# STATE OF MICHIGAN

# COURT OF APPEALS

AUTO CLUB INSURANCE ASSOCIATION,

Plaintiff-Appellant,

v

KIMBERLY HARDIMAN, a minor by her next friend, BONNIE HARDIMAN,

Defendant-Appellee.

FOR PUBLICATION
March 6, 1998
9:05 a.m.

No. 196428
Oakland Circuit
LC No. 95-508944-CK

Before: Holbrook, Jr., P.J. and White and R.J. Danhof,* JJ.

PER CURIAM.

Plaintiff, Auto Club Insurance Association, appeals as of right from an order denying its motion for summary disposition and granting summary disposition for defendant, Bonnie Hardiman, as next friend for Kimberly Hardiman, a minor, in this declaratory judgment action. We affirm.

On March 1, 1991, six-year old Kimberly Hardiman witnessed an accident in which her pedestrian brother, Kevin Hardiman, was struck by an automobile driven by Norma Lewis. Kevin became a paraplegic as a result of the accident. Lewis was insured under an automobile policy issued by ACIA. The policy provided liability coverage of $100,000 per person and $300,000 per occurrence for bodily injury. The policy further provided:

> The Bodily Injury Limit for each person is the maximum amount that will be paid for bodily injury sustained by one person in one occurrence. *This limit includes all claims for derivative damages allowed under the law.* [Emphasis added.]

Defendant filed suit against Lewis, alleging a cause of action for negligent infliction of emotional distress on behalf of Kimberly Hardiman.[1] A separate cause of action for negligence was alleged on behalf of Kevin Hardiman. Kevin's claim was settled for $95,759. ACIA thereafter offered $4,241 in full settlement of Kimberly's claim, maintaining that her claim was *derivative* of her brother's claim and, therefore, subject to the $100,000 "per person" limitation,

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

inclusive of all claims for derivative damages allowed under the law. Defendant rejected the offer and claimed that the $300,000 "per occurrence" limitation was available to satisfy Kimberly's claim because it involved a separate, independent cause of action, not one that was derivative to Kevin's claim.

In order to settle this dispute, ACIA filed this declaratory action against defendant, seeking a determination that Kimberly's claim for negligent infliction of emotional distress was derivative to her brother's negligence claim and, therefore, subject to the $100,000 "per person" limitation. Both sides filed cross motions for summary disposition. The trial court ruled that Kimberly's claim involved an "independent and non-derivative" claim from her brother's and, therefore, denied ACIA's motion and granted summary disposition for defendant. This appeal followed.

We are presented with the single narrow legal issue whether Kimberly's bystander claim for negligent infliction of emotional distress is *derivative* of Kevin's negligence claim, such that is subject to the $100,000 "per person" limit of coverage.[2]

An insurance policy must be enforced in accordance with its terms. *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 207; 476 NW2d 392 (1991). Undefined terms in an insurance policy are to be interpreted in accordance with common usage. *Group Ins Co v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992). Where an ambiguity is found, the court must construe the policy in a manner most favorable to the insured. *Michigan Millers Mutual Ins Co v Bronson Plating Co*, 445 Mich 558, 567; 519 NW2d 864 (1994). However, where there is no ambiguity, the court must enforce the policy as written. *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 403; 531 NW2d 168 (1995).

ACIA's insurance policy expressly states that the "per person" limit of liability "includes all *claims for derivative damages* allowed under the law." We find that this language is clear and unambiguous insofar as it provides that claims for derivative damages are subject to the "per person" limit of coverage. However, we must determine whether a claim for negligent infliction of emotional distress constitutes a "claim for derivative damages." We hold that it does not.

ACIA cites three cases in support of its argument that Kimberly's claim is derivative to her brother's negligence claim. See *Gibbs v Armovit*, 182 Mich App 425; 452 NW2d 839 (1990); *State Farm Mutual Automobile Ins Co v Descheemaeker*, 178 Mich App 729; 444 NW2d 153 (1989); *Auto Club Ins Ass'n v Lanyon*, 142 Mich App 108; 369 NW2d 269 (1989). However, those cases all involve claims by family members for loss of consortium, society and companionship. None of the cases involve a claim for intentional or negligent infliction of emotional distress. In each case, this Court held that the family member's loss of consortium claim was derivative to the claim of the injured party and, therefore, subject to the liability limit of the injured party. We conclude that ACIA's reliance on these cases is misplaced.

