STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY SUDUL, TERESA SUDUL and BERNARD SUDUL,

Plaintiffs/Counter Defendants-Appellees,

v

COREGIS INSURANCE COMPANY,

Defendant/Counter Plaintiff/Cross Plaintiff-Appellant,

and

CITY OF HAMTRAMCK, GENERAL STAR INDEMNITY COMPANY, and NORTHFIELD INSURANCE COMPANY,

Defendants/Cross Defendants,

and

WILLIAM ROBINSON and DAVID DONNELL,

Defendants/Cross Defendants-Appellees.

UNPUBLISHED
May 25, 2001

No. 214715
Wayne Circuit Court
LC No. 98-803857-CZ

Before: Hoekstra, P.J., and Cavanagh and Gage, JJ.

PER CURIAM.

Defendant Coregis Insurance Company (Coregis) appeals as of right the trial court's grant of summary disposition in favor of plaintiffs and codefendants Robinson and Donnell (the insureds) in this declaratory judgment action. We affirm.

This action arises as a consequence of a jury verdict in favor of plaintiffs after finding that two Hamtramck police officers, the insureds, committed an assault and battery and violated

plaintiff Anthony Sudul's civil rights, in violation of 42 USC 1983, during his arrest in October 1991.[1] At the time of the incident that gave rise to the underlying suit, the City of Hamtramck had three commercial insurance policies in effect regarding law enforcement liability: (1) a primary policy issued by Northfield Insurance Company (Northfield); (2) a "first level" excess liability policy issued by General Star Insurance Company (General Star); and (3) a "second level" excess liability policy issued by International Insurance Company, the rights and obligations of which were assumed by Coregis through novation, with a limit of $3 million. Northfield and General Star entered into a settlement agreement with plaintiffs for policy limits. Coregis, however, contests liability under its policy.

The trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Although the trial court did not specify under which subsection of MCR 2.116 it ruled, the trial court relied on facts outside the pleadings; therefore, this Court will treat all issues on appeal as brought pursuant to MCR 2.116(C)(10). *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). When reviewing a motion under MCR 2.116(C)(10), this Court reviews the documentary evidence to determine whether a party is entitled to judgment as a matter of law or whether a genuine issue of material fact exists. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Construction and interpretation of an insurance contract are issues of law reviewed de novo on appeal. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

Coregis first argues on appeal that it had no duty to indemnify the insureds under the Coregis umbrella policy because there was no "occurrence," as defined by the policy, since the insureds' actions were wilful, intentional, and malicious.

Coregis' commercial umbrella policy included, in general, that coverage would be provided for sums in excess of the "Retained Limit" that the "Insured" was obligated to pay as damages for bodily and personal injuries caused by an "occurrence." An "occurrence" was defined by the policy, in general, as "an accident." However, Coregis' insurance policy also contained the following endorsement:

> Professional Liability Limitation
>
> With respect to "professional liability" arising out of any "insured's" activities as a(n) law enforcement officers, emergency medical technicians and firemen, this policy is limited to the coverage provided in the "underlying insurance".
>
> If coverage is not provided by "underlying insurance", coverage is excluded from this policy.
>
> "Professional liability", as used in this endorsement, means liability arising out of any "insured's" profession as stated above and caused by the rendering or failure to render "professional services" for others: including "professional services" of

[1] Our opinion in that case is also being issued today.

> any employee of any "insured" or of any other person for whom any "insured" is legally liable.

Coregis argues that the professional liability limitation endorsement was not triggered until an "occurrence" was established.

An insurance policy is a contract that should be read as a whole to determine what the parties' intended to agree on. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). To determine whether Coregis must indemnify the insureds, we examine the language of the applicable insurance policy and interpret its terms in accordance with well-established Michigan principles of construction. See *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). An insurance policy must be enforced in accordance with its terms. *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 207; 476 NW2d 392 (1991). Further, if there is a conflict between the terms of an endorsement and the form provisions of an insurance contract, the language of the endorsement controls. See *Royce v Citizens Ins Co*, 219 Mich App 537, 544; 557 NW2d 144 (1996); *Hawkeye-Security Ins Co v Vector Construction Co*, 185 Mich App 369, 380; 460 NW2d 329 (1990).

In this case, the professional liability limitation endorsement was the operative provision with regard to triggering Coregis' coverage obligation for amounts in excess of the underlying law enforcement liability policy. The endorsement clearly indicated that coverage would be provided in conformity with the coverage provided in the "underlying insurance." The provision is unambiguous and expressly references and limits its coverage to those instances in which coverage was provided by the "underlying insurance." The "underlying insurance" in this case was Northfield's law enforcement professional liability policy. Therefore, if coverage was provided by the Northfield policy, and the limits of such policy were exhausted, Coregis became liable for amounts in excess of the Northfield policy limits. The endorsement modified the general policy and its terms control. See *Royce*, *supra*; *Hawkeye-Security Ins Co*, *supra*.

Next, Coregis argues that, if Northfield's policy controls, the requirements of Northfield's policy were not met because there was no "wrongful act," i.e. negligent act, that triggered Northfield's coverage.

