STATE OF MICHIGAN

COURT OF APPEALS

WOLVERINE MUTUAL INSURANCE COMPANY, as Assignee of SANDRA MOON and HAROLD MOON,

Plaintiff-Appellant,

v

ROSPATCH CORPORATION EMPLOYEE BENEFIT PLAN,

Defendant-Appellee.

August 3, 1992
9:40 a.m.

No. 137975

PUBLISHED

Before: Shepherd, P.J., and Connor and Michael F. Sapala,* JJ.

CONNOR, J.

Plaintiff instituted this action to seek reimbursement from defendant for medical expenses plaintiff paid on behalf of Sandra Moon resulting from a motor vehicle accident. Plaintiff asserted that defendant's employee benefit plan included medical benefits subject to coordination under the no-fault act, MCL 500.3109a; MSA 24.13109(1). The trial court held that coordination by plaintiff under the no-fault act was not available because defendant's plan excluded any benefits for motor vehicle accidents in this case. We affirm.

The parties stipulated to the facts in the trial court. Sandra Moon was injured in an automobile accident on November 19, 1988. Her no-fault automobile insurance policy, issued to her father Harold Moon, contained a valid coordination-of-benefits provision, pursuant to MCL 500.3109a; MSA 24.13109(1). The automobile accident occurred in Michigan while Sandra Moon was a resident of Michigan.

At the time of her accident, Sandra Moon and Harold Moon were both covered persons under the Rospatch Corporation Employee Benefit Plan which was administered within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 USC 1001, et seq. The Rospatch Corporation Employee Benefit Plan ("defendant") contained two separate provisions purporting to exclude the payment of expenses incurred due to automobile accidents:

> MICHIGAN NO FAULT [sic] EXCLUSION
>
> Benefits are not payable under this Plan for injuries received in an accident involving a car or other motor vehicle.
>
> OUT OF MICHIGAN NO-FAULT EXCLUSION
>
> Benefits will not be paid under this plan for injuries received in an accident involving a car or other motor vehicle which is owned or leased by a covered person or any member of his immediate family or involving any car or other motor vehicle for which there is in effect, or is required to be in effect, any policy of No-Fault insurance. This exclusion is not applicable to expenses not paid by any policy of No-Fault insurance as a result of state required policy deductibles or maximums.

Plaintiff paid the medical expenses incurred by Sandra Moon under the no-fault policy. Defendant reviewed those expenses and determined that if it were required to pay expenses for the injuries, defendant would pay $13,546.85. The only issue the parties could not resolve between themselves was whether

*Recorder's Court judge, sitting on the Court of Appeals by assignment.

defendant had to pay any expenses associated with Sandra Moon's automobile accident.

On appeal, plaintiff challenges the trial court's ruling that defendant's plan provided for the exclusion of benefits for injuries incurred in this case. Plaintiff claims defendant's plan provided for a coordination of medical benefits, and therefore plaintiff was entitled to seek reimbursement under MCL 500.3109a; MSA 24.1309(1).

The trial court held that despite the ambiguity in the two different clauses defendant's plan excluded benefits in this case, and did not provide simply for a coordination with other insurance benefits. The trial court held that defendant's plan was unambiguous since the Michigan exclusion for no-fault benefits was the only provision that applied.

The seminal case in Michigan on coordination of benefits is Federal Kemper Ins Co, Inc v Health Ins Administration, Inc, 424 Mich 537, 551-552; 383 NW2d 590 (1986). The Supreme Court held that the defendant health insurer, under a group plan, was primarily liable for medical coverage as a result of a motor vehicle accident where the defendant's coordinated benefits clause conflicted with the plaintiff's no-fault policies. The Court reasoned that because the Legislature required insurers to offer coordinated coverage with other health insurance under no-fault policies in order to reduce premiums, the no-fault insurer must be secondarily liable in order to effectuate the Legislature's intent. Id., pp 546, 551-552.

The application of Federal Kemper, supra, to the instant case depends on whether defendant's plan can be construed as including either a coordination-of-benefits provision or an exclusion of coverage. If defendant's plan included a "pure" exclusion, then it could not be required to coordinate its benefits with those paid in accordance with the no-fault act.

In Auto-Owners Ins Co v Autodie Corp Employee Benefit Plan, 185 Mich App 472, 474; 463 NW2d 149 (1990) an almost identical clause was interpreted to create an exclusion to coverage rather than a coordination provision. The panel relied on Transamerica Ins Co of North America v Peerless Industries, 698 F Supp 1350, 1355-1356 (WD Mich, 1988), which held that because the exclusion to coverage in defendant's plan for automobile accidents under Michigan's no-fault act is clear and unambiguous, no other health or accident insurance exists for purposes of MCL 500.3109a; MSA 24.13109(1). Peerless, supra, pp 1353, 1355. This type of an exclusion is considered a "pure" exclusion, since it clearly is not dependent upon the existence of any other insurance. Transamerica Ins Co of America v IBA Health & Life Assurance Co, 190 Mich App 190, 194-195; 475 NW2d 431 (1991).

Plaintiff contends this case should be distinguished from Autodie because defendant's plan appears to coordinate benefits with no-fault insurance benefits for motor vehicle accidents that occur outside the State of Michigan. This arguably is an "escape" exclusion that does not avoid coordination under MCL 500.3109a; MSA 24.13109(1). See Peerless, supra, pp 1351, 1354; Auto-Owners Ins Co v Lacks Industries, 156 Mich App 837, 838-839; 402 NW2d 102 (1986), lv den 428 Mich 902 (1987).

We believe that this "escape" provision is inapplicable and irrelevant in this case because the parties agree that Sandra Moon's accident occurred in Michigan while she was a resident of Michigan. Exclusions to coverage in insurance contracts in general are to be read independently of one another. Hawkeye-Security Ins Co v Vector Construction Co, 185 Mich App 369, 384; 460 NW2d 329 (1990). Under the facts of this case the only applicable provision clearly excludes coverage, and an inapplicable exclusion to coverage cannot be relied upon to make the entire plan ambiguous. Hawkeye-Security, supra, pp 384-385. See also Fresard v Michigan Millers Mutual Ins Co, 414 Mich 686, 697-698; 327 NW2d 286 (1982) (Fitzgerald, C.J.).

Defendant also argued below, as an alternative theory, that because its plan was self-insured, federal law, 29 USC 1144(a), preempted the coordination of benefits under the state no-fault insurance act. Defendant conceded through the testimony of its administrator that defendant's plan includes stop-loss insurance coverage, or excess insurance coverage for claims in excess of $50,000. Defendant pays all benefits due claimants under the plan, but defendant can seek reimbursement for those claims that exceed $50,000 as a means of protecting the plan. The trial court held that defendant was not a self-insured plan within the

meaning of ERISA because of the excess insurance coverage, and consequently federal law did not preempt the coordination of benefits in this case.

We believe the trial court erred in this portion of its ruling. The panel in Auto Club Ins Ass'n v Frederick & Herrud, Inc (On Remand), 191 Mich App 471, 475; 479 NW2d 18 (1991), lv pending, recently held that stop-loss coverage does not transform an employee benefit plan into an insured plan for purposes of ERISA, citing FMC Corp v Holliday, 498 US ___; 111 S Ct 403; 112 L Ed 2d 356, 366 (1990).[2] We are satisfied that Auto Club, supra, was correctly decided and under Administrative Order 1990-6, 436 Mich lxxxiv, and Administrative Order 1991-11, 439 Mich xlv, both this Court and the trial court are bound by that decision.[3]

Affirmed.

/s/ Michael J. Connor
/s/ John H. Shepherd
/s/ Michael F. Sapala

[1] The trial court decided this case under MCR 2.116(C)(10), for no genuine issue of material fact. Under this rule, summary disposition is only appropriate when there is no factual support for a claim. See SSC Associates Limited Partnership v General Retirement System of the City of Detroit, 192 Mich App 360, 363-365; 480 NW2d 275 (1991).

[2] In FMC Corp, supra, 112 L Ed 2d at 362, Justice O'Connor wrote in the Court's opinion that the plan in that case was self-funded because it did not purchase an insurance policy from any insurance company in order to satisfy the obligations to its participants. Consequently, an insurance policy that merely protects the plan from disastrous consequences, but does not directly insure the obligations owed to the plan members, does not affect the plan's status as self-insured, according to the panel in Auto Club, supra.