Whereas a claim for loss of consortium is contingent upon the injured person's recovery of damages, *Bias v Asbury*, 369 Mich 378, 382; 120 NW2d 233 (1963); *Morrison v Grass*, 314 Mich 87, 106; 22 NW2d 82 (1946); *Hilla v Gross*, 43 Mich App 648, 652; 204 NW2d 712 (1972), a claim for negligent or intentional infliction of emotional distress may be maintained as a

separate, independent cause of action and is not dependent upon actual injury to, or recovery by, another person. *Barnes v Double Seal Glass Co, Inc*, 129 Mich App 66, 75-76; 341 NW2d 812 (1983); *Campos v General Motors Corp*, 71 Mich App 23, 25; 246 NW2d 352 (1976).

In *Barnes*, the plaintiffs' son died in a work-related accident. The plaintiffs sued their son's employer and coemployees for wrongful death, alleging claims for negligence as well as intentional tort. The plaintiffs also alleged claims in their individual capacities for intentional infliction of emotional distress. The trial court granted accelerated judgment of the intentional infliction of emotional distress claims, but this Court reversed, stating:

> Michigan has recognized intentional infliction of emotional distress as a separate cause of action. . . .
>
> The trial court erroneously assumed that plaintiffs' claim was derivative to decedent's claim under the wrongful death act. Plaintiffs' claim for intentional infliction of emotional distress is made on their own behalf, for their own injuries, for a tort directed at them rather than at their son. The claim is not for wrongful death and is not covered by § 2922 of the wrongful death act, MCL 600.2922; MSA 27A.2911, or the exclusive remedy provision of the WDCA, MCL 418.131; MSA 17.237(131). [*Barnes* at 75-76; citations omitted.]

Kimberly's claim for negligent infliction of emotional distress likewise involves a separate, independent cause of action. Her claim seeks recovery for a tort directed at her personally, not at her brother. The success of her claim is not contingent on any recovery by her brother. Accordingly, we conclude that Kimberly's claim is not derivative of her brother's negligence claim and, therefore, not subject to the $100,000 "per person" limit of coverage for claims involving derivative damages.

Other states that have considered this issue have likewise concluded that a claim for negligent or intentional infliction of emotional distress is a separate cause of action, such that it is subject to a "per occurrence" as opposed to "per person" coverage limitation. *Pekin Ins Co v Hugh*, 501 NW2d 508 (Iowa, 1993); *Crabtree v State Farm Ins Co*, 632 So2d 736 (La, 1994); *Treichel v State Farm Mutual Automobile Ins Co*, 930 P2d 661 (Mont, 1997); *Wolfe v State Farm Ins Co*, 540 A2d 871; 224 NJ Super 348 (1988). In *Pekin Ins Co v Hugh*, *supra*, the Iowa Supreme Court specifically distinguished a bystander claim for negligent infliction of emotional distress from a claim for loss of consortium and held that the bystander claim was subject to a "per occurrence," rather than "per person" limitation of coverage. The court stated:

> Unlike the loss of consortium claim, an injury the bystander suffers is not one that results from an injury to another person. Rather, the injury is directly to the bystander as a result of the bystander seeing the accident and reasonably believing that the direct victim of the accident would be seriously injured or killed.

* * *

[T]he injury—emotional distress—is compensable to the extent of the $100,000 remaining of the $300,000 per occurrence underinsurance coverage limits. *Id.* at 511-512.

Accordingly, because Kimberly Hardiman's claim for negligent infliction of emotional distress constitutes a separate, not a derivative, cause of action, the trial court did not err in denying ACIA's motion for summary disposition and granting summary disposition in favor of defendant.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ Robert J. Danhof

[1] It was alleged that Kimberly sustained psychological and emotional injuries, with physical manifestations.

[2] We are neither presented with, nor express any opinion on, the question whether Kimberly possesses a valid claim for negligent infliction of emotional distress, see *Wargelin v Mercy Health Corp*, 149 Mich App 75; 385 NW2d 732 (1986), or, if so, whether her claim is either subject to or meets the threshold requirements for tort liability under the no-fault act. MCL 500.3135; MSA 24.13135.