IN THE SUPREME COURT OF IOWA

Supreme Court No. 18-1516

TRACIE AKERS,

Appellant

vs.

EMPLOYERS MUTUAL CASUALTY COMPANY,

Appellee

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

Honorable Michael D. Huppert

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. Uncharted Waters—a matter of first impression.

It is undisputed that no reported decision in any jurisdiction enforces a reduction-of-benefits provision like that advanced by EMCC, in a combined single limit policy, to offset coverage of an insured receiving no third-party recovery. Appellant does not present a challenge to Iowa precedent; rather, she presents a matter of first impression.

Appellant concedes Iowa takes a "narrow coverage view" of uninsured motorist coverage, and that workers' compensation benefits received by an insured may be permissibly offset against uninsured motorist coverage *of the same insured*. Appellant does not contest that in Iowa uninsured motorist coverage is deemed duplicative of any third-party recovery *by the same insured*.

However, to avoid liability for Appellant's stipulated, covered damages in

the amount of the remaining policy benefits[1], EMCC must establish that it is entitled under both its policy and Iowa law to apply an offset to Ms. Akers' coverage for third-party benefits received by a different insured.

None of the cases cited by EMCC and the district court are controlling here, as the contracts before the courts and/or the questions presented in those cases were materially different than those of the case at bar. The cases relied upon by EMCC and the district court offset UM coverage of the *same insured* receiving workers' compensation benefits, and/or interpret and apply split-limit contracts, which by their express terms limit coverage for loss of consortium damages to an "each person" limit available to the bodily-injured insured. While generally related by subject matter, the cases relied upon by EMCC and the district court are distinguishable and not dispositive of the issues in this case.

II. The district court decision should be reversed because it relied on authority which is readily distinguishable.

The district court conclusion that while loss of consortium damages must be covered, they are covered only to the extent of coverage available to the bodily-injured insured is flawed. Neither the EMCC policy nor Iowa case law provides for that result.

Whether or not Tracie Akers sustained a bodily injury has absolutely

[1] Over $300,000 of the combined single limit policy benefits remain unpaid to any insured. (App. 123, ¶21("remaining benefits available under the EMCC uninsured motorist policy . . . total $313,785.44."))

nothing to do with the limit of coverage for her damages, because the EMCC policy does not provide a separate limit of coverage for all damages arising from each bodily injury. Instead, the EMCC policy provides coverage for Tracie Akers' loss of consortium damages, like all other damages, up to the $1M combined single limit available to all insureds. (App. 081) The policy does not tie Appellant Tracie Akers' coverage limit to that of David Akers, any more than to that of all other insureds. While Tracie Akers' status as an insured arises because of David Akers' bodily injury, the contract in no way ties or subordinates her *coverage limit* to the coverage available to the bodily-injured insured—save the combined single limit which provides a maximum payment for all damages arising from one accident.

EMCC and the district court rely on *Lepic ex. rel. Lepic v. Iowa Mut. Ins. Co.*, 402 N.W.2d 758 (Iowa 1987), in which the Supreme Court interpreted and applied a split-limit policy that expressly limited all damages arising out of bodily injury to one person to an "each person" limit of coverage. The split-limit contract language which was outcome determinative in *Lepic* is not present in the EMCC policy.

Moreover, the *Lepic* Court did not consider UM offsets at all. In *Lepic*, the "each person" limit had been paid in full. The question before the court was whether under the split-limit contract language the loss of consortium claim

should be covered under a separate "each person" limit.

Conversely, in the case at bar, the benefits under the combined single limit policy have not been exhausted. (App. 123, ¶21("remaining benefits available under the EMCC uninsured motorist policy . . . total $313,785.44.")) Over $300,000 of the combined single limit policy benefits remain unpaid to any insured. *Id.* EMCC seeks to avoid payment of Appellant Akers' stipulated damages, by applying an offset for compensation received by a different insured.

Similarly, the policy in *Craig v. IMT Ins. Co.* provided a split-limit of coverage, with "virtually identical" language to that analyzed in *Lepic*. 407 N.W.2d 584, 585-86 (Iowa 1987). The court concluded the parents of an unborn but viable son killed in an auto accident may recover loss of consortium damages under the applicable "each person" limit. While the contract in *Craig* is materially different than the EMCC policy, this case is of value to the extent it underscores the complete independence of a loss of consortium claim. *Id.* at 586.

EMCC's and the district court's reliance on *Dahlke v. State Farm Mut. Auto. Ins.*, 451 N.W.2d 813 (Iowa 1990) is similarly misplaced. The *Dahlke* Court held loss of consortium is not a separate bodily injury. Again, whether loss of consortium is a separate bodily injury is irrelevant to the case at bar, because the EMCC policy does not provide a separate limit of coverage for all damages arising out of each bodily injury.