[3] But see Frankenmuth Mutual Ins Co v Meijer, Inc, 176 Mich App 675, 677-679; 440 NW2d 7 (1989), lv den 433 Mich 864 (1989), wherein another panel of this Court held that stop-loss coverage does not render an ERISA plan uninsured. The panel in that case placed its reliance on Northern Group Services, Inc v Auto Owners Ins Co, 833 F2d 85 (CA 6, 1987), cert den 486 US 1017 (1988), opinion clarifying first decision 898 F2d 1125 (CA 6, 1990), which the panel in Auto Club, supra, p 474, believed was effectively overruled by the decision in FMC Corp, supra. The federal courts have also held that FMC Corp, supra, overruled Northern Group, supra. Auto Club Ins Ass'n v Health & Welfare Plans, Inc, 961 F2d 588, 592-593 (CA 6, 1992), and cases cited therein. But see also Michigan United Food & Commercial Workers Unions v Baerwaldt, 767 F2d 308, 312-313 (CA 6, 1985), cert den 474 US 1059 (1986); Auto Club Ins Ass'n v Mutual Savings & Loan Ass'n, 672 F Supp 997, 1000 (ED Mich, 1987); State Farm Mutual Automobile Ins Co v American Community Mutual Ins Co, 659 F Supp 635, 637-639 (ED Mich, 1987), aff'd 863 F2d 49 (1988) (stop-loss insurance only did not affect the status of an employee benefit plan as insured for purposes of the savings clause pursuant to ERISA). See also Udell v Georgie Boy Mfg, Inc, 174 Mich App 171, 179; 435 NW2d 413 (1988), vacated and remanded for reconsideration 432 Mich 889 (1989).

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allowing him to settle another case while he was mentally incompetent, the claim is barred by collateral estoppel. The question of plaintiff's competence during settlement was decided in a previous federal case.

Plaintiff suffered a work-related injury. He sued his employer, a railroad company, in federal court. Defendant represented plaintiff. Defendants advised plaintiff to settle. Ten months after plaintiff settled, he moved to set the settlement aside. He claimed he was not mentally competent when he entered into the agreement. The federal court refused. The decision was not appealed.

Plaintiff subsequently sued defendants for legal malpractice. Plaintiff claimed defendants negligently allowed him to settle the federal case while he was incompetent. The court granted defendants summary disposition based on collateral estoppel. We affirm.

"To succeed in his malpractice case, plaintiff must prove: (1) the existence of an attorney-client relationship; (2) the act constituting negligence; (3) that the negligence proximately caused an injury, and (4) the fact and extent of the injury. ... there is no question that the acts allegedly constituting negligence, i.e., allowing or causing plaintiff to settle while he was not mentally competent, are identical to the issue decided in the federal case.... There is also no question that plaintiff had a full and fair opportunity to litigate this issue in federal court."

Plaintiff is collaterally estopped from relitigating the issue. Affirmed.

*Alterman v. Provizer, Eisenberg, Lichte, et al.* (Lawyers Weekly No. MA-5368 - 3 pages) (per curiam).

*Summary by LCC.*

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## *No-Fault*
### Auto Accident Exclusion Exclusion Unequivocal

Even though defendant-medical insurer's out-of-state auto accident exclusion clause was ambiguous, the court properly held that defendant did not have to coordinate benefits with auto accident exclusion was unequivocal.

An auto accident victim was insured under an employee medical benefit plan. She was also insured under her father's no-fault auto insurance. The auto insurance policy contained a valid coordination of benefits provision. The employee medical benefit plan had excluded coverage for auto-accident expenses. Plaintiff-no-fault insurer paid the medical expenses and sued defendant-employee benefit plan for reimbursement.

The court held that plaintiff was not entitled to reimbursement because defendant's policy excluded benefits for auto accidents. Plaintiff appeals.

Defendant's policy had two exclusion provisions. One exclusion provided for a Michigan no-fault exclusion. The Michigan exclusion stated that no benefits were available for auto accident-related injuries. The other exclusion provided for out-of-state no-fault insurance. The out-of-state exclusion stated that "[t]his exclusion is not applicable to expenses not paid by any policy of No-Fault insurance as a result of state required policy deductibles or maximums." Plaintiff claims this creates an ambiguity and therefore defendant's plan provides for coordination of medical benefits.