Coregis' policy contained an "other insurance" clause that limited its coverage obligations to that of a true excess secondary insurer, i.e. liability only attached once the limits of all underlying insurance were exhausted. See *Bosco v Bauermeister*, 456 Mich 279, 295-296; 571 NW2d 509 (1997). In this appeal, Coregis is contesting Northfield's liability under Northfield's own policy. However, Northfield did not contest coverage under its policy and, in fact, paid its policy limits and was discharged from further responsibility. Coregis cites no authority in support of its asserted right to challenge the existence and scope of coverage or interpretation of the underlying insurer's policy. Further, the plain language of Coregis' professional liability limitation endorsement indicated that the "policy is limited to the coverage provided in the 'underlying insurance.' If coverage is not provided by 'underlying insurance,' coverage is excluded from this policy." Conversely, reasonable interpretation of the contractual language leads to the conclusion that, when coverage *is* provided by the underlying insurance, coverage *is* provided by the Coregis policy. An insurer is charged with knowledge of the provisions of its insurance contract. See *Community Nat'l Bank v Michigan Basic Property Ins*

Ass'n, 159 Mich App 510, 518; 407 NW2d 31 (1987). Consequently, Coregis was bound, through its own terms, by the coverage decisions of the underlying insurer, Northfield. Therefore, we need not address Coregis' argument that coverage under the Northfield policy was precluded by Northfield's "malicious acts" exclusionary provision.

Coregis also argues that the acts for which the insureds were found liable were not "professional services" within the contemplation of Coregis' professional liability limitation endorsement and that insurance coverage in such instances is against public policy. These issues have not been properly presented for appeal because Coregis has failed to appropriately argue the merits of the issues and has failed to provide apposite, supporting authority for its position; therefore, the issues are deemed abandoned on appeal. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Thomas v McGinnis*, 239 Mich App 636, 649; 609 NW2d 222 (2000).

Next, Coregis argues that it had no duty to indemnify the insureds because the notice provision of the Coregis policy was violated.

The Coregis policy contained the following condition:

> (2) If a "Claim" is made or "Suit" is brought against any "Insured" that is likely to involve this policy, you must notify us, in writing, of the "Claim" or "Suit" as soon as possible.

It is a well-established principle of contract law that one who seeks the performance of a contractual obligation must prove that all conditions precedent have been satisfied, including the notice requirement of an insurance policy. See *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998).

Coregis argues that it did not receive the requisite notice because it was not notified of its potential liability until after the completion of the second trial. However, the primary purpose served by the notice provision is to give the insurer an opportunity to investigate the facts and circumstances affecting the question and extent of liability. See *Wehner v Foster*, 331 Mich 113, 119; 49 NW2d 87 (1951). Consequently, when an insurer attempts to disclaim liability because of an alleged failure to comply with the notice provision, the insurer must establish actual prejudice to its position. *Koski*, *supra*. A presumption of prejudice does not arise simply by observing the length of the delay in providing notice. *Id*.

As discussed earlier, Coregis' liability under its umbrella insurance policy did not attach until the limits of all underlying insurance were exhausted. As a true excess insurer, Coregis expected the primary insurer to conduct the investigation, negotiation, and defend the claims until the primary insurer's limits were exhausted. See *Bosco*, *supra* at 295. Confirmation of Coregis' expectation is illustrated by the express terms of its policy that included the following provision, in pertinent part:

> (1) We shall have the right and duty to defend any "Claim" or "Suit" seeking damages covered by the terms and conditions of this policy when:

> (a) the applicable limits of insurance of the underlying insurance policies set forth in Schedule A and to be maintained by you in accordance with Condition M of this policy (the "Underlying Insurance"), plus the applicable limits of other insurance have been exhausted by payments. . . .

Under the terms of its notice provision, notification of Coregis' potential liability was to be provided to Coregis when it appeared "likely" that its policy would become "involved." There were two other insurance policies with limits of $500,000 each that were available to cover the insureds' liability if the jury returned a verdict for plaintiffs. The first trial, which included the City of Hamtramck as a defendant, resulted in a verdict for the plaintiffs in an amount well within the policy limits of the two priority insurers. Coregis has not articulated any reason to support its assertion that it "appeared likely" that its policy would become "involved" either from the inception of the case, throughout the duration of the case, or until its ultimate conclusion. Further, Coregis has not provided any support for its assertion of prejudice arising merely from its obligation to pay a portion of the jury verdict, a risk it had contractually assumed and for which it was compensated. In sum, Coregis received the requisite notice in conformity with its policy. However, even if there was a breach of the notice provision, Coregis has not established that it suffered actual prejudice to its position; therefore, Coregis may not disclaim its liability under the policy.

Finally, Coregis argues that the insureds' breached the cooperation clause contained in its insurance policy. We decline to review this issue because Coregis has not properly presented this issue for appeal, having given only cursory treatment to the issue and has failed to cite authority in support of its argument. *Wilson, supra*; *Community Nat'l Bank, supra* at 520-521.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Hilda R. Gage