Lastly, *English v. Pretti*, 2002 WL 31414093 (Tenn. Ct. App. Oct 24, 2002) also presented a split-limit policy that contractually indemnified loss of consortium under the same limit as the bodily injury giving rise to the claim. *Id.* at *17-18. Significantly, the Tennessee Supreme Court granted discretionary appeal of the *English* case before the case was resolved without decision.

EMCC makes an analytical leap from David Akers' bodily injury triggering Ms. Akers' status as an insured to the assertion that Ms. Akers' coverage *limit* is therefore "necessarily coextensive with David Akers." (EMCC proof brief, 52) EMCC enjoyed the power and freedom of drafting the contract. If it wished to limit coverage for loss of consortium damages to the limit of coverage available to the bodily-injured insured, it could have done so, as is evidenced by split-limit policies which contractually limit coverage for all damages arising out of injury to one person to an "each person" limit. However, that is not the contract EMCC drafted and sold.

EMCC elected to provide a combined single limit of coverage for all damages arising out of one accident. In its own words, any insured could receive the entire per-accident limit, upon proof of damages. (App. 081). EMCC must perform under the contract it sold. Any applicable reduction-of-benefit provisions must comply with the Code, or they are rendered ineffective. *Greenfield v. Cincinnati Ins. Co.*, 737 N.W.2d 112, 117 (Iowa 2007).

The district court decision should be reversed because it relied on distinguishable authority, and its conclusion that coverage for a loss of consortium claim is properly "folded in" with coverage for an underlying bodily injury—without contract language to that effect—was error.

III. The district court decision should be reversed because provisions as advanced by EMCC violate Iowa Code Chapter 516A.

A "duplicate" is an identical copy—something "consisting of or existing in two corresponding or identical parts" or "the same as another." https://www.merriam-webster.com/dictionary/duplicate (last accessed May 26, 2018). No *duplication* of benefits or insurance can exist between different legal entities with different damages. *McClure v. Employers Mut. Cas. Co.*, 238 N.W.2d 321, 329-30 (Iowa 1976); *Condon v. Employers Mut. Cas. Co.*, 529 N.W.2d 630, 631-32 (Iowa Ct. App. 1995); *see also Greenfield*, 737 N.W.2d at 124 (finding, in an underinsured context, a husband's loss of consortium award not duplicative of his injured wife's workers' compensation settlement).

The plain language of Section 516A.2(1)(a) (2015) does not authorize offsets on a "per accident" basis. The legislature limited permissible reduction-of-benefit provisions to those designed to avoid *duplication*. In so doing, the legislature necessarily directed that application and enforceability of such provisions must be analyzed on an insured-by-insured basis.

While *Miller v. Westfield Ins. Co.*, 606 N.W.2d 301 (Iowa 2000) clarified that no actual duplication of benefits is required to render a reduction-of-benefits provision enforceable; the *Miller* Court identified the potential for duplication of benefits *to the same insured*, which the provision it upheld was designed to avoid. *Id.* at 307. Ultimately, the *Miller* Court reinforced the statutory requirement that a permissible reduction-of-benefits provision must be designed to avoid duplication of insurance or other benefits. 606 N.W.2d at 305-07.

The reduction-of-benefits provision as advanced by EMCC conflicts with the legislative intent behind Chapter 516A. The legislature sought to protect insureds from losses caused by uninsured motorists, without requiring insurers to make a duplicate payment to an insured who had already received third-party compensation for his or her loss.

A provision which applies an offset to all insureds regardless of whether they receive other benefits or insurance is not designed to avoid duplication—it is designed to avoid payment of benefits. The provision as advanced by EMCC is overly broad, and therefore in violation of section 516A.2(1)(a). In the event it leaves an insured without the minimum safety net coverage, the provision may also run afoul of section 516A.1.

EMCC's construction of its contract prevents dollars from flowing from its coffers in the event any insured involved in the accident receives third-party

compensation. EMCC contends this complies with the Code because it prevents duplication on a per accident basis. This interpretation flies in the face of legislative history and nearly a half-century of precedent stating the purpose of Chapter 516A is to protect insureds.

Adopting EMCC's position could have dire consequences for innocent Iowans. Under such a scheme, insurers could comfortably and confidently sit back and collect premiums, knowing they have no real exposure when damages are high. Whether the UM policy is sold to a school district or to other Iowa employers whose employees travel for work, the insured vehicle would routinely contain more than one employee who would be covered by workers' compensation benefits.

If all benefits paid or *payable* through workers' compensation, social security, and other benefits received by any insured offset the policy limit applicable to all insureds, innocent Iowans will be left with no safety net of coverage. A large van full of talented and gifted students on their way to a debate competition, or a school bus of all-star athletes, who are seriously injured and insured under a $1,000,000 policy may find themselves with no coverage; because their teachers or coaches have received, or are expected to receive, third-party benefits in an amount to fully offset the UM policy limit. This offsets-to-all approach keeps the insurer's pockets full of premiums, despite damages well in

excess of the policy limits. This outcome is out of line with legislative intent, and should be rejected.

