies involved. Where the status of the primary insurer is clear, as in these single car accident cases, the primary insurer is liable for the defense and its costs until its limit is paid. Additional insurers who by the terms of their policies also cover some loss arising from the single car accident are coincidental excess insurers. The duty of these coincidental excess insurers may vary depending on the terms of their policies. [*Frankenmuth Mut Ins Co, Inc*, 450 Mich at 437-438.]

The Court has further instructed that it is necessary to reconcile “competing other insurance clauses[.]” *Id.* at 438. And, “where there are disputes regarding the potentially conflicting duties to defend and to bear defense costs between multiple insurers for multiple insureds, we hold that the policies at issue should be honored to the greatest extent possible.” *Id.*

Based on the designations and status of the two insurers, their respective duty to defend is delineated by the language of their policies. *Frankenmuth Mut Ins Co, Inc*, 450 Mich at 438. Both policies indicate a right and duty to defend. The Allstate policy restricts its obligation to defend by permitting termination of the duty “upon our payment of policy limits.” Contrary to the trial court’s ruling, given the status of the respective insurers and the language of their policies, Allstate’s obligation to defend ended when its liability equaled the maximum of its policy limits. Allstate’s policy limit defined when its obligation to defend terminated, not the amount it was obligated to provide for defense of its insureds under the policy by stating: “Our obligation to defend an insured person may be terminated upon our payment of policy limits.” Consequently, while Allstate is not necessarily obligated to provide all defense costs incurred by Westfield, there must be a determination of the point at which Allstate’s maximum liability of \$100,000 was attained and a calculation of defense costs incurred to that point. In such a calculation, costs incurred by Westfield in defending Alta until the time the Allstate policy was triggered by Kalabat’s amendment of her complaint to plead vicarious liability rather than owner liability must be excluded. In addition, the trial court overlooked a provision in the Allstate policy that when it undertakes to defend an insured person it will pay “court costs for defense.” Such costs should be incorporated in any determination or award of reimbursable defense costs.

We affirm the trial court's determination of Allstate's liability for defense costs, but reverse on the limitation of liability premised on the limit of the Allstate policy \$100,000 benefit and remand for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ William C. Whitbeck

/s/ Michael J. Riordan