STATE OF MICHIGAN

COURT OF APPEALS

AUTO-OWNERS INSURANCE COMPANY,

Plaintiff-Appellee,

v

BRENTON LEEFERS, Personal Representative of the Estate of Phyllis Ann Leefers, Deceased, and JAURON KATRINA LEEFERS, a minor,

Defendant,

and

KEYSHA DENEEN CASH,

Defendant-Appellant.

December 20, 1993
9:00 a.m.

No. 152342
LC No. 91-070177-CK

AUTO-OWNERS INSURANCE COMPANY,

Plaintiff-Appellee,

v

BRENTON LEEFERS, Personal Representative of the Estate of Phyllis Ann Leefers, Deceased, and JAURON KATRINA LEEFERS, a minor,

Defendant-Appellant,

and

KEYSHA DENEEN CASH,

Defendant.

No. 152648
LC No. 91-070177-CK

Before: Reilly, P.J., and Sawyer and P.J. Clulo,* JJ.

CLULO, J.

In Docket No. 152342, defendant Cash ("Cash") appeals an April 30, 1992, order of summary disposition in the context of a declaratory relief action whereby plaintiff's complaint for interpleader was granted and plaintiff was ordered to remit the sum of $250,000 to the court for disbursement to defendants as compensation for injuries they suffered in an automobile accident. The order further enjoined Cash from pursuing a suit for coverage under her grandfather's insurance policy. In Docket No. 152648, defendant Leefers ("Leefers") appeals from the same order. We affirm.

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

On January 27, 1990, Phyllis Leefers, now deceased, was operating her motor vehicle in which defendants Jauron Leefers and Keysha Cash were passengers. The vehicle was struck by another automobile owned and operated by Josh Prather. Phyllis Leefers died as a result of injuries she sustained in the accident, while both Jauron Leefers and Keysha Cash sustained serious injuries. It is undisputed that the sole cause of the accident was Prather's negligence.

Prather had a policy of liability insurance with State Farm Insurance Company that had a $50,000 per person / $100,000 per occurrence limitation. The proceeds from the policy were distributed to defendants with Phyllis Leefers' estate receiving $50,000, Jauron Leefers receiving $10,000, and Keysha Cash receiving $40,000. It is undisputed that the Prather Policy was inadequate to cover the damages to each defendant, requiring defendants to make claims under other insurance policies. Phyllis Leefers' policy (referred to as the "Leefers Policy" herein), issued by plaintiff, contained an underinsurance clause with a $300,000 per person / per occurrence limitation.[1] Similarly, Keysha Cash's grandfather, Arthur L. Hall, had a policy (referred to as the "Hall Policy" herein) issued by plaintiff containing an identical clause for underinsured motorist coverage.[2]

On October 15, 1991, plaintiff filed a complaint for interpleader based upon the fact that defendants made conflicting claims for underinsured motorist coverage under the Leefers and Hall Policies and were unable to agree upon a division of the benefits. Plaintiff offered to submit $250,000 to the court (representing the $300,000 per occurrence liability on the Leefers Policy less the $50,000 per person limitation paid under the Prather Policy) and walk away from further liability for any injuries that arose out of the accident. Plaintiff denied any liability under the Hall Policy because of a clause in the Hall Policy that reads as follows:

> This coverage shall not apply: (a) to bodily injury to an insured sustained while in, upon, entering or alighting from, any motor vehicle not owned by the insured if the owner has insurance similar to that afforded by this coverage and such coverage is available to the insured . . . .

Based upon this exclusion and our Supreme Court's decision in Rowland v DAIIE, 388 Mich 476; 201 NW2d 792 (1972), the trial court concluded that Cash was precluded from seeking underinsured motorist benefits under the Hall Policy. Thereafter, the parties entered into a conditional consent decree whereby the $250,000 in underinsured motorist benefits available under the Leefers Policy was distributed to defendants in prorated shares.[3]

On appeal, defendants[4] claim that because it is agreed that the aggregate amount of their injuries exceeds the adjusted $250,000 limitation on underinsured motorist coverage available under the Leefers Policy, the underinsured motorist coverage that would otherwise be available to Cash is, in fact, not available and therefore the identical exclusion in the Hall Policy does not operate to preclude Cash's recovery of underinsured motorist benefits under the Hall Policy. In response, plaintiff claims that because defendants have equal rights to the underinsured motorist coverage under the Leefers Policy, the benefits are equally available to all and the clause in the Hall Policy operates to exclude Cash's recovery of underinsured motorist benefits from the Hall Policy. We resolve this issue of first impression in favor of plaintiff and affirm the decision of the trial court.