Section 516A.2(1) may have been enacted for the protection of the insurer to the extent it allows an insurer to offset or exclude coverage which may duplicate a third-party recovery by the same insured. However, in *Fort Madison*, the Iowa Supreme Court observed its previous approval of UM offsets under the terms of an insurance contract "*of course* [] assumes the monies sought to be offset by the insurer were received by the party or entity seeking to recover UM benefits." 543 N.W.2d 591, 595 (Iowa 1996) (punctuation omitted).[2]

Rather than drafting a term which took advantage of the protections the legislature intended to provide—that is, to prevent insurers from having to pay windfall or duplicate recoveries to the same insured—EMCC drafted an overly broad provision, which if interpreted and applied in the manner they advance, is designed to prevent insurers from having any liability at all in the most catastrophic accidents. The overreach of the limitation and offset provision as

[2] While in *Fort Madison* the insurer sought to enforce a different reduction-of-benefits provision, and only one of the insureds sought recovery under the UM policy, the relevant question before the court was whether an insurer may offset third-party recoveries of one insured against UM coverage of a different insured. Because the insured seeking UM benefits could not experience "double recovery" the Court found the insurer was not entitled to an offset against its unpaid UM liability. *Id.* at 595.

advanced by EMCC is particularly evident for policies sold to employers where workers' compensation coverage is in play.

Appellant urges the Court to consider the intent of the Eldora Community School District as it entered into the contract at issue. The school district sought to insure its automobiles, all of which were to be driven by its employees. It sought not only liability coverage, but also uninsured motorist coverage. It did not purchase uninsured coverage at the statutory minimum, but rather $1,000,000 of coverage.

Would the school district have intended to enter into a contract of insurance, and been willing to pay the necessary consideration, if it believed the policy provided no payment whatsoever when an uninsured motorist causes a school bus transporting a few employees and twenty children to be overturned? Appellant contends the school district intended that coverage and offsets under the combined single limit policy would be analyzed on an insured-by-insured basis. No insured would receive a duplicate recovery; the insurer would be liable for a maximum *payment* of $1,000,000; and all insureds would have a safety net of coverage.

Importantly, invalidating the provision as advanced by EMCC does not strip the insurer of the benefit the legislature intended to provide in section 516A.2(1)(a). Insurers may utilize permissible limitation and offset provisions

which are truly designed to avoid duplication, by drafting the contracts such that coverage and reduction-of-benefit provisions are analyzed on an insured-by-insured basis, whereby offsets are applied only to those insureds receiving a third-party recovery.

The district court decision should be reversed because EMCC's construction of its contract violates Chapter 516A.

IV. The General Release and Settlement Agreement between David Akers and EMCC is irrelevant to resolution of Tracie Akers' claim.

The General Release and Settlement Agreement between EMCC and David Akers anticipates a judicial determination as to whether Tracie Akers is entitled to recover her loss of consortium damages. (App. 104-05) The agreement contemplates the potential for judicial determination in the district court, and to allow for the appellate process to unfold. *Id.* The Agreement provides a separate settlement agreement would be prepared with Ms. Akers, consistent with the final judicial ruling setting forth the parties' relative rights, should her position prevail. *Id.*

Only if the district court decision were not appealed would the Settlement Agreement with David Akers direct that his compensation should be deemed to include all consideration and payments for claims asserted by Tracie. Moreover, only David was a party to that settlement agreement. While he can agree to

indemnify and hold harmless EMCC from any claim asserted by Tracie, he cannot waive or extinguish her rights to pursue her own benefits under the EMCC contract.

CONCLUSION

Neither the policy nor Iowa law authorizes EMCC to apply offsets for third-party benefits received by one insured against coverage of all other insureds. Appellant contends the EMCC policy is ambiguous and should be interpreted in her favor. However, if the Court finds the EMCC policy does offset Tracie Akers' coverage in the amount of workers' compensation benefits received by David Akers, Appellant respectfully requests the Court find the relevant provisions unenforceable, as in violation of Iowa Code Chapter 516A. Appellant seeks entry of judgment in the amount of her stipulated damages, equal to the remainder of the unpaid benefits under the EMCC policy, $313, 785.44. (App. 123, ¶ 23(a))

CERTIFICATE OF COST

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This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) or (2), because this

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_____ January 24, 2019

Lindsay Hecht Strosche Date

PROOF OF SERVICE AND CERTIFICATE OF FILING

The undersigned certifies that on the 24th day of January, 2019, she electronically filed the above named document with the Clerk of Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following opposing counsel. Per Iowa R. Elec. P. 16.315(1)(b), this constitutes service of the document for purposes of the Iowa Court Rules.

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