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STATE COURT OF
BIBB COUNTY, GEORGIA

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IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA

James J. ...

CLERK STATE COURT

NANCY SMARR, INDIVIDUALLY
and as ADMINISTRATOR OF THE
ESTATE OF THOMAS J.
COCHRAN, II,

Plaintiffs,

THOMAS J. COCHRAN,

Intervenor,

ZACK L. DOZIER,

Intervenor,

vs.

DONALD EUGENE RICHARDSON,
ANN BENTLEY AND CALVIN J.
BENTLEY,

Defendants.

CIVIL ACTION NO. 63520

**ORDER DENYING SAFECO INSURANCE COMPANY'S MOTION FOR
SUMMARY JUDGMENT AND GRANTING PLAINTIFFS' CROSS-
MOTION FOR SUMMARY JUDGMENT**

Safeco Insurance Company of Illinois ("Safeco") has filed a Motion for Summary Judgment¹. Safeco's Motion and Plaintiffs' Cross-Motion for Summary

¹ Safeco originally filed a Motion for Dismissal of Uninsured Motorist Insurance Carrier Without Prejudice. Safeco, in its brief responding to Plaintiffs' Cross-Motion for Summary Judgment, then moved to convert its Motion to a Motion for Summary Judgment. Said Motion is granted.

Judgment² came before the Court for hearings on November 20, 2008, and March 12, 2009. Upon careful review and consideration of the pleadings, briefs and argument of counsel, and pertinent legal authority, the Court now rules as follows.

For the purpose of the legal issue presented to the Court, the material facts are not in dispute. Thomas J. Cochran, II ("T.J."), then seventeen years of age, was severely injured on August 7, 2005, when the vehicle in which he was a passenger collided with a vehicle driven negligently by Defendant Donald Richardson. As a result of his injuries, T.J. incurred medical expenses in excess of \$750,000.00 before his death on December 23, 2006, from those injuries. His Estate incurred funeral expenses in excess of \$13,400.00.

Allstate Insurance Company provided liability insurance coverage for Defendant Richardson in the amount of \$100,000.00 per person and \$300,000.00 per occurrence. T.J.'s mother, Plaintiff Nance Smarr ("Smarr"), was covered by an automobile insurance policy with Safeco which provided uninsured/underinsured motorist ("UM") coverage of \$100,000.00 per person and \$300,000.00 per accident.

T.J.'s parents, who are divorced,³ are before the Court as Plaintiffs asserting a wrongful death claim. T.J.'s Estate is before the Court as the Plaintiff asserting the survival action. Smarr, as noted above, is the Administrator of T.J.'s Estate.

² The Plaintiffs filing this Motion are Nancy Smarr in her individual capacity and the Estate of Thomas J. Cochran, II, by Nancy Smarr in her representative capacity as Administrator of the Estate.

³ Nancy Smarr filed the original action and T.J.'s father, Thomas J. Cochran ("Cochran") was allowed to intervene.

Safeco, as the UM company, was served with the Complaint and is also before the Court. Safeco seeks to avoid any responsibility for these claims by its reliance on the general rule in Georgia that a UM company has no exposure if the liability insurance coverage equals or exceeds the UM coverage. O.C.G.A. § 33-7-11(b)(1)(D)(ii).⁴ Safeco's position is that the vehicle driven by Defendant Richardson does not qualify as an "uninsured motor vehicle." Dewberry v. State Farm Insurance Company, 197 Ga. App. 248, 249 (1990), Toomer v. Allstate Insurance Company, 292 Ga. App. 60, 61 (2008).

Plaintiffs contend that Safeco does have exposure here based on their intended resolution of the claims with Allstate. Specifically, Smarr proposes that she and Cochran, as T.J.'s parents, settle the wrongful death claim for \$99,900.00 by executing a general release with Allstate and filing a Dismissal with Prejudice as to the Bentley Defendants and the wrongful death claim.⁵ This proposed resolution would leave only the Estate claim and only Defendant Richardson. Smarr, as the Administrator of T.J.'s estate, proposes to then settle with Defendants and Allstate for the remaining coverage of \$100.00 as to the survival action by means of a limited liability release. These releases, Plaintiffs argue, will

⁴ The changes made by the General Assembly to (D)(ii) as effective January 1, 2009, do not apply to this case.

⁵ Also pending before the Court is the motion of Plaintiff Nancy Smarr individually for authorization to settle wrongful death claim, which was filed on November 20, 2008, the date of the first hearing. On December 29, 2008, Cochran filed his Reply to the Motion. Cochran denies signing any settlement papers thus far and takes the position the Estate claim should be the one settled for \$99,900.00 and the wrongful death claim for \$100.00. The Court's analysis and conclusion, as set forth below, would seem to apply to either scenario. Both this aspect of the case and the disposition of the attorney's fee lien filed by Zack Dozier remain to be resolved.

exhaust the Allstate coverage and allow the Estate to pursue a UM claim against Safeco to the extent of \$99,900.00, the amount the Estate claims to be underinsured.

Safeco vigorously challenges Plaintiffs' position.⁶ First, Safeco argues that Plaintiffs have not exhausted the Allstate liability coverage to the extent Plaintiffs seek to present separate claims and should thus be able to go after another \$100,000.00 from Allstate as separate "persons". Georgia law does recognize the separate and distinct nature of a survival action and a wrongful death action. Smith v. Memorial Medical Center, 208 Ga. App. 26, 27-28 (1993), Blackstone v. Blackstone, 282 Ga. App. 515, 517 fn. 5 (2006). The party plaintiffs in this case are different and discrete entities even if one individual, such as Smarr, is involved in both actions. In the wrongful death action, Smarr is proceeding in her individual capacity as one who may pursue her own claim pursuant to the Georgia wrongful death statute. O.C.G.A. §§ 51-4-5(b), 19-7-1. In the survival action, the Plaintiff is the Estate for which Smarr has been appointed by the Probate Court and is acting only in her representative capacity. O.C.G.A. §§ 51-4-5(b), 9-2-41. Nonetheless, Allstate's liability insurance policy clearly defines the coverage per person as being the person actually injured in the accident without regard to how the claims might later be presented in Court. The Court concludes Plaintiffs are

⁶ It should be noted that neither party has been able to cite a Georgia appellate decision right on point to the issue presented in this case.

only entitled to Allstate's per person coverage and they will have exhausted this coverage from Allstate by means of the settlements described above.

Safeco next argues that Plaintiffs cannot say, on the one hand, the liability coverage cannot be split, but, on the other hand, the UM coverage can be split. Actually, the UM coverage is not being split. Only one claimant, the Estate, is seeking to recover against Safeco. In addition, Plaintiffs do offer authority for their ability to choose how the Allstate coverage is allocated to the two claims. In Nash v. Allstate Insurance Company, 256 Ga. App. 143, 146 (2002), the Court stated "someone has to determine which of the several causes of action will be satisfied out of the meager funds available, and the Plaintiffs who have the right to bring those causes of action are the logical ones to make that choice." Plaintiffs also point to Phillips v. Government Employees Insurance Company, 288 Ga. App. 504, 506 (2007). In footnote three of the opinion, the Court stated: "for example, where a liability insurance policy has been exhausted as a result of payments made to a plaintiff and others, and the plaintiff's payment is less than the limits of the uninsured motorist coverage, the plaintiff may be able to pursue his or her claim under O.C.G.A. § 33-7-11(b)(1)(D)(ii)." Using this example in the context of our case, Allstate's \$100,000.00 liability insurance policy has been exhausted by its payment of \$100.00 to the Plaintiff, i.e. the Estate, and "others", i.e. the \$99,900.00 paid to the parents on the wrongful death claim. Because the payment to the Estate is less than the UM coverage, the Estate has a claim against Safeco under (D)(ii). In Phillips, the plaintiff was not able to pursue the UM claim

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because she had been paid more by the liability insurance company than she had UM coverage.

Plaintiffs also cite Toomer v. Allstate Insurance Company, 292 Ga. App. 60 (2008), which follows Thurman v. State Farm Mutual Automobile Insurance Company, 278 Ga. 162 (2004). These cases focus on the language in (D)(ii) that the available liability coverage limits shall be reduced by “any amounts by which the maximum amounts payable under such limits of coverage have, *by reason of payment of other claims or otherwise*, been reduced below the limits of coverage.” (emphasis provided). These two cases involve plaintiffs who were required to use available liability coverage for satisfaction of liens imposed by federal law. The Courts found those payments reduced the available liability coverage. To the extent the reduced available liability coverage fell below the UM coverage, those plaintiffs were allowed to make claims against the UM companies, even if the face amount of liability coverage equaled the UM coverage. The rationale of Toomer and Thurman has now been extended to hospital liens under state law. See, Adams v. State Farm Mutual Automobile Insurance Company, _____ Ga. App. _____ (A082315, 4/14/09).

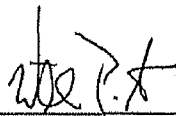
The Court views the rationale and reasoning in Thurman, Toomer, and Adams to allow an interpretation of (D)(ii) beyond cases involving federal and hospital liens.⁷ In the Court’s judgment, the statutory language “by reason of payment of other claims or otherwise” leads to the conclusion that the proposed

⁷ See Georgia Automobile Insurance Law, 2008-2009 Edition, §32:3, pp. 382-388.

payment of \$99,900.00 by Allstate to the parents on the wrongful death claim results in "available" coverage on the Estate's survival claim of only \$100.00. Safeco thus has UM exposure in the amount of \$99,900.00. Such a result is consistent with the "complete compensation rule", as discussed in Thurman and Toomer, especially in the context of the facts of this case. T.J. suffered severe injuries and later died as the result of Defendant Richardson's negligence. Both claims asserted here indisputably have values well in excess of the coverages from both the policies of Allstate and Safeco.

For the reasons stated above the Court hereby DENIES Safeco's Motion for Summary Judgment and GRANTS Plaintiffs' Cross-Motion for Summary Judgment.

SO ORDERED, this 23day of April 2009.



William P. Adams, Judge
State Court of Bibb County, Georgia