The Michigan Supreme Court decision in *Federal Kemper Insurance Co., Inc. v. Health Insurance Administration, Inc.*, 424 Mich. 537 (1986), is the "seminal case in Michigan on coordination of benefits...." In *Federal Kemper*, the court held that a health insurer was primarily liable for medical coverage where the health insurance and the no-fault insurance were both coordinated policies. Applying *Federal Kemper* to this case, if defendant's policy is "a 'pure' exclusion," then defendant cannot be required to coordinate its benefits with those paid by defendant.

Plaintiffs claim the out-of-state escape provision "does not avoid coordination" of benefits. We disagree. This "'escape' provision is inapplicable and irrelevant" because the auto accident victim was injured in Michigan and was a Michigan resident. Therefore, the Michigan no-fault exclusion always applies.

Affirmed.

*Wolverine Mut. Ins. Co. v. Rospatch Corp. Employee Benefit Plan.* (Lawyers Weekly No. MA-5321 - 3 pages) (Connor, J.).

*Summary by KMP.*

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## *Real Property*
### Mineral Rights - Dormant Minerals Act

Even though the order assigning residue did not contain a precise description of the surface estate, plaintiffs' conveyance was not rendered invalid by the dormant minerals act.

"The purpose of the dormant minerals act is not to abolish severed mineral interests, but to promote the development of mineral interests by reducing the difficulty in locating the owners of severed mineral interests where there has been no recent recording of those interests. ... Section one of the act merely describes the circumstances under which a mineral interest may be deemed abandoned *if not preserved within twenty years of the last sale, lease, mortgage, or transfer.* ... Section one ... imposes no requirements on a conveyance of mineral rights. Section two provides a method of preservation for those interests that have not been sold, leased, mortgaged or transferred for a period of twenty years. Neither section is concerned with the conveyance or actual transfer of mineral rights...."

Thus, the court "correctly determined that the conveyance of mineral rights by order assigning residue of the previous owner conveyed was not rendered invalid by the dormant minerals act."

Affirmed.

*Gibbs, et al. v. Sun Exploration & Prod. Co., et al.* (Lawyers Weekly No. MA-5364 - 3 pages) (per curiam).

*Summary by LCC.*

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## *Sentencing*
### Juvenile - Adult System

Even though defendant is a minor, the seriousness of his crime and the unlikelihood that defendant will be rehabilitated mandates that defendant be sentenced as an adult.

Defendant was dealing crack cocaine out of the victims' house. After a disagreement, defendant shot the victim five times in the face. Defendant-minor pleaded guilty to a first-degree murder charge. After reviewing MCL 679.1(3); MSA 28.1072(3), the court decided to sentence defendant as a juvenile instead of as an adult. The state appeals.

The state claims the court committed reversible error in sentencing defendant as a juvenile instead of as an adult offender. "[T]here have been no reported decisions discussing the appropriate standard of review of a trial court's determination of whether to sentence a minor as a juvenile or as an adult." The "customary sentence review standard" should be used to determine if there was an abuse of discretion.

The court made the following findings — "(1) that defendant was physically and mentally mature; (2) that the offense committed by defendant was of a serious nature; (3) that defendant's behavior was not likely to disrupt the rehabilitation of other juveniles in the treatment program; (4) that defendant's behavior was not likely to render him more dangerous to the public at age 21; (5) that defendant was more likely to be rehabilitated by the services and facilities available in a maximum security juvenile program rather than by the services available in an adult program; (6) that the best interests of defendant and the public would be served by placing defendant on probation and committing him to a juvenile facility; and (7) that the prosecution had failed to prove, by a preponderance of the evidence, that the best interests of the juvenile and the public would be served by sentencing defendant as an adult."

After reviewing the record, we find the court erred "by placing defendant in the juvenile offender system." Defendant had a "troublesome prior record." Before this offense, defendant had already been in four juvenile programs for drug-related activity. Defendant had escaped from two facilities. When defendant committed this murder, defendant was on "escape status." Defendant was placed in a deten-