STATE OF MICHIGAN

COURT OF APPEALS

JAMES RIVER INSURANCE COMPANY,

Plaintiff-Appellant,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

UNPUBLISHED
November 18, 2021

No. 355140
Wayne Circuit Court
LC No. 19-017142-NF

Before: GLEICHER, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

This matter concerns the relative priority of two insurers, plaintiff James River Insurance Company (James River) and defendant Citizens Insurance Company of America (Citizens), to provide underinsured motorist damages in excess of $250,000 in an underlying no-fault action. The trial court granted summary disposition in favor of Citizens and denied summary disposition in favor of James River. James River appeals by leave granted,[1] contending that the trial court disregarded the plain language of the two insurance policies at issue. We affirm.

I. BACKGROUND

At least for purposes of this appeal, the facts of the underlying no-fault action are undisputed. Joseph Bolton was driving his personal vehicle as a rideshare driver for Uber. Tristan Goodwin, driving a truck owned by Dale Goodwin,[2] turned into Bolton's path and caused an accident. Dale's truck was covered by a no-fault insurance policy issued by Progressive, and Tristan was covered by that policy as a resident relative. The Progressive policy provided bodily

[1] *James River Ins Co v Citizens Ins Co of Am*, unpublished order of the Court of Appeals, entered December 9, 2020 (Docket No. 355140).

[2] We will refer to the individual Goodwins by their first names where necessary to distinguish between them.

injury liability coverage with limits of $100,000 per person. Dale also had a homeowners' insurance policy through Citizens, which also covered Tristan. The Citizens policy included a "Personal Umbrella Liability Supplement" that provided liability coverage as "excess insurance over any other insurance available to an 'insured.' " However, it required Dale to have maintained no-fault insurance with a minimum liability coverage of $250,000, and would only cover damages above that amount. Meanwhile, James River insured Uber[3] under a "business auto" policy, which insured Uber drivers when those drivers were driving their personal vehicles; neither party disputes that Bolton was covered by that policy. The James River policy provided coverage of up to $1,000,000 for, in relevant part, injuries arising from underinsured motor vehicles if "the limit of any applicable liability bonds or policies ha[d] been exhausted by payment of judgments or settlements."

James River commenced this action for declaratory judgment against Citizens, requesting the trial court declare Citizens liable for any judgment above $250,000[4] entered against the Goodwins in the underlying no-fault action. This matter was temporarily consolidated with the underlying action. James River and Citizens each sought summary disposition, generally arguing that their own policy would be liable only if no other insurance was liable, and further arguing that the other policy was indeed liable. Without holding a hearing, the trial court granted summary disposition in favor of Citizens, and it dismissed James River's declaratory action. The trial court's only explanation was, "James River first in Priority." James River, on reconsideration, asked the trial court, at a minimum, to issue a written opinion explaining the basis for its decision, which the trial court denied without explanation. Thereafter, James River filed for leave to appeal with this Court, which we granted. *James River Ins Co v Citizens Ins Co of Am*, unpublished order of the Court of Appeals, entered December 9, 2020 (Docket No. 355140).[5]

II. STANDARDS OF REVIEW

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary

[3] Uber does business under the name "Rasier LLC, Rasier-CA LLC, Rasier-DC LLV, and Rasier-PA LLC."

[4] James River asserts, seemingly accurately, that the parties never litigated who was liable for the "gap" above the $100,000 limit of the Progressive policy and below the $250,000 threshold at which the Citizens policy would theoretically become available. However, although that issue may not technically be before us, it appears tacitly undisputed that Citizens does not even potentially have any liability until some other source has paid a minimum of $250,000. We therefore presume, although we do not decide, that James River is liable for the "gap."

[5] With its leave application, James River also moved this Court for peremptory reversal, which this Court denied. See *id*.

disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120.

