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May 19, 2021

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You are hereby notified that the Court has entered the following opinion and order:

2020AP1288 Safeco Insurance Company of Illinois v. State Farm Mutual Automobile Insurance Company (L.C. #2019CV1317)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Safeco Insurance Company of Illinois appeals from an order of the circuit court. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We affirm.

Background

The following facts are undisputed. On December 14, 2017, Sean Manley was in a two-vehicle automobile accident while driving a vehicle owned by Arthur Manley (accident vehicle). At the time of the accident, Safeco had issued to Arthur and Theresa Manley an automobile policy on this vehicle that had a policy limit of $100,000 per person; Sean Manley qualified as an insured under this policy and was entitled to coverage for the accident. Also at the time of the accident, Patricia Manley had in effect a separate auto insurance policy issued to her by State Farm Mutual Automobile Insurance Company on a different vehicle, which was not involved in the accident (nonaccident vehicle); Sean Manley also qualified as an insured under this policy, which also had a policy limit of $100,000 per person.

The driver of the other vehicle in the accident made a claim against Safeco for bodily injuries she sustained, and Safeco settled that claim for $100,000. Safeco requested that State Farm contribute to the settlement on a pro rata basis, which in this case would be half, and State Farm declined.

Safeco filed this suit seeking contractual or equitable subrogation. State Farm denied any financial responsibility related to the accident. The circuit court entered a summary judgment

[1] All references to the Wisconsin Statutes are to the 2019-20 version.

order in favor of State Farm. The court determined that Safeco's policy provided primary insurance coverage to Sean Manley with regard to the accident, State Farm's policy provided excess coverage, and because the settlement amount did not exceed the primary coverage amount of Safeco's policy, "there was no excess" and State Farm's policy "did not kick in"; thus, State Farm was not obligated to pay anything with regard to the accident. As to the equitable subrogation issue, the court concluded that "Safeco does not have a greater equity over State Farm because State Farm's excess coverage does not and did not come into play here because there wasn't an excess over the policy coverage limits." Safeco appeals. We agree with the circuit court in every respect and affirm.

Discussion

This appeal requires us to interpret insurance contract language, decide whether subrogation applies, and review a summary judgment decision of the circuit court. All of these matters present questions of law we review de novo. ***Behrendt v. Gulf Underwriters Ins. Co.***, 2009 WI 71, ¶11, 318 Wis. 2d 622, 768 N.W.2d 568; ***Auto-Owners Ins. Co. v. Rasmus***, 222 Wis. 2d 342, 348, 588 N.W.2d 49 (Ct. App. 1998); ***United States Bank Nat'l Ass'n v. Stehno***, 2017 WI App 57, ¶27, 378 Wis. 2d 179, 902 N.W.2d 270. Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Behrendt***, 318 Wis. 2d 622, ¶11.

"We must give an insurance policy's language its common and ordinary meaning; moreover, we construe the language as would a reasonable person in the position of the insured." ***Auto-Owners Ins. Co.***, 222 Wis. 2d at 348. The relevant language from Safeco's automobile insurance policy issued to Arthur and Theresa Manley on the accident vehicle is:

> **A.** We will pay damages for **bodily injury** or **property damage** for which any **insured** becomes legally responsible because of an auto accident. We will settle or defend … any claim or suit asking for these damages…. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted….
>
> **B.** "**Insured**" as used in this Part means:
>
> 1. You or any **family member** for the ownership, maintenance or use of any auto ….
>
> 2. Any person using **your covered auto** with your express or implied permission.
>
> ….
>
> *If* there is *other applicable liability insurance available* any insurance we provide shall be *excess over* any other applicable liability insurance. If more than one policy applies on an excess basis, we will bear our proportionate share with other collectible liability insurance.

(Emphasis added.) The relevant language from State Farm's automobile insurance policy issued to Patricia Manley on the nonaccident vehicle is:

> **If Other Liability Coverage Applies**:
>
> ….
>
> 2. The Liability Coverage provided by this policy applies as primary coverage for the ownership, maintenance, or use of ***your car*** ….
>
> ….
>
> 3. Except as provided in 2. above, the Liability Coverage provided by this policy applies as excess coverage.

Safeco admits that State Farm's policy, issued to Patricia Manley on the nonaccident vehicle, provides only excess coverage. But, Safeco claims, the other insurance provision of its policy issued to Arthur and Theresa Manley on the accident vehicle effectively renders its coverage excess as well. Because of this, Safeco contends that we should determine "that both

policies apply to provide primary coverage on a pro rata primary basis." We disagree. With regard to this accident, Safeco's policy provides primary coverage and State Farm's policy provides excess coverage.

