

STATE OF MICHIGAN
COURT OF APPEALS

STATE AUTO MUTUAL INSURANCE COMPANY,

Plaintiff-Appellee,

v

No. 102408

KATHERINE CATES, Personal Representative
of the Estate of Jeffery M. Cates,
deceased, and JOHN CATES,

Defendant-Appellants.

Before: Murphy, P.J., and Weaver and McDonald, JJ.

PER CURIAM

Defendants appeal as of right from a circuit court order pursuant to MCR 2.116(C)(9) granting summary disposition in favor of plaintiff on its declaratory judgment action. We reverse.

Our review of this matter leads us to conclude that the plaintiff-insurer's policy language is ambiguous.¹ The policy language provides: "We will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements." The policy language further provides:

"Underinsured motor vehicle' means a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the limit of liability for this coverage."

Does "limit for bodily injury liability" refer to the \$100,000 per accident limit of liability under the tortfeasor-driver's policy of insurance or to the \$50,000 limit of liability available under that policy to the deceased after division among the four casualties? Due to the ambiguity arising from this language we conclude that the policy must be strictly construed against the insurer and in favor of the insured. Powers v DAIIE,

427 Mich 602, 623-624; 398 NW2d 411 (1986). Cf. Lotoszinski v State Farm Mutual Auto Ins Co, 417 Mich 1, 10-11; 331 NW2d 467 (1982) (Supreme Court infers that, unlike uninsured motorist coverage, purpose of underinsured motorist coverage is to "guarantee an irreducible minimum sum" to the policy holder.)

Because the defense was not so clearly untenable as a matter of law that no factual development could possibly have denied plaintiff's right to recovery, summary disposition was improperly granted. Michigan Oil Co v Dep't of Natural Resources, 148 Mich App 745, 755; 384 NW2d 777 (1985).

The trial court's grant of summary disposition is reversed. We hold that the deceased's \$100,000 underinsurance policy applies and plaintiff is entitled to coverage in that amount with a setoff for the \$50,000 plaintiff has already received. We do not address the stacking issue because the trial court did not reach it. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Elizabeth A. Weaver
/s/ Gary R. McDonald

¹ The tortfeasor-driver, Daryll March, was a named insured in two separate insurance policies with State Farm Insurance, each policy having a limit of \$50,000 per person and \$100,000 per accident. The deceased's underinsurance policy provided the deceased with a coverage of \$100,000 per accident. His father's policy provided the deceased with an additional \$40,000 in underinsurance coverage.