Interpretation of contracts or contractual clauses is reviewed de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Interpretation of statutes is likewise reviewed de novo, with the goal to give effect to the intent of the Legislature as expressed in plain and unambiguous language. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). Court rules are construed in the same manner as statutes. *Grievance Administrator v Underwood*, 462 Mich 188, 193; 612 NW2d 116 (2000).

Although we review de novo any questions of law in a declaratory judgment action, the trial court's decision whether to grant declaratory relief is reviewed for an abuse of discretion. *Guardian Environmental Services, Inc v Bureau of Constr Codes and Fire Safety, Dep't of Labor and Economic Growth*, 279 Mich App 1, 5-6; 755 NW2d 556 (2008). An abuse of discretion occurs when the trial court chooses an outcome outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

III. FINDINGS AND CONCLUSIONS ON THE RECORD

James River argues that the trial court erred under by failing to articulate findings of fact and conclusions of law on the record. We disagree. Pursuant to MCR 2.517(A)(4), "Findings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule." No such requirement is imposed by MCR 2.116(C). We agree that it would be desirable to have some insight into the trial court's reasoning, and certainly it would be more respectful to the parties and to this Court for the trial court to offer some kind of explanation. However, as noted, summary disposition is reviewed de novo by this Court, and we generally affirm a correct result even if the trial court's reasoning was wrong, or even if the trial court did not rely on the correct subrule. *Mulholland v DEC Internat'l Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989); *Spiek v Michigan Dep't of Transportation*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998).

James River cites *Nicpon v Nicpon*, 9 Mich App 373, 378; 157 NW2d 464 (1968),[6] for the proposition that " '[w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong.' " *Id.*, quoting *United States v Chicago, Milwaukee, St Paul & Pacific Ry Co*, 294 US 499, 511; 55 S Ct 462; 79 L Ed 1023 (1935). Of course, that would likely be true if we were called upon to review a trial court's findings of fact or exercise of discretion. However, none of the parties' disputes in this matter concern facts, but rather only the interpretation and ramifications of their contracts. As discussed, those are also reviewed de novo. To the extent the trial court exercised any discretion in declining to enter a declaratory judgment in favor of James River, it did so as a mechanical consequence of granting summary disposition in favor of Citizens. We find James River's frustration with the trial court's brevity to be reasonable, but the trial court did not err.

[6] James River also cites several unpublished cases, which are not binding.

IV. INSURER PRIORITY

James River argues that Citizens was first in priority to pay for any liability beyond $250,000. We disagree.

"[I]nsurance policies are subject to the same contract construction principles that apply to any other species of contract." *Rory*, 473 Mich at 461. "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Id*. at 464. "The primary goal in the construction or interpretation of any contract is to honor the intent of the parties[.]" *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003) (quotation marks and citation omitted). The courts must "give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp*, 468 Mich at 468. Thus "policies should be read as a whole and the negotiated intent of the parties should not be nullified." *Bosco v Bauermeister*, 456 Mich 279, 302; 571 NW2d 509 (1997). "If the contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties' intent as a matter of law." *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

Neither party's policy is *strictly* first in priority, because Progressive's policy is liable for the first $100,000. We presume, although we do not decide, that James River is liable for the next $150,000.[7] The issue is which insurer is liable for any damages beyond $250,000. Both policies contain "other insurance" clauses, which "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." *St Paul Fire & Marine Ins Co v American Home Assurance Co*, 444 Mich 560, 564; 514 NW2d 113 (1994). James River's policy provides, in relevant part, that it will pay underinsured motorist benefits only if "[t]he limit of any applicable liability bonds or policies has been exhausted." Citizens's policy provides, in relevant part, that it will only pay "excess insurance over any other insurance available to an 'insured.' "

Both clauses are best characterized as "excess clauses," which are a subcategory of "other insurance" clauses that "limit[] the insurer's liability to the amount of loss in excess of the coverage provided by the other insurance." *St Paul Fire & Marine Ins Co*, 444 Mich at 565. Superficially, they appear to conflict, especially because the subtle distinctions between "available" and "applicable" do not have much readily-apparent useful meaning.[8] Courts must attempt "to reconcile competing 'other insurance' clauses where reasonably possible," but if they are truly incompatible and "mutually repugnant," then "the courts should attempt to apportion coverage

[7] See footnote 4.

