IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

PROGRESSIVE EXPRESS INSURANCE COMPANY,

Appellant,

v.

Case No. 5D19-1967

ROBERT FERRIS, NORMA FERRIS, AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Appellees.

_____/

Opinion filed July 24, 2020.

Appeal from the Circuit Court
for Brevard County,
Charles J. Roberts, Judge.

Brooke Gaffney and Jeffrey E. Bigman, of Smith Bigman Brock, PA, Daytona Beach, for Appellant.

N. John Hedrick, Jr. and Gregory J. Donoghue, of Law Offices of Donoghue & Associates, Melbourne, for Appellees Robert Ferris and Norma Ferris.

Warren Kwavnick, of Cooney Trybus Kwavnick Peets, Ft. Lauderdale, for Appellee State Farm Mutual Automobile Insurance Company.

EDWARDS, J.

This appeal answers some important, but not intriguing, questions regarding the priority of uninsured/underinsured motorist ("UM") coverage provided by two insurers with conflicting UM "other insurance" clauses. Appellant Progressive Express Insurance Company correctly argues that the trial court erred by inappropriately substituting defined terms from other parts of Progressive's policy for unambiguous, defined terms and conditions specific to the other insurance clause in the UM provisions. Progressive also correctly asserts that the trial court misconstrued the word "may" in section 627.727(9)(b) and (c), Florida Statutes (2019), as mandatory, rather than permissive. The unambiguous language of the two policies and the statute, combined with well-settled insurance law, confirms that the UM coverage provided by the policy of Appellee State Farm Mutual Automobile Insurance Company is primary. Accordingly, we reverse and remand for entry of an amended final judgment.

Appellee Robert Ferris was allegedly injured in an automobile accident caused by an uninsured motorist. Mr. Ferris was driving a vehicle owned by Ferris Auto Repair, LLC, and insured by Progressive's policy, which identifies "Ferris Auto Repair" and "Roger and Sons Auto" as the only named insureds. However, Progressive's policy provides UM coverage to any person occupying the insured automobile. State Farm issued an automobile policy which identifies Appellee Norma Ferris, Mr. Ferris' wife as the named insured, and provides UM coverage for Mr. Ferris as a resident relative of Mrs. Ferris. The parties agree that both policies provide UM coverage to Mr. and Mrs. Ferris; however, they disagree over which policy pays first.

Both policies have other insurance clauses within the section of each policy's UM provisions, which in general terms state how coverage will be prioritized or shared if more

than one policy provides UM coverage. The policies have conflicting "other insurance" or excess UM clauses. Because insurance policies are contracts, our review of the summary final declaratory judgment is de novo. *See State Farm Auto. Ins. v. Lyde*, 267 So. 3d 453, 458 (Fla. 2d DCA 2018). "If the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as it was written." *Travelers Indem. Co. v. PCR, Inc.*, 889 So. 2d 779, 785 (Fla. 2004) (citations omitted). Accordingly, we begin by examining each policy's other insurance or excess UM clause in detail.

Progressive's other insurance clause found in that section of its policy that provides UM coverage reads as follows:

> OTHER INSURANCE
> Any insurance **we** provide shall be excess over any other uninsured or underinsured motorist coverage, except for **bodily injury** to **you** and, if the named insured is a natural person, a **relative** when **occupying** an **insured auto** or **temporary substitute auto.**
>
> We will not pay for any damages which would duplicate any Payment made for damages under other insurance.

According to Progressive's policy, the words in bold type in its other insurance clause are defined terms. According to Progressive's UM provisions, "**we**" means Progressive and "**you**" is defined as "the named insured on the declarations page" which are the two corporate entities identified above. Progressive's other insurance clause is a classic example of a pure excess clause, which provides only one exception which clearly does not apply here. While it would seem obvious, the reason the exception does not apply is because **you** (the named insureds) are corporations that cannot suffer bodily injury or have relatives. Rather than looking to the specific language above, the trial court

relied upon the Progressive policy's definition, found elsewhere, of **insured**; however, that was inappropriate because the term **insured** does not appear anywhere in the UM other insurance clause. Using inapplicable terms to analyze insurance coverage is like trying to solve a math problem using the wrong equation. "Courts may not 'rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties.'" *Intervest Constr. of Jax, Inc. v. Gen. Fid. Ins.*, 133 So. 3d 494, 497 (Fla. 2014) (quoting *State Farm Mut. Auto. Ins. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986)).

