STATE OF MICHIGAN

COURT OF APPEALS

LIBERTY MUTUAL INSURANCE COMPANY,

Plaintiff Counter-Defendant-Appellee/
Cross-Appellant,

v

ALLSTATE INSURANCE COMPANY, Individually and as Subrogor of Betty Durfee, Personal Representative of the Estate of Robert T. Durfee, Deceased,

Defendant Counter-Plaintiff-Appellant/
Cross-Appellee.

UNPUBLISHED
February 11, 1997

No. 184914
Ogemaw Circuit Court
LC No. 94-000416-NZ

Before: Doctoroff, C.J., and Wahls and Smolenski, JJ.

PER CURIAM.

Defendant Allstate Insurance Company appeals as of right a final order that awarded plaintiff Liberty Mutual Insurance Company $38,500 against Allstate and declined to award either party costs or attorney fees. Liberty cross-appeals as of right the same order. We affirm.

Allstate argues that the trial court erred in determining the legal effect of the competing "other insurance" clauses contained in Allstate's policy and one of the policies issued by Liberty.

As explained by our Supreme Court in *St Paul Fire & Marine Ins Co v American Home Assurance Co*, 444 Mich 560, 565; 514 NW2d 113 (1994), "other insurance" clauses fall into three general categories:

> 1. A pro-rata clause, which purports to limit the insurer's liability to a proportionate percentage of all insurance covering the event;
>
> 2. An escape or no-liability clause, which provides that there shall be no liability if the risk is covered by other insurance; and

3. An excess clause, which limits the insurer's liability to the amount of loss in excess of the coverage provided by the other insurance.

In reconciling competing "other insurance" clauses, the courts of this state will generally follow the majority rule and give effect to the meaning and intent of the policy language. *Id*. at 577. However, when the "other insurance" clauses are identical excess clauses, it may be necessary to declare the competing clauses irreconcilable and require the insurers to apportion liability. *Id*.

In this case, contrary to Allstate's contention, the trial court considered the legal effect of the competing "other insurance" clauses in Allstate's policy and Liberty's "O27" policy. Allstate's automobile policy provided the decedent, Robert Durfee, with $50,000 coverage for bodily injury liability. Allstate's "other insurance" clause states:[1]

> Allstate shall not be liable under this Part I for a greater proportion of any loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all collectible insurance against such loss: provided, however, the insurance with respect to a temporary substitute automobile or a non-owned automobile shall be excess insurance over any other collectible insurance.

The trial court found that Allstate's "other insurance" clause was an excess clause. We find no error in this conclusion where it is undisputed that Durfee did not own the automobile he was driving at the time of the accident. See *Bosco v Auto-Owners Ins Co*, 212 Mich App 421, 424, 429; 539 NW2d 517 (1995). We also note that Allstate does not limit its excess coverage so as to prevent concurrent coverage by other policies. *Id*. at 432.

It was undisputed below that Liberty's "027" business automobile policy provided both Durfee and Al Bennett Ford, Inc, (the owner of the vehicle) with $100,000 coverage for bodily injury liability. The "other insurance" clause in Liberty's "027" policy states in relevant part:[2]

> B. OTHER INSURANCE.
>
> 1. For any covered auto you own this policy provides primary insurance. For any covered auto you don't own, the insurance provided by this policy is excess over any other collectible insurance. . . . .
>
> * * * *
>
> 2. When two or more polices cover on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the limit of our policy bears to the total of the limits of all the polices covering on the same basis.

The trial court found that this clause constituted an excess clause. Allstate's argument that this clause constituted a primary, pro-rata clause is premised on defining "you" in the first sentence as Al Bennett Ford. However, the term "you" is defined in Liberty's "027" policy to mean "the person or

organization shown as the named insured in ITEM ONE of the declarations." The named insured in item one of the declarations of this policy was Ford Motor Company and other entities not relevant to this case. Under Liberty's "027" policy, Durfee and Al Bennett Ford were not defined as named insureds, but, rather, were defined as additional insureds. Thus, the first sentence of the "other insurance" clause in Liberty's "027" policy is inapplicable in this case because the vehicular accident did not involve an automobile owned by Ford. Therefore, the second sentence applies. Accordingly, we find no error in the trial court's determination that the "other insurance" clause in Liberty's "027" policy constituted an excess clause in this case. See *Bosco, supra* at 423-425, 431-432. We also note that Liberty's "027" excess clause does not refuse contribution with policies containing an excess clause such as that found in Allstate's "other insurance" clause. *Id*. at 432.

In summary, we conclude that the trial court correctly found that the competing "other insurance" clauses in Allstate's policy and Liberty's "027" policy constituted excess insurance clauses. We further conclude that the trial court properly declared that the competing excess clauses were irreconcilable and that each insurer's liability "should be prorated on the basis of the ratio of the insurer's limits of liability to the total limits of available coverage on the loss." *Id*. at 435.

Next, Allstate argues that even if it was liable for a pro-rata amount, the trial court erred in calculating Allstate's proportionate share. Specifically, Allstate contends that the total coverage available under its $50,000 policy and Liberty's "037" policy was $1,050,000, and, therefore, its proportionate share should have been $2,500. We disagree. First, we note that the total coverage available under Liberty's "037" policy was five million dollars. Second, the trial court did not consider this policy because it only covered Al Bennett Ford. Rather, the trial court apportioned liability between the two polices that covered Durfee, i.e., Allstate's $50,000 policy and Liberty's $100,000 "027" policy, under the formula enunciated above. We decline to review this apportionment, but see, e.g., *Secura Ins Co v Cincinnati Ins*, 198 Mich App 243, 247-248; 497 NW2d 230 (1993), on the ground that the trial court also found that requiring Allstate to pay Liberty $50,000 was appropriate in this case under equitable principles of indemnification, contribution and subrogation. Allstate has not raised on appeal any issue concerning these findings and conclusions. Accordingly, we affirm the trial court's decision that Allstate pay Liberty $50,000.[3]

On cross-appeal, Liberty argues that the trial court abused its discretion in failing to award it the costs and attorney fees it incurred in bringing this action. We disagree. Michigan follows the common-law tradition known as the "American rule" concerning attorney fees. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 474; 521 NW2d 831 (1994). "Under this rule, attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides to the contrary." *Id*. In this case, Liberty has cited no statute or court rule authorizing an award of costs and attorney fees. Even assuming such an award would be available in equity, see Liberty's cited case of *Block v Schmidt*, 296 Mich 610, 621; 296 NW 698 (1941), we conclude that after reviewing Liberty's argument on appeal we are simply not persuaded that the trial court abused its discretion in failing to award costs and attorney fees in this case. *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 634; 552 NW2d 671 (1996).

Affirmed.

/s/ Martin M. Doctorff
/s/ Myron H. Wahls
/s/ Michael R. Smolenski

[1] On appeal, both Allstate and Liberty erroneously cite the "other insurance" clause in Liberty's "037" policy as the "other insurance" clause contained in Allstate's policy.

[2] Allstate erroneously states that this clause was contained in Liberty's "037" policy.

[3] The trial court offset its award of $50,000 to Liberty by $11,500, which the court found was the amount Liberty owed Allstate on Allstate's counterclaim for its costs of defending Durfee in the underlying personal injury suit. No issue has been raised by either party concerning this determination.