

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

PROGRESSIVE MICHIGAN
INSURANCE,

Plaintiff,

vs.

Case No. 2015-692-CB

U.S. CARGO EXPRESS, LLC and
GRANGE INSURANCE COMPANY,

Defendants.

OPINION AND ORDER

Plaintiff has filed a motion for summary disposition as to its claim against Defendant Grange Insurance Company ("Defendant Grange").¹ Defendant Grange has filed response and requests that the motion be denied and that it be granted summary disposition pursuant to MCR 2.116(1)(2). In addition, Plaintiff and Defendant Grange have both filed reply briefs in support of their positions.

I. Factual and Procedural History

This insurance priority dispute arises out of a March 5, 2014 automobile collision. David McCowan was the operator and title owner of a 2000 Volvo semi-truck involved in the incident (the "Truck"). Mr. McCowan later complained of injuries he claimed were caused by the accident and submitted a claim to Plaintiff. Plaintiff paid \$12,000.00 in benefits and settled Mr. McCowan's potential future claims for \$40,000.00.

At the time Mr. McCowan was involved in the accident he was an independent contractor of U.S. Cargo Express, LLC ("U.S. Cargo"). Pursuant to Mr. McCowan's

agreement with U.S. Cargo, U.S. Cargo agreed to lease the Truck, with Mr. McCowan remaining responsible for maintenance, fuel, and repairs. Defendant Grange issued a commercial liability policy to U.S. Cargo pursuant to which it agreed to insure several vehicles, including the Truck (“Grange Policy”).

After paying/settling Mr. McCowan’s claim, Plaintiff filed the instant matter claiming that Defendant Grange was first in order of priority to pay PIP benefits in connection with Mr. McCowan’s injuries, and that as a result it is entitled to be reimbursed. On September 15, 2015, Plaintiff filed its instant motion for summary disposition of its claims against Defendant Grange. On October 9, 2015, Defendant Grange filed its response. Plaintiff and Defendant Grange have also each filed a reply brief in support of their positions. On November 9, 2015, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Standard of Review

A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant’s pleadings by accepting all well-pleaded allegations as true. *Id.* If the defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff’s right to recovery, then summary disposition under this rule is proper. *Id.* Further, a court may look only to the parties’ pleadings in deciding a motion under MCR 2.116(C)(9). *Id.*

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence

¹ Plaintiff has, pursuant to a November 9, 2015 Order, dismissed its claims against Defendant U.S. Cargo Express, LLC with prejudice.

submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

III. Arguments and Analysis

In its response and reply, Defendant Grange contends that the situation presented in this case is virtually identical to that present in *Adalalic v Harco National Ins Co*, 309 Mich App 173; ---NW2d---(2015), and that as a result that caselaw governs.

In *Adalalic*, the plaintiff was injured in an automobile accident involving a semi-truck that he was operating. The truck was owned by plaintiff, but leased to DIS. DIS held a commercial insurance policy with Harco, which included no-fault coverage. In addition, plaintiff, through his wife, held a no-fault policy on the truck through Millers. On appeal, the Court's analysis of the insurance companies' dispute focused on whether the plaintiff was an employee of DIS or an independent contractor. After concluding that plaintiff was an independent contractor, the Michigan Court of Appeals affirmed the trial court's decision that Millers, as plaintiff's no-fault insurer, was responsible for payment of his PIP benefits. (*Id.* at 194.)

In its reply, Plaintiff contends that *Adalalic* does not apply to this case because the plaintiff's insurance in that matter was not a bobtail policy, but rather a standard no-fault policy. Further, Plaintiff asserts that this Court should be guided by the Michigan Court of Appeal's decision in *Perkovic v Hudson Ins Co*, unpublished opinion of the

Court of Appeals, decided December 20, 2012 (Docket No. 302868.)

In *Perkovic*, the plaintiff was involved in an automobile accident involving a semi-truck he owned and was driving, but that he leased to Hollingsworth. At the time of the accident, plaintiff held a bobtail policy from Hudson, which included an exclusion providing that PIP coverage did not apply to injuries resulting from the operating, maintenance or use of the covered auto in the business of anyone to whom it is leased or rented if the leasee has PIP coverage on the auto. In addition, Hollingsworth held a commercial insurance policy from Zurich at the time of the accident which covered the truck. On appeal, the Court of Appeals held that both plaintiff and Hollingsworth were owners of the truck, that both owners held policies on the truck, but that the Zurich policy held by Hollingsworth was first in priority because of the exclusion in the bobtail limiting its coverage to situations in which no other no-fault coverage is available. *Id.* at 4.

In this case, the bobtail policy Plaintiff issued contained the following exclusion:

Coverage under this endorsement, including our duty to defend, does not apply to:

1. Any insured auto while it is:
 - a. Leased or rented to any person or organization other than the named insured shown on the declarations page; or
 - b. Being operated, maintained, or used, whether or not for compensation, for or on benefit of any person or organization other than the named insured shown on the declarations page.

This exclusion applies only when that person or organization other than the named insured has:

- (i) Michigan Personal Protection Insurance coverage for bodily injury; or
- (ii) Michigan Property Protection Insurance coverage for property damage on the Insured Auto.

(See Exhibit A to Plaintiff's reply, at pp. 28-29.)

Accordingly, in this case as in *Perkovic*, the driver's bobtail policy contained an exclusion providing that coverage provided under the policy was limited to situations in which no other insurance was available. Further, as in *Perkovic*, the lessee of the vehicle maintained PIP coverage on the vehicle at issue. Moreover, the other operative facts presented in *Perkovic* are also presented in this case. Specifically:

- (1) The Truck was owned and operated by a plaintiff who had leased the vehicle to a company for whom he was an independent contractor;
- (2) The plaintiff held a bobtail insurance policy covering the Truck and the lessee of the Truck held a separate no fault policy that included PIP coverage; and
- (3) The bobtail policy contained an exclusion that excluded coverage where there was other PIP coverage available and where the accident occurred while the Truck was being operated for the benefit of someone other than the insured.

While the Court recognizes that the *Perkovic* decision is not binding, it finds *Perkovic* persuasive and virtually identical to the factual situation presented in this case. Moreover, the Court notes that the decision in *Adalalic* is not on point with the facts presented in this case because the policy held by the driver/owner/operator in that case was not a bobtail policy and did not include an exclusion similar to that provided in the policies at issue in *Perkovic* and this case. For these reasons, the Court is convinced that the policy issued by Defendant is first in priority.

While the Court is satisfied that Defendant's policy is first in priority, the Court is nevertheless convinced that summary disposition on the issue of whether Defendant is liable for the amounts Plaintiff has paid in connection Mr. McCowan's claim is

premature. The parties' arguments have focused solely on the issue of priority, and the issue regarding the extent to which Defendant must reimburse Plaintiff has not been addressed. Accordingly, Plaintiff's motion will only be granted on the issue of priority.

IV. Conclusion

For the reasons discussed above, Plaintiff's motion for summary disposition is GRANTED, IN PART, and DENIED, IN PART. Specifically, the Grange Policy issued by Defendant Grange is higher in priority than the bobtail policy issued to Mr. McCowan by Plaintiff with respect to Mr. McCowan's injuries arising out of the March 4, 2014 automobile collision. Plaintiff's request for a judgment in the amount of monies it has paid to Mr. McCowan is DENIED, WITHOUT PREJUDICE. Defendant Grange's motion for summary disposition is DENIED.

Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

Date: JAN 15 2018

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge