STATE OF MICHIGAN

COURT OF APPEALS

FARM BUREAU MUTUAL INSURANCE COMPANY,

Plaintiff-Appellee,

v No. 104512

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

Before: Beasley, P.J., and Sawyer and T.J. Foley,* JJ.

PER CURIAM

Defendant, American Community Mutual Insurance Company (American), appeals as of right from an October 19, 1987, judgment requiring it to pay plaintiff, Farm Bureau Insurance Company (Farm Bureau), $55,086.43 reimbursement for medical benefits paid to Randolph Mys for injuries received in an automobile accident.

At the time of the accident, Mys was insured by both Farm Bureau and American. Farm Bureau had issued a no-fault insurance policy to Mys which contained a coordination of benefits clause, providing in part:

> "B. Coordination of Benefits
> "In consideration of the reduction in premium:
> "1. When 'Excess Medical Payments' are indicated in the Declarations, the Company shall not be liable to the extent any Personal Protection Insurance allowable expenses benefits are paid, payable, or required to be provided to or on behalf of the person named in the policy, their spouse or any relative of either domiciled in the same household under the provisions of any valid and collectible:
> "a. individual, blanket or group accident disability or hospitalization insurance;
> "b. medical or surgical reimbursement plan * * *
> "2. When 'Excess Loss of Wages' are indicated in the Declarations, the Company shall not be liable to the extent any Personal Protection Insurance work loss benefits are paid, payable, or required to be provided to or on behalf of the person named in the policy, their spouse or any relative of either domiciled in the same household, under the provisions of any valid and collectible:
> "a. individual, blanket or group accident or disability insurance;

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* Circuit judge, sitting on Court of Appeals by assignment.

"b. salary or wage continuation program, including sick pay programs; or

"c. worker's disability compensation or disability laws of a similar nature or any state or federal government law."

American had issued a group health insurance plan which covered Mys as an employee of Rochester Gears, Inc. That policy contained the following provision:

"EXCEPTIONS
"CONDITIONS NOT COVERED:
" * * * The company shall not be liable for any loss caused by accidental bodily injury which arises out of or results from an automobile accident when benefits are provided under the Michigan No-Fault Insurance Act (Act No. 294 of the Public Acts of 1972) including any amendments thereto, exceeding three hundred dollars ($300) for any one insured person as a result of any Automobile Accident."

American paid Mys $300 and asserted that it was not obligated to pay any further sums. By agreement with its insured, Farm Bureau paid Mys' medical expenses arising out of the accident and was subrogated to Mys' rights against American. Farm Bureau then brought suit against American seeking reimbursement of the medical benefit payments made on Mys' behalf.

On November 24, 1986, Farm Bureau moved for summary disposition pursuant to MCR 2.116(C)(10), on the issue of liability. In a March 24, 1987, opinion, the trial court found that American's "exclusionary clause" was, in reality, an escape type coordination of benefits clause. The court granted plaintiff's motion for summary disposition, holding that American had primary liability for all medical expenses which Mys incurred as a result of the accident.

On appeal, defendant argues that the exclusionary clause limiting American's primary liability for losses covered by no-fault insurance is not an "other insurance" provision, but merely limits the amount of primary liability to $300. In Federal Kemper Ins. Co. v Health Ins. Administration, Inc.,[1] the Supreme Court resolved a dispute between a no-fault insurance carrier and a health insurance carrier concerning which was liable for their insured's medical expenses resulting from injuries received in an automobile accident, where both policies contained coordinated benefits clauses. The court held that, in

order to give effect to the legislative intent behind MCL 500.3109a; MSA 24.13109(1), the health insurer must be deemed the primary insurer. As such, the health insurer must pay for its insured's medical expenses to the limits of the policy.

Defendant argues that, unlike the provision under consideration in Federal Kemper, the provision at issue here does not seek to make American secondary to a no-fault carrier, but merely sets a limit of $300 on its primary liability. In Michigan Mutual Ins. Co. v American Community Mutual Ins. Co.,[2] a panel of this court addressed this issue concerning an identical provision in a policy American had issued and concluded:

> "We are persuaded that defendant's clauses are modified versions of an 'escape' clause, for they enable defendant to restrict or escape liability after payment of $300. They therefore fall into the category of an 'other insurance' provision."

We agree. An "escape" clause is one that provides that the insurer has no liability where the risk is covered by other insurance.[3] As the court stated in Michigan Mutual:

> "Defendant's argument that it does not deny primary liability as the Federal Kemper insurers did misperceives the meaning of the word 'primary' as used in that case. While it asserts that Federal Kemper was concerned with order of priority, it is clear from that case that 'primary' was intended to mean 'principal' or 'first in importance' and did not denote 'first in time' or refer to temporal priority. Within that context, defendant does not accept 'primary' liability for payment of its insureds' medical expenses from auto accidents where no-fault insurance is available, but has instead carved out from its ordinary coverage a $300 limitation applicable to those situations."[4]

Because the provision in American's policy is tied to the existence of no-fault coverage, it is an "other insurance" provision, notwithstanding its coverage of the first $300.

American also argues that MCL 500.3438; MSA 24.13138 and MCL 500.3610a; MSA 24.13610(1) authorize a health insurer to coordinate benefits with a no-fault insurer. Section 3438 provides:

> "There may be a provision as follows:
> "INSURANCE WITH OTHER INSURERS: If there be other valid coverage, not with this insurer, providing benefits for the same loss on a provision of service basis or on an expense incurred basis and of which this insurer has not been given written notice prior to the occurrence or commencement of loss, the only liability under any expense incurred coverage of this policy

shall be for such proportion of the loss as the amount which would otherwise have been payable hereunder plus the total of the like amounts under all such other valid coverages for the same loss of which this insurer had notice bears to the total like amounts under all valid coverages for such loss, and for the return of such portion of the premiums paid as shall exceed the pro rata portion for the amount so determined. For the purpose of applying this provision when other coverage is on a provision of service basis, the 'like amount' of such other coverage shall be taken as the amount which the services rendered would have cost in the absence of such coverage."

Section 3610a provides:

"(1) A group disability insurance policy may contain provisions for the coordination of benefits otherwise payable under the policy with benefits payable for the same loss under other group insurance; automobile medical payments insurance; or coverage provided on a group basis by hospital, medical, or dental service organizations, by union welfare plans, or employee or employer benefit organizations.

"(2) If a group disability insurance policy contains a coordination of benefits provision, the benefits shall be payable pursuant to the coordination of benefits act."

We note that § 3610 was amended by 1987 PA 52. Section 2 of that act provides in part:

"This amendatory act does not affect the relationship between disability insurance benefits and personal protection insurance benefits as provided in Federal Kemper[5] v Health Insurance Administration Inc. 424 Mich 537."

Should an insured elect to have its health insurer be secondary to its no-fault insurance, it may pay the no-fault insurer a premium based on the absence of a coordination of benefits clause. The insured's choice is not abrogated by holding the health insurer liable in face of a conflict in coordination clauses. To the contrary, the court in Federal Kemper opined that requiring a no-fault insurer to provide primary coverage would vest the choice to coordinate benefits in the health insurer rather than the insured. This may be particularly true where, as here, the health insurance is a group policy issued to the insured's employer.

Next, defendant argues that the sole basis on which Federal Kemper imposed primary liability on the health insurer was the ability of non-profit health care corporations to reduce medical costs through provider agreements. While this consideration was a factor supporting the court's finding, it was not, by

any means, the sole factor. Moreover, the language of § 3109a refers to "other health and accident coverage on the insured". That non-limiting language was held to include Blue Cross/Blue Shield in LeBlanc v State Farm Mutual Automobile Ins. Co.,[6] notwithstanding its argument that it was not an insurer. We conclude that the Federal Kemper court did not intend to limit its decision to non-profit health care corporations.

Finally, defendant argues that the trial court erred in granting plaintiff summary disposition when Farm Bureau failed to show that it issued an insurance policy to Mys at a reduced rate due to the coordination of benefits clause. A party moving for summary disposition under MCR 2.116(C)(10) must specifically identify the issues as to which it asserts no genuine issue of fact exists and file affidavits, depositions, admissions or other documentary evidence in support.[7] The responding party may not merely rest on the allegations or denials in the pleadings, but must, by affidavits or otherwise, show that a genuine issue of material fact remains.[8] Defendant asserts that because plaintiff failed to produce any documentation that Mys purchased its policy at a reduced premium, Farm Bureau failed to show its compliance with § 3109a.

In support of its motion for summary disposition, Farm Bureau submitted the affidavit of David Morrish, a personal injury claims specialist for Farm Bureau. The affidavit attested that an attached insurance policy was a true copy of the no-fault policy which Farm Bureau had issued to Mys. The face of the attached policy indicates that the policy contemplated coordination of benefits. The terms "excess loss of wages" and "excess medical payment" appear in the appropriate places. This documentary evidence suffices to show a reduction in premium based on coordination of benefits, particularly in the absence of any evidence to the contrary. Defendant did not raise this issue in its brief or at oral arguments in the trial court. The issue was not in dispute, and no specific finding by the trial court was necessary.

Affirmed.

/s/ William R. Beasley
/s/ David H. Sawyer
/s/ Thomas J. Foley

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[1] 424 Mich 537; 383 NW2d 570 (1986).

[2] 165 Mich App 269, 273-274; 418 NW2d 455 (1987), lv den 430 Mich 884 (1988).

[3] Federal Kemper, supra, at p 542.

[4] Michigan Mutual, supra, at pp 274-275.

[5] See note following MCL 500.3610.

[6] 410 Mich 173, 197; 301 NW2d 775 (1981).

[7] MCR 2.116(G)(3).

[8] MCR 2.116(G)(4).