"The purpose of an 'other insurance' clause is to define which coverage is primary and which coverage is excess between policies." ***Progressive N. Ins. Co. v. Hall***, 2006 WI 13, ¶27, 288 Wis. 2d 282, 709 N.W.2d 46 (citation omitted).

Safeco ignores the entirety of the applicable provisions, including both the duty to indemnify and to defend, and the discussion of the limits of its liability. Its policy provides:

> We will pay damages for **bodily injury** or **property damage** for which any **insured** becomes legally responsible because of an auto accident. We will settle or defend … any claim or suit asking for these damages.… Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted.

It is undisputed that Sean Manley is an "insured" under this policy and that he became "legally responsible because of an auto accident."

As Safeco's policy also provides, the coverage afforded Sean Manley by the policy would be "excess" only "*[i]f* there is other *applicable* liability insurance *available*." (Emphasis added.) In asserting that its policy provides excess coverage, Safeco erroneously claims that State Farm's policy provides "other applicable liability insurance [that is] available" with regard to this accident; it does not. Subsection 3. of the State Farm policy issued to Patricia Manley on the nonaccident vehicle states that it "applies as *excess* coverage" *unless* subsection 2. of that policy applies. (Emphasis added.) As Safeco acknowledges, subsection 2. does not apply because that primary coverage clause only applies "for the ownership, maintenance, or use of ***your car***," and here the accident is not related to the ownership, maintenance, or use of the

nonaccident vehicle of Patricia Manley. Thus, with regard to this accident, State Farm's policy has at all times only provided the possibility of excess coverage.

As State Farm asserts, "coverage cannot be excess unless primary coverage exists in the first place and is then exhausted." *See* ***Amcast Indus. Corp. v. Affiliated FM Ins. Co.***, 221 Wis. 2d 145, 162 n.12, 584 N.W.2d 218 (Ct. App. 1998) ("[U]ntil the [excess] coverage is triggered by the provisions of the primary policy, the excess insurance does not come into play."); ***Azco Hennes Sanco, Ltd. v. Wisconsin Ins. Sec. Fund***, 177 Wis. 2d 563, 571-72, 502 N.W.2d 887 (Ct. App. 1993) ("The unique feature of the excess policy is that it provides that the excess insurer realizes no obligation to the insured until the primary insurer has exhausted its policy limits. *The excess carrier has no obligation to defend or contribute to a settlement or judgment where the final loss figure, whether by judgment or settlement, is within the primary coverage limits, even where the amount claimed exceeds the primary limits*." (citation omitted)). This understanding comports with the key language from Safeco's policy: "If there is other applicable liability insurance available any insurance we provide shall be excess *over* any other applicable liability insurance." (Emphasis added.) Here, "other applicable liability insurance" is referring to primary, not excess, insurance coverage, and, again, there is no dispute that State Farm's policy did not provide primary coverage with regard to this accident such that Safeco's insurance could be "over" it. We agree with State Farm's position:

> When agreeing that Safeco's policy would be excess only "[i]f there is other applicable liability insurance available," Safeco could not have intended its policy to be excess to other excess insurance. The plain meaning … interpretation of the phrase "other applicable liability insurance" in Safeco's policy, then, is that it refers to other liability insurance that applies on a primary basis, not to excess liability coverage of the type provided by State Farm.

Safeco settled the claim with the injured driver of the other vehicle for the exact amount of its policy limit of $100,000. State Farm's excess coverage would have "kick[ed] in" if the injured driver of the other vehicle was entitled to an amount greater than Safeco's $100,000 policy limit; however, that is not the case. As a result, State Farm's liability insurance never "applied" with regard to the accident and was not "available." Because Safeco's "other applicable liability insurance available" clause does not apply, Safeco's policy provides primary coverage with regard to the accident; its coverage never becoming excess.

As to its subrogation claims, Safeco recognizes that it is only entitled to subrogation if its position is correct that State Farm was contractually obligated under its policy of insurance to contribute to the settlement. Because we have concluded that Safeco's reading of the contracts of insurance is incorrect and that State Farm has no obligation to contribute to the settlement, no subrogation is warranted. We agree with the circuit court's conclusion that Safeco is not entitled to subrogation because "Safeco does not have a greater equity over State Farm because State Farm's excess coverage does not and did not come into play here because there wasn't an excess over the policy coverage limits."

IT IS ORDERED that the order of the circuit court is hereby summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals