

STATE OF MICHIGAN
COURT OF APPEALS

AMERICAN STATES INSURANCE COMPANY

Plaintiff-Appellee,

v

SHARILYN KESTEN and SANFORD KESTEN,

Defendants,

and

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

FOR PUBLICATION
January 31, 1997
9:15 a.m.

No. 178085
Genesee Circuit Court
LC No. 94-026802-CK

Before: Saad, P.J., and Corrigan and R. A. Benson,* JJ.

SAAD, J.

I

Nature of Case and Facts

In this coverage dispute between two insurers, the Auto Club Insurance Association ("ACIA") appeals the circuit court's grant of summary disposition to plaintiff American States Insurance Company ("American"). The trial court ruled that the insurance policy exclusion on which defendant ACIA relied was inapplicable, and that ACIC is therefore liable as a coinsurer for \$20,000 in damages. ACIA appeals and we reverse.

Sharilyn Kesten was a passenger in a car driven by Debra Carpenter. While Carpenter was stopped for a red light, an uninsured motorist's vehicle rear-ended Carpenter's vehicle. Carpenter's car was insured by American, and the policy included uninsured motorist ("UM") coverage. Kesten and her husband also held a policy on their own automobile, issued by ACIA, which included UM coverage.

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

Kesten made a claim for UM coverage under her ACIA policy; ACIA rejected the claim, relying upon the following exclusion:

The coverage does not apply to **bodily injury** sustained by an **insured person**:

* * *

while occupying a motor vehicle which provides the same or similar coverage for you or a resident relative.

ACIA contends that because Carpenter (the driver) has a policy of insurance with American that provides the "same or similar" insurance to Kesten (the passenger), ACIA's exclusion applies, and American must provide the sole coverage. As stated above, the circuit court found the exclusion in ACIA's policy inapplicable, and thus found ACIA liable for \$20,000 in UM coverage.

II

Analysis

ACIA correctly points out that Kesten is entitled to benefits from the policy issued by American on Carpenter's vehicle, which provides:

We will pay damages which an "insured" is legally entitled to recover from the owner or operator of an "uninsured" or "underinsured motor vehicle" because of "bodily injury" sustained by an "insured" and caused by the accident.

* * *

"Insured," as used in this part, means:

1. You or any family member.
2. Any other person "occupying" "your covered auto."

Because Carpenter's UM coverage (American) includes Kesten as one who occupied the "covered auto," ACIA maintains that Carpenter's American policy provided the "same or similar" coverage as the UM provision in Kesten's ACIA policy. Part IV of ACIA's policy deals expressly with UM coverage. As stated above, the language under "Exclusions" is plain that if "you" (the insured) are a passenger in a car, as here, that has UM coverage – and this UM coverage covers you, then the ACIA's UM coverage does not cover you. There is nothing about this exclusion that is ambiguous. To the contrary, the exclusion is clear, concise and specific. American's argument (that, because its policy has a \$100,000 limit of liability, while ACIA's limit is \$20,000, this means that coverage is not the "same or similar,") confuses the *type* of coverage with the *amount* of coverage. We reject American's argument as specious.

American also makes the unpersuasive (and internally inconsistent) argument that ACIA's exclusionary policy language conflicts with its "other insurance" provision in the policy, such that the exclusion should not apply.¹ American has the analysis backwards. Because the exclusion does, in fact, apply, there is no need to use the "other insurance" clause—it has no applicability at all.²

We reverse and remand for entry of judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Maura D. Corrigan

/s/ Robert A. Benson

¹ The "other insurance clause" provides:

If there is other Uninsured Motorists Coverage with us or any other insurer for a loss covered by this part, then for the purposes of this coverage damages shall be limited to a maximum of \$20,000 for any one insured person and \$40,000 for two or more insured persons. We will not be liable under this coverage for a greater proportion under this coverage than the applicable Limit of Liability of this coverage bears to the sum of the applicable Limits of Liability of this insurance and all other insurance.

² The "other insurance" clause serves to reveal how to apportion the dollars when two or more policies apply to the same covered act. *St Paul Fire & Marine Ins v American Home Assur Co*, 444 Mich 560, 564-565; 514 NW2d 113 (1994). Where, as here, ACIA's policy provides no coverage, and only American's policy applies, there is nothing to "apportion" between the two carriers.