State Farm's UM other insurance clause states that:

> **If Other Uninsured Motor Vehicle Coverage Applies**
>
> . . . .
>
> 2. The Uninsured Motor Vehicle Coverage provided by this policy applies as primary coverage for an ***insured*** who sustains ***bodily injury*** while ***occupying your car***.
>
> . . . .
>
> 3. Except as provided in 2. above, the Uninsured Motor Vehicle Coverage provided by this policy applies as excess coverage
>
> a. If:
>
> (1) this is the only vehicle policy issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** that provides Uninsured Motor Vehicle coverage which applies to the Accident as excess coverage; and
>
> (2) uninsured motor vehicle coverage provided by one or more sources other than the ***State Farm Companies*** also applies as excess coverage for the same accident,
>
> then ***we*** will pay the proportion of damages payable as excess that ***our*** applicable limit bears to the sum of ***our*** applicable limit and the limits of all other uninsured motor vehicle coverage

that apply as excess coverage.

. . . .

The parties agree that paragraph 2., above, does not apply because Mr. Ferris was occupying a company car rather than one owned by his wife. The parties further agree that paragraph 3.(a)(1) applies as Mrs. Ferris' State Farm policy is the only policy issued by State Farm to her or Mr. Ferris that provides UM coverage. While State Farm disagrees, it is obvious that paragraph 3.(a)(2) also applies because Progressive's other insurance UM provision makes Progressive's UM insurance excess coverage. Thus, State Farm's policy provides what is known as pro rata excess coverage, which means that it will contribute to satisfying a UM claim by paying its fractional share based upon all the UM coverage applicable to the claim.

In a scenario where two policies provide coverage for the same loss, one of which is pro rata and the other is pure excess, courts give effect to the pure excess provision. *See, e.g.*, *Progressive Am. Ins. v. Nationwide Ins.*, 949 So. 2d 293, 294 (Fla. 1st DCA 2007) (citing *Demshar v. AAACon Auto Transp., Inc.*, 337 So. 2d 963, 965 (Fla. 1976)). Thus, contrary to the trial court's conclusion, State Farm's pro rata policy is primary and Progressive's is excess.

The trial court also justified its erroneous conclusion that Progressive's UM coverage was primary by a misinterpretation of section 627.727(9). The trial court mistakenly concluded that the statute mandated insurers to offer a particular form of UM insurance that explicitly dealt with priority of coverage in a specific way. The relevant portions of that statute's provisions read as follows:

> (9) Insurers **may** offer policies of uninsured motorist coverage containing policy provisions, in language approved by the office,

> establishing that **if the insured accepts this offer**:
> . . . .
>
> (b) If at the time of the accident the injured person is occupying a motor vehicle, the uninsured motorist coverage available to her or him is the coverage available as to that motor vehicle.
>
> (c) If the injured person is occupying a motor vehicle which is not owned by her or him or by a family member residing with her or him, the injured person is entitled to the highest limits of uninsured motorist coverage afforded for any one vehicle as to which she or he is a named insured or insured family member. Such coverage shall be excess over the coverage on the vehicle the injured person is occupying.

§ 627.727(9), Fla. Stat. (emphasis added).

"The word 'may' when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word 'shall.'" *Progressive Select Ins. v. Fla. Hosp. Med. Ctr.*, 236 So. 3d 1183, 1187 (Fla. 5th DCA 2018) (quoting *Fla. Bar v. Trazenfeld*, 833 So. 2d 734, 738 (Fla. 2002)). Therefore, section 627.727(9) permits, but does not require, an insurer to offer UM coverage with that primary and excess scheme. It is clear that Progressive's policy did not contain that optional type of UM other insurance provisions; therefore, that statutory provision has no application to this case. The trial court erred in considering those inapplicable statutory priority provisions.

Accordingly, we conclude that by applying the law to the unambiguous provisions of both policies' UM sections, State Farm's UM coverage is primary and Progressive's is excess for this particular claim. We reverse and remand for entry of an amended final judgment making that declaration of respective priority of UM coverage.

REVERSED and REMANDED with INSTRUCTIONS.

COHEN and LAMBERT, JJ., concur.