STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of BRET DOUGLAS ARNOLD, Deceased, and MEGAN ELIZABETH HERR, Deceased.

JOHN ARNOLD, Personal Representative of the ESTATE of BRET DOUGLAS ARNOLD, Deceased, and JANE HERR, Personal Representative of the ESTATE OF MEGAN ELIZABETH HERR,

Plaintiffs-Appellants,

v

AUTO-OWNERS INSURANCE COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
September 16, 2003

No. 240513
Kent Circuit Court
LC No. 00-001168-CK

Before: Fitzgerald, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Plaintiff estates appeal by delayed leave granted the order granting summary disposition in favor of defendant insurance companies pursuant to MCR 2.116(I)(2) upon a finding that the settlements received by plaintiffs from other insureds who shared responsibility for the deaths of plaintiffs' teenage decedents completely set-off defendant insurance companies' obligations to pay uninsured motorist benefits under their respective policies. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On March 7, 1999, the traffic on westbound I-196 came to a stop near the Ottawa Avenue entrance ramp as a result of the conduct of Stephen Adams, who was driving his motor vehicle eastbound in the westbound lanes of I-196. The motor vehicle operated by plaintiff's decedent Bret Arnold was stopped near the end of a line of westbound vehicles that had stopped as a result of the wrong-way driving of Adams. Plaintiff's decedent Megan Herr was a passenger in Arnold's vehicle. After Arnold stopped his vehicle, a motor vehicle operated by intoxicated

driver Kerry Brougham and traveling westbound on I-196 slammed into the rear of Arnold's vehicle, causing Arnold's vehicle to burst into flames and killing Arnold and Herr.

The Kent County prosecutor charged both Adams and Brougham with manslaughter. Brougham pleaded guilty, and a jury convicted Adams as charged. Additionally, both were named in a wrongful death and dram shop suit, as were Brougham's mother (the owner of the vehicle Brougham was driving), a sports bar, and Chrysler (the manufacturer of the vehicle Arnold was driving). Eventually, this suit was settled against all defendants except Adams, with Arnold's and Herr's survivors each being paid a combined total of $315,000. The settlement documents provide that the payments are exclusively for the survivors' loss of society and companionship. Each estate also took a default judgment against Adams in the amount of $1,000,000 exclusively for Arnold's and Herr's conscious pain and suffering. Adams is not insured, however.

The parents of both Arnold and Herr had no-fault insurance policies that included uninsured motorist coverage. Defendant Auto-Owners insures the Arnolds and their policy provides uninsured motorist coverage in the amount of $250,000 per person. Defendant State Farm insures the Herrs and their policy provides uninsured motorist coverage in the amount of $100,000 per person. Both policies provide for offsets against this coverage. The Arnold and Herr families filed claims for uninsured motorist benefits under these policies. Defendants denied their claims as premature pending the outcome of the wrongful death and dram shop suit. Plaintiffs then commenced the present suit.

Once the wrongful death and dram shop suit was resolved, plaintiffs moved for summary disposition, arguing that the manner in which the suit was settled against all of the defendants but Adams did not allow for a set-off of the settlement amounts against the limits of the uninsured motorist benefits and, therefore, that plaintiffs were entitled to payment of the policy limits. Defendants responded that they were not obligated to pay any uninsured motorist benefits once the settlement amounts were offset as required by the set-off provisions in the respective policies. Following a hearing on plaintiffs' motion for summary disposition, the trial court denied plaintiffs' motion and granted summary disposition in favor of defendants.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Farm Bureau Mutual Ins Co v Buckallew*, 246 Mich App 607, 611; 633 NW2d 473 (2001). Additionally, the construction and interpretation of an insurance contract is a question of law that is also subject to de novo review. *Id.* at 611-612.

This Court interprets an insurance contract by reading it as a whole and according its terms their plain and ordinary meaning. *Buckallew, supra* at 611. The terms of an insurance policy are to be enforced as written when no ambiguity is present. *Id.* A contract is ambiguous when its words may be reasonably understood in different ways. *Raska v Farm Bureau Mutual Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982). If a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation, it may not be said to be ambiguous. *Id.* This Court will construe a policy containing ambiguous terms in favor of the insured and against the insurer. *Buckallew, supra* at 612.

Paragraph 4 of the uninsured motorist coverage rider to defendant Auto-Owners' policy provides in pertinent part:

> **We** will pay compensatory damages for **bodily injury** up to the Limit of Liability stated in the Declarations as follows:
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> * * *
>
> d. The amount we pay will be reduced by any amounts paid or payable for the same **bodily injury**:
>
> * * *
>
> (3) by or on behalf of any person or organization who may be legally responsible for the **bodily injury**.

The policy defines the term "bodily injury" as "physical injury, sickness or disease sustained by a person including resulting death of that person." Loss of society and companionship do not constitute bodily injuries for purposes of the Auto-Owners' insurance contract. See *State Farm Mutual Automobile Ins Co v Descheemaeker*, 178 Mich App 729, 732; 444 NW2d 153 (1989) (loss of consortium, society and companionship are not bodily injuries where the policy defines bodily injury as "bodily injury to a person and sickness, disease or death results from it"). Although the claim for loss of society and companionship is a separate claim with separate injuries, the claim arises from the same bodily injury as the claim for the decedents' conscious pain and suffering. The claim is therefore derivative and is subject to the same policy limitations imposed on the coverage for the bodily injury. *Id.* at 732-733.

Defendant State Farm's uninsured motorist coverage provides in pertinent part:

> 2. Any amount payable under this coverage shall be reduced by any amount paid or payable to or for the insured:
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> a. by or for any person or organization who is or may be held legally liable for the bodily injury to the insured.

The State Farm policy requires the coverage amount to be reduced by any amount paid "to or for the insured . . . by any person or organization who is . . . legally liable for the bodily injury to the insured." This language clearly indicates that the set-off follows from the liability for the bodily injury. Who sustained the injury is irrelevant for set-off purposes. Accordingly, it does not matter that the settlement compensates the survivors of plaintiffs' decedents for their losses or that the default judgment compensates plaintiffs' decedents. Instead, what does matter for purposes of the offset is who is liable. Here, the Broughams, the sports bar, and Chrysler all admitted some legal liability for the bodily injuries sustained by entering into the settlements. Under the clear terms of the State Farm policy, it is the liability of these defendants, or their potential liability, which triggers the offset, not the nature of the settlement payments made.

Plaintiffs also contend that even if the set-off provisions apply, the set-off must be applied against the total damages to each estate, not to the limits of coverage. Whether the trial court correctly determined that the settlement total was to be set-off against the liability limits of the insurance policies and not against the million dollar default judgment depends on the language of each insurance contract.

In *Mead v Aetna Casualty & Surety Co*, 202 Mich App 553, 554-555; 509 NW2d 789 (1993), the sole question before this Court was whether the defendant insurance company was entitled to offset the amount of monies received by the plaintiffs from other sources against the underinsured motorist coverage limits rather than against the total amount of damages. To answer this question, this Court looked to the following policy language:

> Any amounts otherwise payable for damages under this coverage shall be reduced by:
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> 1. All sums paid because of the bodily injury by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under the Liability Coverage of this policy . . . . [*Id.* at 555.]

This Court concluded that this language unambiguously indicated that the offset was to be against the coverage limits, and not against the total amount of damages, explaining:

> The amount that is "otherwise payable . . . under this coverage" refers to, in this case, the policy limits of $100,000. That amount must, therefore, be reduced by the sums paid from other sources. This Court interpreted similar clauses in *Parker v Nationwide Mutual Ins Co*, 188 Mich App 354; 470 NW2d 416 (1991), and *Schroeder v Farmers Ins Exchange*, 165 Mich App 506; 419 NW2d 9 (1987), reaching similar results. As the Court in *Schroeder* noted, this type of insurance substitutes for residual liability coverage and benefits paid under another policy may be set off against the benefits paid under an uninsured or underinsured policy. *Id.* at 509. [*Mead, supra* at 555.]

In *Michigan Mutual Liability Co v Karsten*, 13 Mich App 41, 50-52; 163 NW2d 670 (1968), this Court concluded that the plaintiff insurance company's uninsured motorist liability should be determined by subtracting the settlement amount from the total amount of damages suffered, but with a maximum liability of the insurance company not to exceed the policy limit of $10,000. The Court reached this conclusion after construing the following limits of liability provisions in the parties' insurance contract:

> (a) The limit of liability for uninsured motorists coverage stated in the declarations as applicable to 'each person' is the limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting each person, the limit of liability stated in the declarations as applicable to 'each accident' is the total limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by two or more persons as the result of any one accident.
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> (b) *Any amount payable* under the terms of this Part because of bodily injury sustained in an accident by a person who is an insured under this Part shall be reduced by

> (1) all sums paid on account of such bodily injury by or on behalf of (i) the owner or operator of the uninsured automobile and (ii) any other person or organization jointly or severally liable together with such owner or operator for such bodily injury including all sums paid under Coverage A, and
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> (2) the amount paid and the present value of all amounts payable on account of such bodily injury under any workmen's compensation law, disability benefits law or any similar law. [*Id*. at 50-51 (italics in original).]

State Farm's policy, like the policy in *Mead*, specifically references amounts "payable under this coverage." The Court in *Mead* found this language to clearly refer to the policy limits and, hence, to clearly evidence the intent that the policy limits are to be reduced by the sums paid from other sources. In light of the similarity of the language employed in State Farm's insurance contract and the insurance contract construed in *Mead*, the trial court correctly determined that the set-off was to be applied against limits of the State Farm policy.

The Auto-Owners' policy does not contain the "under this coverage" language. However, paragraph 4(d) contains the language "[t]he amount **we** pay." This phrase relates back to the first sentence of paragraph 4 where the amount Auto-Owners will pay is specified as "up to the Limit of Liability stated in the Declarations." The limit of liability stated in the declarations for residual uninsured motorist coverage is $250,000 per person and $500,000 per occurrence. Reading the first sentence of paragraph 4 together with the text of subparagraphs d(3), wherein the offset is detailed, reveals that the settlement offset shall be against the coverage limits and not against the total amount of the damages.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard Allen Griffin
/s/ Henry William Saad