IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 5-148 / 94-0576

FORT MADISON BANK & TRUST CO., As Administrator of the Estate of BERTA BOYD, Deceased,
Plaintiff-Appellant,

vs.

FARM BUREAU MUTUAL INSURANCE COMPANY and GEORGE L. NORMAN, As Administrator of the Estate of DAVID BOYD, Deceased,
Defendants-Appellees.

Appeal from the Iowa District Court for Lee County, R. David Fahey, Judge.

The administrator of Berta Boyd's estate appeals a district court judgment holding it was not entitled to uninsured motorist benefits from the defendants.

REVERSED AND REMANDED.

Robert N. Johnson, III, of Saunders, Humphrey, Johnson & Hoyer, Fort Madison, for appellant.

David A. McNeill of Morain, Burlingame, Pugh & Koop, West Des Moines, for appellees.

Considered by Donielson, C.J., and Hayden and Huitink, JJ.

HAYDEN, J.

On July 8, 1990, David and Berta Boyd were killed in a one-car accident. Berta was the owner of the car, and David was the driver at the time of the accident. Jazzber Boyd, a minor, is the only child of David and Berta.

Vera Boyd, David's mother, was appointed guardian of Jazzber. Fort Madison Bank & Trust Company was named as Jazzber's conservator and the administrator of Berta's estate. George Norman was named as the administrator of David's estate. David and Berta had two automobile insurance policies with Farm Bureau Mutual Insurance Company.

The Bank, as conservator for Jazzber, brought a dram shop action against the Tin Shed, a bar which had served David alcoholic beverages prior to the accident. Jazzber sought damages for loss of consortium due to his mother's death. The parties entered into a settlement in which the Tin Shed agreed to pay the conservatorship $50,000.

On September 5, 1991, Berta's estate and Jazzber brought suit against Farm Bureau and David's estate. Later, Jazzber was removed as a plaintiff, and the parties agreed his claims should be prosecuted by Berta's estate. Berta's estate sought damages for the wrongful death of Berta and for Jazzber's loss of parental consortium.

Farm Bureau filed a motion for adjudication of law points. David's insurance policy included a family exclusion clause, which provided there would be no liability

coverage for any bodily injury to any insured or any member of an insured's family residing in the insured's household. Since Berta was an insured under the policy, the clause prevented her estate from recovering under David's liability coverage. The district court determined David was thus an uninsured motorist and Berta's estate could recover under the uninsured motorist provisions of the policy. The court found plaintiffs' claims were subject to the $100,000 uninsured motorist policy limits.

Farm Bureau filed a motion for summary judgment. It claimed it was entitled to an offset for the $50,000 dramshop settlement. It also stated David's estate was worth more than $50,000, and claimed Berta's estate should be able to recover this amount in the wrongful death action. Farm Bureau believed it owed no monetary payment to plaintiff because it was able to offset the entire $100,000 uninsured motorist coverage limits from settlements or judgments received by plaintiff.

Berta's estate also filed a motion for summary judgment. It claimed the anti-stacking provisions in the two Farm Bureau policies were ineffective and the estate should be able to recover $100,000 under each policy.

The district court filed a combined ruling on the motions for summary judgment. The court denied plaintiff's motion for summary judgment because it found the anti-stacking provisions could be enforced. Regarding Farm Bureau's motion for summary judgment, the court found the settlement with the Tin Shed was the settlement of a claim which legally belonged to Berta's estate and therefore Farm Bureau was entitled

to offset the value of the settlement against any uninsured motorist payments it might be required to make to the estate. The court found, however, Berta's estate had not yet made any recovery against David's estate and therefore it could not determined if an offset would be appropriate. For this reason, the court denied Farm Bureau's motion for summary judgment.

Berta's estate voluntarily dismissed Jazzber's claim for loss of parental consortium. The parties entered into a stipulation in which they agreed to the following matters: (1) David's estate was legally liable for Berta's injuries; (2) Berta's estate suffered damages of $300,000 as a result of Berta's death; (3) David's estate had paid $49,049 to Jazzber's conservatorship as the sole beneficiary of the estate; and (4) Farm Bureau did not file any subrogation claims against David's estate. They agreed the remaining issues were whether the $50,000 offset from the Tin Shed was applicable and the extent of Farm Bureau's subrogation rights.

The district court then entered findings of fact and conclusions of law in the case. The court determined the settlement with the Tin Shed was binding on Berta's estate and the $50,000 should be used to offset any sum paid by Farm Bureau to her estate. The court also determined Farm Bureau's liability was subject to an offset for the amounts Berta's estate would be able to recover from David's estate. The court concluded due to these offsets, Farm Bureau had no monetary liability to Berta's estate

and dismissed the action against Farm Bureau. The court entered judgment against David's estate in favor of Berta's estate for $300,000. Berta's estate appealed.

I. This case was tried at law, and our review is for the correction of errors of law. Iowa R. App. P. 4. The findings of fact in a law action are binding upon an appellate court if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

II. Berta's estate contends the district court erred by permitting Farm Bureau to offset the dramshop settlement payment against the amount due under the uninsured motorist provision. It states the settlement was made on behalf of Jazzber, not Berta's estate. It believes Farm Bureau should not be allowed to offset the amount it owes Berta's estate with a payment made to another entity, Jazzber's conservatorship.

Under Iowa Code section 516A.2(1), uninsured motorist coverage may include offsets designed to avoid duplication of insurance or other benefits. *Condon v. Employers Mut. Cas. Co.*, 529 N.W.2d 630, 631 (Iowa App. 1995). Uninsured motorist coverage guarantees a minimum recovery, while underinsured motorist coverage seeks to provide compensation to the extent of the injury, subject to the policy limit. *In re Estate of Allgood,* 509 N.W.2d 486, 487 (Iowa 1993). This means benefits which are duplicative in the uninsured motorist context are not necessarily so in the underinsured motorist context. *Veach v. Farmers Ins. Co.*, 460 N.W.2d 845, 848 (Iowa 1990).

Damages recovered by an insured from a third-party tortfeasor must be deducted from the benefits due under the uninsured motorist clause even if the insured has not

been fully compensated. *Davenport v. AID Ins. Co.*, 334 N.W.2d 711, 715 (Iowa 1983). An insurance company may provide in its policy its liability to the insured shall be reduced by any other payments the insured receives. *Id.* This includes any recovery an insured may receive in a dramshop action. *See Allgood*, 509 N.W.2d at 487.

However, an insurer may only offset amounts received by the *insured*. *Condon*, 529 N.W.2d at 632. In *Condon*, a widow, in her capacity as administrator of her husband's estate, brought an action against his employer's uninsured motorist carrier for wrongful death benefits. *Id.* at 631. The widow, in her own capacity, had received workers' compensation benefits due to her husband's death. *Id.* We determined even if the widow was the administrator, workers' compensation and wrongful death benefits were payable to two distinct entities, and therefore, the workers' compensation benefits could not be offset against the wrongful death benefits. *Id.* at 632.

In the present case, Jazzber's conservatorship brought a dramshop action seeking damages for loss of consortium due to his mother's death. This claim should have been brought by the administrator of Berta's estate. *See Madison v. Colby*, 348 N.W.2d 202, 209 (Iowa 1984). A child's claim of loss of consortium due to a parent's death should be brought by the administrator of the parent's estate. *Id.* This is not because the claim is in the administrator, but rather to reduce a multiplicity of suits and the possibility of double recovery. *See Beeck v. S. R. Smith Co.*, 359 N.W.2d 482, 487 (Iowa 1984). The administrator is merely the conduit, the nominal plaintiff. *Id.* The recovery for lost

consortium belongs to the child. *Madison*, 348 N.W.2d at 208. The $50,000 received in settlement of the dramshop action belongs to Jazzber.

A wrongful death action must be brought by the administrator of the decedent's estate. *Miller v. Wellman Dynamics Corp.*, 419 N.W.2d 380, 383 (Iowa 1988). A wrongful death claim is the administrator's claim. *Beeck*, 359 N.W.2d at 486-487. Such a claim belongs to the administrator of the estate. *Condon*, 529 N.W.2d at 632. Thus, any recovery due to Berta's wrongful death belongs to Berta's estate.

We determine even if the dramshop claim for loss of consortium had been brought by Berta's estate, the $50,000 recovery belongs to Jazzber, and it should not be offset against Farm Bureau's liability to Berta's estate under the uninsured motorist coverage. We reverse the district court decision on this issue.

III. Berta's estate contends the district court erred by permitting Farm Bureau to reduce its uninsured motorist payment to the estate under the subrogation clause of the policy. The district court ruled Farm Bureau could offset its liability under the uninsured motorist provisions by the amount Berta's estate would receive from David's estate in the wrongful death action. Berta's estate argues David was the named insured in the policy and an insurer should not be permitted to recover by right of subrogation from its own insured.

An automobile insurance policy is a contract of indemnity, and to the extent an insurer is obligated to pay thereunder, it is placed in the position of the insured

Employers Mut. Cas. Co. v. Hanshaw, 176 N.W.2d 653, 655 (Iowa 1970). The insurer has a right of subrogation against the wrongdoer. *Id.* The rights acquired by an insurer against a wrongdoer rise no higher than those held by its insured against such offender. *Id.*

An insurer, however, cannot recover by right of subrogation from its own insured. *Connor v. Thompson Constr. & Dev. Co.*, 166 N.W.2d 109, 113 (Iowa 1969). Therefore, where the alleged wrongdoer is an insured under the policy, the insurer has no right of subrogation. *AID Ins. Co. v. United Fire & Cas. Co.*, 445 N.W.2d 767, 771 (Iowa 1989).

Here, David was the named insured under the policy. We conclude Farm Bureau cannot recover by right of subrogation from David's estate, which is its own insured. We determine Farm Bureau cannot recover from David's estate for the amounts it is required to pay Berta's estate. We reverse the district court decision on this issue as well.

IV. Berta's estate has raised other issues on appeal. However, because we have determined Farm Bureau is not entitled to an offset from Jazzber's dramshop recovery or from David's estate, we need not address these issues. We remand the case with directions to the district court to enter judgment for Berta's estate against Farm Bureau for $100,000. The estate is also entitled to interest of ten percent from July 8, 1990, the

date of Berta's death. *See Lemrick v. Grinnell Mut. Reinsurance Co.*, 263 N.W.2d 714, 719 (Iowa 1978). Costs of this action are assessed to Farm Bureau.

REVERSED AND REMANDED.