[8] The word "applicable" generally means appropriate, relevant, or capable of or suitable for being put to practical use. *Merriam-Webster's Collegiate Dictionary (11th ed)*. The word "available" generally means ready or present for immediate use. *Id*. If both policies had been drafted by the same entity, the distinction between the two words might warrant further scrutiny, but as used by two different drafters, they seem to be essentially synonymous in intent.

between the policies in a reasonably equitable manner." *Pioneer State Mut Ins Co v TIG Ins Co*, 229 Mich App 406, 413-414; 581 NW2d 802 (1998).

In *Bosco*, our Supreme Court explained that although the language of a policy was "of greatest import," it was also important to examine the type of policy involved. *Bosco*, 456 Mich at 293. Our Supreme Court explained that,

> a distinct difference exists between "true" excess insurance coverage and excess "other insurance" on the basis of the difference in policy types within the insurance industry, the premiums charged for and risks assumed by the policies, the language of the policies, and the reasonable expectations of all the contracting parties. This difference requires an excess "other insurance" policy to be exhausted before "true" excess insurance policies are required to contribute to a loss. [*Id*. at 281-282.]

The distinction is whether a policy is written with the expectation that some other primary policy will provide all coverage until its limits are exhausted, or whether a policy offers excess coverage when triggered by limited circumstances. *Id*. at 294-295. Our Supreme Court further explained that "the fact that a policy is issued as an umbrella policy at rates reflecting the reduced risk insured indicates the intent that the policy is excess over other excess policies." *Id*. at 290.

When the two policy clauses here are read in context, it is clear that the James River underinsured-motorist policy is intended to be a primary policy that provides excess coverage under limited circumstances, whereas the Citizens umbrella policy is intended to be a truly last-resort policy. The James River policy was clearly intended as a primary policy in general. It is intended to provide underinsured motorist coverage under certain circumstances. It is similar to the policy in *Bosco* that provided coverage for injuries for injuries caused by motor vehicles, with an excess clause under which, if the insurer caused injury through use of a nonowned automobile, then the insurer's coverage would be "excess over any other valid and collectible insurance." *Bosco*, 456 Mich at 285-286, 296. The Citizens policy is a homeowners policy, not an automobile policy, that includes an umbrella policy explicitly stating that its coverage is "excess." It is similar to the umbrella policies in *Bosco* that would provide liability coverage only after certain primary insurance limits had been exceeded. *Id*. at 286. Our Supreme Court considered only the latter to be " 'true' excess coverage" policies, even if the other policy was only available under certain circumstances. *Id*. at 291-296.

From *Bosco*, it follows that James River's policy provides excess "other insurance" coverage and Citizens's policy provides " 'true' excess coverage." Just as the automobile policy in *Bosco* provided excess coverage only under certain circumstances, so too does James River's policy here. James River's policy does not state it is excess over any underlying coverage; it is excess only if a vehicle is *under*insured—rather than uninsured—or if "other collectible uninsured motorist insurance" applies. In contrast, Citizens's policy provided coverage over *any* of the underlying policies listed on its declaration page, and it is expressly an umbrella policy. Indeed, if Dale did not have liability coverage with Progressive, there is no question James River's policy would have been primary. Also, like the automobile policy in *Bosco*, under James River's policy, James River's liability attached on the occurrence of an insured event: bodily injury caused by an accident with a driver of an uninsured or underinsured motor vehicle. Like the umbrella policies in *Bosco*, under Citizen's policy, Citizens's liability did not arise because of the occurrence of any

insured event. Citizens's liability arose only after Dale had exhausted the limits of his underlying insurance.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Amy Ronayne Krause