In determining that the aforementioned clause prevented Cash from availing herself of the underinsurance coverage under the Hall Policy, the trial court relied upon our Supreme Court's decision in Rowland, supra. On appeal, defendants seek to distinguish the holding of Rowland, while plaintiff argues that the case is controlling.

In Rowland, the claimant was a guest passenger who was injured when the host driver had an accident caused solely by the negligent acts of an uninsured motorist. The host driver and the guest passenger had policies of insurance with identical uninsured motorist coverage of up to $10,000 for each passenger. The guest passenger recovered $10,000 from the host driver's policy, which was admittedly insufficient to compensate her for the injuries she sustained. She then turned to her own policy of insurance and sought uninsured motorist benefits, which the trial court denied based upon a similar exclusion that exists in the case at bar. In affirming the decision of the trial court, our Supreme Court concluded that the policies provided

identical uninsured motorist coverage and the guest passenger was limited to recovery under the host policy. Id. at 481. The Court found it significant that the host and guest were insured by the same company. Id.

In the instant case, defendants argue that Rowland is distinguishable on two separate grounds. First, defendants claim that the $10,000 per person guarantee in the policies at issue in Rowland assured the policy holder that the funds articulated would be "available" to an insured whereas, in this case, there was no such guarantee. Second, defendants argue that there are different purposes to be served by uninsured motorist benefits as opposed to the underinsurance benefits at issue here. While it is true that the Rowland case is factually distinguishable, we cannot agree with defendants that the differences warrant coverage under both the Leefers and Hall policies.

Because underinsured motorist benefits are not statutorily mandated, we must look to policy interpretation to determine under which circumstances benefits are to be provided. Rohlman v Hawkeye-Security Ins Co, 442 Mich 520, 525; 502 NW2d 310 (1993). In interpreting a policy of insurance, we are obligated to construe clear and unambiguous provisions according to the plain and ordinary meaning of the terms in the provision. Clevenger v Allstate Ins Co, ___ Mich ___; ___ NW2d ___ (Docket No. 93890, dec'd September 8, 1993), slip op at 8. A provision is said to be ambiguous when its words may reasonably be understood in different ways. Id. (quoting Raska v Farm Bureau Ins Co, 412 Mich 355, 362; 314 NW2d 400 [1982]). An ambiguous contract is to be construed against its drafter and in favor of coverage. Id. at 9.

In the instant case, we are faced with the task of construing an exclusion containing the term "available." While no court in this state has specifically construed that term, courts of foreign jurisdictions have done so. See Hoffman v United Services Auto Assn, 671 F Supp 922 (D Conn, 1987); Kraft v Allstate Ins Co, 6 Ariz App 276; 431 P2d 917, 920 (1967); Gordon v Maupin, 469 SW2d 848, 850 (Mo App, 1971). Each of these courts has concluded that the term is ambiguous and is to be construed against the insurer. Hoffman, supra at 924; Kraft, supra at 919-920; Gordon, supra at 849-850. Each of the courts has also concluded that the term "available," when construed in favor of the insured, meant "actually" available or "accessible," or that which is reasonably available, as opposed to that which is theoretically or hypothetically available. Hoffman, supra at 925; Kraft, supra at 920; Gordon, supra at 850.

In the instant case, we agree that the term "available" is ambiguous inasmuch as it is capable of being defined in different ways. Clevenger, supra at 8. Moreover, we agree with those jurisdictions cited above which have construed the term to mean that which is "actually" or "reasonably" available to the insured. However, we are persuaded that defendant Cash has failed to establish that the underinsured motorist benefits under the Leefers Policy were not "actually" or "reasonably" available to her under the facts of this case, such that the exclusion under the Hall Policy would be inapplicable. Thus, even though we believe an ambiguity is present, construing the ambiguity in favor of coverage, we are persuaded that defendants were provided the intended coverage under the Hall Policy through the Leefers Policy.

Part of the difficulty with this case is that neither policy contains priority provisions insofar as the order of recovery of underinsured motorist benefits to each of the insureds is concerned.[5] In other terms, there is nothing in the policy or in the statutory framework that entitles any one of the insureds to primary coverage, such that one insured has a greater right to full compensation of her injuries before any other insured may recover. Defendants make the argument that because the policy is that of the Leefers, the Estate of Phyllis Leefers and Jauron Leefers should be entitled to recover underinsured benefits for their injuries before Cash can recover under the policy. However, as plaintiff points out, there is no contractual or legal support for such an argument.

Unlike those cases upon which defendants rely, there is nothing in this case to prevent defendant Cash from recovering her prorated portion of the $250,000 in underinsurance benefits under the Leefers Policy. None of the insureds have, in fact, shown that they are entitled to the benefits before defendant Cash. Moreover, none of the insureds have settled with, or obtained a judgment against, plaintiff for an amount of

benefits that would render them "actually" or "reasonably" unavailable to Cash. Contrary to what defendants suggest, there is nothing in the policies that guarantees each insured full availability of the $300,000 in underinsured motorist benefits. Rather, the policies guarantee that in the event of an accident, $300,000 in underinsured motorist benefits will be available to those insureds who have sustained injury.

Defendants also seek to distinguish this case from Rowland, supra on the ground that a different type of insurance is at issue. In Rowland, the Court was faced with an "other insurance" clause as it pertained to uninsured motorist benefits, while in this case, the "other insurance" clause applies to underinsured motorist benefits. Although we recognize the distinctions between the purposes of uninsured and underinsured motorist benefits, see Keeton & Widdick, Insurance, § 4.9(e)(3), pp 406-407, we believe that Rowland still controls where the identical coverage of one policy is available to an insured under another policy.

Our decision today is supported by our Supreme Court's statements in Bradley v Mid-Century Ins Co, 409 Mich 1; 294 NW2d 141 (1980). In construing an other insurance clause insofar as it pertained to uninsured motorist coverage, Justice Levin stated:

> In a policy with an other insurance clause, the insurer makes no promise to provide coverage in the stated amounts without regard to the insured's having available from other sources similar insurance benefits or protection. The insurer promises only that the insured will have insurance coverage in the stated policy limits from some source. [Id. at 49 (Emphasis added).]

Justice Levin further stated:

> Since there is presently no requirement that the premium charged for voluntarily provided and purchased automobile insurance accurately reflect the risk covered by such insurance [referring to uninsured motorist benefits], and there is no evidence that the insurer reaps a windfall, we cannot say that other insurance clauses are unconscionable because they limit the coverage applicable to a single accident to that provided by a single policy. [Id. at 57.]

We believe these statements to be particularly persuasive insofar as the coverage dispute in this case is concerned.

When plaintiff issued the Hall and Leefers policies, it specifically stated on the declarations page that underinsured motorist benefits were to be provided up to $300,000 per person or occurrence subject to the setoffs clearly articulated in the policy. Were we to construe the policy as defendants ask, plaintiff would have to provide up to $300,000 in underinsured motorist benefits for each insured, notwithstanding the $300,000 per occurrence cap. This construction would render the per occurrence limitation meaningless and would subject the insurer to liability above that which it agreed to provide. Such a result is contrary to the principles of contract interpretation. See Group Ins Co of America v Czopek, 440 Mich 590, 596-597; 489 NW2d 444 (1992).

For the reasons expressed herein, the order of the trial court granting summary disposition in plaintiff's favor is affirmed.

s/Paul J. Clulo
s/Maureen Pulte Reilly
s/David H. Sawyer

[1] The underinsured motorist coverage was actually a separate endorsement for which Leefers and Hall paid an additional premium. However, the underinsured motorist clause expressly incorporates those terms of the policy that apply to the uninsured motorist coverage.

[2] For purposes of the motion for summary disposition only, plaintiff conceded that Cash resided with her grandfather and, as such, was a legitimate insured under that policy. We will make the same assumption for purposes of this appeal.

[3] The consent decree was conditioned on this Court's resolution of the issue at hand. Under the order, the Estate of Phyllis Leefers was to retain $170,000 less attorney fees, while Cash was to retain $80,000 less fees.

[4] Throughout this opinion, we will use "defendants" to refer to the Leefers and Cash collectively. The majority of arguments made on appeal were presented in a brief filed by counsel for the Leefers. Cash merely filed a brief adopting the analysis of that brief as its position on appeal.

[5] In fact, the conditional consent decree provides for a prorated split of the $250,000 between the victims and suggests that none of the defendants had priority to the underinsured motorist benefits over the other.