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APR 13 1989

STATE OF MICHIGAN

COURT OF APPEALS

CITIZENS INSURANCE COMPANY OF AMERICA,

Plaintiff/Counter-Defendant-Appellee/
Cross-Appellee,

v

CLARK CLOUSE,

Defendant/Counter-Plaintiff/
Cross-Plaintiff,

and

TRANSAMERICA INSURANCE CORPORATION OF AMERICA,

Defendant/Cross-Defendant-Appellant/
Cross-Appellee,

and

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY,

Defendant/Cross-Defendant-Appellee/
Cross-Appellant.

March 21, 1989

FOR PUBLICATION

No. 103394

Before: Holbrook, Jr., P.J., and Murphy and C.O. Grathwohl,* JJ.

PER CURIAM.

Defendant Transamerica Insurance Corporation of America (Transamerica) appeals by right and defendant American Community Mutual Insurance Company (American Community) cross-appeals from an order of summary disposition in favor of plaintiff Citizens Insurance Company of America (Citizens). The trial court in granting summary disposition ruled that American Community was primarily liable only for Clark Clouse's medical expenses as his health insurer and as between Citizens and Transamerica, two no-fault insurers of equal priority, liability was to be a apportioned equally between the two insurers. We affirm.

Defendant Clark Clouse was involved in a motor vehicle accident on August 17, 1986. At the time, Clouse was a passenger in a vehicle driven by Kevin Buehler. Clouse was not a named insured under his own or a relative's no-fault insurance policy, even though he resided with his parents and a sister. Clouse's injuries required that he receive no-fault benefits for medical services and for work loss.

On the date of Clouse's accident, Citizens was the insurer of four vehicles owned by Clouse's parents, Frank and Carol Clouse. Transamerica, also on that date, was the insurer of one vehicle owned by Carol Clouse and of a vehicle owned by Bonita Clouse, Clark Clouse's sister. Clark Clouse sought work loss benefits and medical expenses from both Citizens and Transamerica. American Community insured Clouse under its major medical expense policy. That policy was in effect on the date of Clark Clouse's accident.

Both Citizen's and Transamerica's respective no-fault policies contained clauses providing for excess or coordinated coverage with other health or medical policies. Both American Community and Transamerica denied coverage under their respective policies, thereby necessitating the instant action to determine the priorities between the three insurers.

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

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Citizens moved for summary disposition in April, 1987. The trial court granted Citizens motion for summary disposition pursuant to MCR 2.116(c)(10). The trial court held that American Community, as Clark Clouse's health insurer, is the primary insurance company from whom Clark Clouse must seek his medical benefits. And that American Community shall reimburse the two no-fault carriers for any sums either has paid towards medical expenses on behalf of Clark Clouse. The trial court also held that to the extent any medical benefit is due and owing over and above that which is paid by American Community, that liability is to be shared equally (50-50) along with all other no-fault liability between Citizens and Transamerica. Both American Community and Transamerica appeal by right from the trial court's granting of summary disposition.

A motion for summary judgment pursuant to MCR 2.116(c)(10) tests whether there is factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. Giving the benefit of the doubt to the non-moving party, the court must determine whether any genuine issue of disputed fact exists. If there is no genuine issue as to any disputed fact and the moving party is entitled to judgment as a matter of law, the motion should be granted. Eriksen v Fisher, 166 Mich App 439, 444-445; 421 NW2d 193 (1988).

American Community argues that the trial court erred in holding that American Community is primarily liable for Clark Clouse's medical costs. American Community's argument is based on a provision of their policy with Clark Clouse, the deductible clause, which is in effect, a coordination-of-benefits provision. Applying this provision in the instant case, American Community argues, leads to the conclusion that the no-fault insurers should be primarily liable for Clark Clouse's medical expenses.

Our Supreme Court faced essentially the same issue in Federal Kemper Ins Co, Inc v Health Insurance Administration, Inc, 424 Mich 537; 383 NW2d 590 (1986). In Federal Kemper, our Supreme Court held that the defendant, as a health insurer, was primarily liable for medical coverage for a motor vehicle accident where the defendant's coordinated benefits clause conflicted with that under the plaintiff's no-fault policy. Because the Legislature required insurers to offer coordinated coverage with other health insurance under no-fault policies, in order to reduce insurance costs, the no-fault insurer then must be secondarily liable in order to uphold the Legislature's goal. Id, 546, 551-552. Although Federal Kemper, supra, involved a group health insurance policy, the rule has been applied to individual insurance policies. Michigan Mutual Ins Co v American Community Mutual Ins Co, 165 Mich App 269; 418 NW2d 455 (1987). Applying Federal Kemper in the instant case results in the decision reached by the trial court below, that American Community is primarily liable for medical costs and Citizens and Transamerica secondarily liable as no-fault insurers. The trial court correctly granted summary disposition on this issue.

Transamerica argues that the trial court erred in holding that Transamerica and Citizens are both equally secondarily liable for Clark Clouse's medical and other expenses. Transamerica argues that the priority between the two no-fault insurers should be determined based on the number of vehicles insured and consequently upon the amount of premium received for each insurer for the particular risk.

Priorities among no-fault insurers are determined by statute. The statutory provision at issue states:

> "When 2 or more insurers are in the same order of priority to provide personal protection insurance benefits an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution of the loss among such insurers." MCL 500.3115(2); MSA 24.13115(2).

We were unable to find precedent that interprets what the phrase "in order to accomplish equitable distribution of the loss amongst such insurers" means in regard to how liability is to be divided between two insurers of equal priority. The trial court ruled that the two no-fault insurers share equally the liability, stating that no matter "how many vehicles or persons there are in a family, each insurer insures all in the household no matter how many vehicles or persons are specifically covered in a policy. The risk falls equally on each insurer no matter what the premium is paid."

A panel of this Court in State Farm Fire & Casualty Co v Citizen Insurance Co of America, 100 Mich App 168; 298 NW2d 651 (1980), based priority between two no-fault insurers who were otherwise equal in priority, upon the nature of the insurer's risk. State Farm was subsequently followed by other panels of this Court in Allstate Ins Co v Transamerica Ins Co, 138 Mich App 782; 360 NW2d 925 (1984), and Johnson v Michigan Educational Employees Mutual Ins Co, 137 Mich App 205; 357 NW2d 329 (1984). However, our Supreme Court in DAIIE v Home Ins Co, 428 Mich 43, 49; 205 NW2d 85 (1987), ruled that the essential focus of the Court of Appeals in the State Farm case upon the nature of the insurer's risk was misplaced and our Supreme Court disapproved State Farm. Thus, if we were to adopt Transamerica's argument and base priority between two no-fault insurers on the nature of the insurer's risk, we would find ourselves at odds with our own Supreme Court. Thus, we hold that priority between two otherwise equal in priority no-fault insurers is not to be determined based on the nature of the risk taken on by the insurer.

The statute, as quoted above, requires that there be an equitable distribution of the loss among insurers. We believe that equitable distribution of the loss among the insurers is best achieved by reference to the number of insurers. This result is consistent with the Legislature's intent that persons and not vehicles be insured against loss. DAIIE v Home, supra, p 49. Under the facts of this case, it is an equitable distribution of the loss having both insurers equally liable for costs not covered under Clark Clouse's health insurance with American Community. The trial court ruling on this point is equitable, fair and correct. We find that the trial court properly granted summary disposition in favor of Citizens.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy
/s/ Casper O. Grathwohl