Ignotov v Reiter
130 Mich App 409, 343 NW2d 574

Submitted October 12, 1983, at Lansing.
Decided November 8, 1983. Leave to appeal applied for.
Docket No(s) 66565.
Disposition: Reversed.

Counsel:
Stuart J. Dunning, III, for plaintiff.

Douglas I. Buck, for defendant. Douglas I. Buck, II -- Brief

Judges:
Opinion by Per Curiam. Before: Danhof, C.J., and Bronson and W. R. Peterson,* JJ.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Per Curiam. Return to top

Defendant was retained by plaintiff to represent him in a parental rights termination proceeding brought by plaintiff's ex-wife, Janice Everest, who sought termination of plaintiffs parental rights to enable her current husband to adopt plaintiffs natural daughter. Plaintiff's parental rights were terminated at a hearing on April 19, 1977, and plaintiff thereafter filed the instant legal malpractice action. After a bench trial, judgment was entered on behalf of plaintiff. Plaintiffs damages were found to be $25,000 and he was found to be 25% negligent. A judgment against defendant for 75% negligence in the amount of $18,750 plus $134 costs was entered by the trial court. Defendant's motion for new trial or judgment notwithstanding the verdict was denied. Defendant presently appeals as of right.

[Page 411] At trial, the testimony established that defendant was retained by plaintiff, who lived in Ohio, through a telephone contact. The original hearing date on the termination petition was adjourned several times and, in late February, defendant contacted plaintiff regarding a settlement proposed by Ms. Everest's attorney. Plaintiff rejected the proposed settlement and shortly thereafter received a letter from defendant stating in part:

"I believe that the conclusion of our conversation was that you did not wish to make any such offer and that under the circumstances you would not contest the Adoption Petition."

Defendant testified at trial that plaintiff rejected the settlement and refused to offer any counterproposal which would include a provision for child support. Plaintiff admits that he was in arrears in his child support payments and had not seen his daughter in more than two years. Plaintiff denied informing defendant that he would not contest the adoption proceedings. Defendant did not appear at the April 19, 1977, termination hearing and did not inform plaintiff of the hearing date.

In an action for legal malpractice, the plaintiff has the burden of proving:

"(1) the existence of the attorney-client relationship; (2) the acts which are alleged to have constituted the negligence; (3) that the negligence was the proximate cause of the injury and; (4) the fact and extent of the injury alleged." *Basic Food Industries, Inc v Grant,* ***107 Mich App 685****, 690; 310 NW2d 26 (1981), lv den****413 Mich 913*** *(1982).*

This Court recognized in *Grant* that the element of proximate cause is often problematic:

[Page 412] "'The recovery sought is usually the value of the claim in suit in the proceeding in which the negligent act occurred, if the client was a plaintiff in that action, or, if he was a defendant, the amount of the judgment imposed upon him, and, in accordance with general rules as to proximate cause, it is generally held that before such recovery can be had the client must establish that, absent the act or omission complained of, the claim lost would have been recovered or the judgment suffered avoided. Accordingly, the client seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding.' 45 ALR2d 5, § 2, p 10.

* * *

"From the authorities cited above, it would appear that the 'suit within a suit' concept has vitality only in a limited number of situations, such as where an attorney's negligence prevents the client from bringing a cause of action (such as where he allows the statute of limitations to run), where the attorney's failure to appear causes judgment to be entered against his client or where the attorney's negligence prevents an appeal from being perfected. In such cases, it is at least arguably true that the suit within a suit requirement serves to insure that the damages complained of due to the attorney's negligence are more than mere speculation." (Footnote omitted.) *Grant, supra,* pp 691, 693.

Plaintiff here failed to establish that the proximate cause of his injury was defendant's failure to appear at the termination hearing. Plaintiff presented no evidence to show that he would have appeared at the hearing willing to work out an alternative settlement to prevent the termination of his parental rights. Although the trial judge concluded that plaintiff might have finally realized that defendant's advice "was correct and that if he wanted to cease halt *[sic]* the termination of his parental rights he must recognize the legal fact that he had an obligation to pay back and future **[Page 413]** support", there was no evidence in the record to support this contention.

Since we agree with defendant's first allegation of error, we do not address the two remaining issues raised by defendant.

Reversed. Costs to defendant.

Ignotov v Reiter
425 Mich 391, 390 NW2d 614

Argued June 5, 1985
Decided July 22, 1986.
Calendar No. 16.
Docket No(s) 73095.
Lower Court Docket No(s) 66565.
Disposition: The judgment of the Court of Appeals is affirmed by equal division.

Counsel:
Dunnings & Canady, P.C. (by *Stuart J. Dunnings, III),* for the plaintiff.

Buck & Mangapora (by *Douglas I. Buck* and *Douglas I. Buck, II*) for the defendant.

Judges:
Opinion by Levin, J. Williams, C.J., concurred with Levin, J.Concurring opinion by Boyle, J.Dissenting opinion by Riley, J. Brickley and Cavanagh, JJ., concurred with Riley, J.Archer, J., took no part in the decision of this case.

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The issue presented in this legal malpractice action is whether the trial judge clearly erred in finding that a lawyer's negligence was a cause of the termination of his client's parental rights. We conclude that the judge did not err, and would reverse the judgment of the Court of Appeals which set aside a money judgment in favor of the client.

I

Samuel S. Reiter was retained by Daniel T. Ignotov to represent Ignotov in proceedings concerning his daughter, Dana Sue. These proceedings were initiated by Ignotov's ex-wife, Janice Everest, as the first step in having Dana Sue adopted by Janice Everest's husband. Ignotov had not communicated with his daughter nor paid child support [Page 394] for two years, thereby providing statutory authority to terminate his parental rights.[1]

Ignotov spoke to Reiter on the telephone and sent him a retainer and a letter expressing his thoughts.[2] Discussions ensued between Reiter and Everest's lawyer. Her lawyer made an offer in settlement that would have required Ignotov to pay back child support and increased future support. In return, Everest would agree to suspend the proceedings for two years. Ignotov rejected the offer.

Reiter testified that Ignotov was unwilling to pay child support and that he had advised Ignotov that unless he modified his stance he would lose his parental rights.[3] Ignotov testified he knew he [Page 395] had to pay child support, but rejected the settlement offer because it did not provide for visitation rights and contained other provisions he found objectionable, such as requiring counseling and having Dana Sue change her last name to Everest.

Shortly after ◂Ignotov▸ rejected the settlement offer, Reiter wrote to ◂Ignotov▸ stating: "I believe that the conclusion of our conversation was that you did not wish to make any such [counter] offer and that under the circumstances you would not contest the Adoption Petition." The letter also stated: "As soon as I receive Notice of the Hearing date on the Petition I will notify you of it and will consult with you as to further actions."[4]

◂Ignotov▸'s parental rights were terminated following a hearing. Although Reiter was notified of the hearing, he neither notified ◂Ignotov▸ of the date of the hearing nor appeared on his behalf.[5] Reiter's [Page 396] failure to appear was not inadvertent. When Reiter failed to appear, the probate judge telephoned him. Nevertheless, Reiter did not appear.

◂Ignotov▸ commenced this action alleging legal malpractice. After a bench trial, the judge found that ◂Ignotov▸'s damages were $25,000, and that he was twenty-five percent comparatively negligent. A judgment against Reiter for $18,750 was entered. The Court of Appeals reversed.[6]

II

◂Ignotov▸ established that he had retained Reiter to represent him and that Reiter had breached his obligation to exercise due care when he failed to notify ◂Ignotov▸ of the date of the hearing or to appear on that date. Reiter argues that ◂Ignotov▸ nevertheless may not recover damages because he did not show that had Reiter appeared at the hearing he would have been able to prevent the termination of ◂Ignotov▸'s parental rights. The Court of Appeals agreed with Reiter, stating that ◂Ignotov▸ had presented no evidence that he would have appeared at the hearing prepared to settle.

When it has been established that a lawyer failed to represent his client properly, it then becomes necessary to determine whether, if the client had been properly represented, a more favorable result would have been achieved. In the instant case, a more favorable result might have been achieved either by a successful defense or by a settlement on terms more favorable than the result that ensued.

[Page 397]

A

The result adverse to ◂Ignotov▸ in the proceedings in which Reiter failed to appear was not inevitable. If Reiter had appeared and had represented ◂Ignotov▸ at the hearing, ◂Ignotov▸'s parental rights might not have been terminated. While the evidence of nonpayment and noncommunication for two years permitted the probate judge to terminate ◂Ignotov▸'s parental rights, consideration of the best interests of the child might have led the judge to conclude that termination was not warranted. Reiter did not show that ◂Ignotov▸ could not have avoided the termination of his parental rights.

B

While ◂Ignotov▸ did not show that had he been properly represented he would have prevailed and his parental rights would not have been terminated, the trial judge properly considered whether a more favorable result might have been achieved through a settlement. The judge's finding that ◂Ignotov▸ might have achieved a more favorable result through settlement, and his determination of the amount of damages to be awarded for depriving ◂Ignotov▸ of the opportunity to achieve a more favorable result through settlement, are not clearly erroneous.

The judge acknowledged that without some recognition by ◂Ignotov▸ of his support obligation it was not likely that he could have avoided the termination of his parental rights. The judge reasoned, however, that had ◂Ignotov▸ continued to be properly represented he might have realized the weakness in his position and settled by agreeing to some acceptable payment before the termination of his parental rights.

◂Ignotov▸'s ex-wife had made a settlement offer [Page 398] that required ◂Ignotov▸ to pay back and future child support, but did not require termination of ◂Ignotov▸'s parental rights. She thus might have agreed to a counter proposal not involving termination of his parental rights.

◂Ignotov▸'s letter to Reiter stating in effect that if he were forced to pay child support he would demand visitation rights does not compel the conclusion that he would have allowed his parental rights to be terminated if he could thereby have avoided paying child support. It appears that ◂Ignotov▸ sought to retain the ability to regain custody of his daughter because he was apprehensive about her fate should anything happen to her mother.

While ◂Ignotov▸ might have insisted on maintaining a weak, if not indefensible, bargaining position he might indeed, as the judge found, after receipt of notice of the hearing date, have developed, at or shortly before the hearing, a negotiating stance more likely to bring about a settlement and made a counter proposal acceptable to his ex-wife or a payment that would have satisfied the judge that his parental rights should not be terminated.[7]

Even stubborn clients are entitled to continued representation. A lawyer may seek permission from the court to withdraw from further representation of a client. A lawyer may not, however, simply abandon his client.

C

We have considered, but do not address, the suit within a suit doctrine adverted to in the opinion of [Page 399] the Court of Appeals and the briefs of counsel.[8] In the instant case, damages were awarded because the lawyer had deprived the client of the opportunity to resolve the controversy by settlement, not on the basis that the client would have prevailed had the matter gone to judgment.[9]

In the instant case, both the breach and the loss were clearly established. Reiter breached his duty to exercise due care and ◂Ignotov▸ lost his parental rights. The disputed factual issue was whether the breach caused the loss.

The Court of Appeals ruled as a matter of law that ◂Ignotov▸ was required to show that if he had been notified of the hearing, he would have appeared prepared to settle. The judge, who sat as trier of fact, found that had Reiter notified ◂Ignotov▸ of the date of the hearing as he had promised the matter might well have been settled before the hearing with a result more favorable to ◂Ignotov▸ than the result that ensued.

Reiter undertook to represent ◂Ignotov▸ and failed to do so. ◂Ignotov▸ lost his parental rights. Damages were properly awarded for the lost opportunity to resolve the matter by settlement. The settlement value of a matter in controversy is determinable without regard to, and does not depend on, whether the parties are willing to settle on that basis. ◂Ignotov▸ was not required to show that “but for” Reiter's failure to exercise due care a more favorable or acceptable settlement would assuredly have been achieved. It was for the trier of fact to [Page 400] assess the likelihood that ◂Ignotov▸ would have achieved a result through settlement more favorable than the result that ensued.

Williams, C.J., concurred with Levin, J.

FOOTNOTES

1

> (6) If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in section 39(2) of this chapter, and if the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing *may* issue an order terminating the rights of the other parent if both of the following occur:
>
> (a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.
>
> (b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition. [Emphasis supplied. **MCL 710.51**; MSA 27.3178(555.51).]

2 The letter included the following statement: "Its just that I cant rely on her mothers judgment and I would want my daghter should anything happen to her mother." [Sic.]

3 Reiter testified that ◂**Ignotov**▸ "said that he would rather that things remain the way they were with him paying no support, remaining in the background, being available for his wife. He was sure based upon [sic] his wife's prior behavior that there would be another breakdown in whatever [marital] relationship [she had]. In fact, he told me that was her fourth marriage, and he was positive that there would come within the near future another time in which she would leave the children, abandon this child and he wanted to be able to remain in the background and available for that child."

4 The full text of the letter is as follows:

> Dear Dan,
>
> I enclose herewith a copy of the proposal submitted to me by your ex-wife's attorney.
>
> As I stated over the phone this is only a proposal and I believe they *would be amenable to a counter proposal.* However, it will require some effort upon your part of some recognition of your obligation to support your daughter before we can come to any agreement which would result in their withdrawing their Petition for Adoption.
>
> I believe that the conclusion of our conversation was that you did not wish to make any such offer and that under the circumstances you would not contest the Adoption Petition.

> As soon as I receive Notice of the Hearing date on the Petition I will notify you of it and will consult with you as to further actions.
>
> Very truly yours,
>
> /s/ Samuel S. Reiter [Emphasis supplied.]

5 At the trial, Reiter acknowledged that he should have appeared at the hearing. He offered no excuse for his failure to appear. He said he believed that if ◂**Ignotov**▸ appeared at the hearing and did not acknowledge a willingness to pay child support, he would be jailed for contempt. He also said he believed that if ◂**Ignotov**▸ refused to pay child support until he received full visitation rights, the probate judge would definitely terminate ◂**Ignotov**▸'s parental rights.

6 ◂***Ignotov***▸ *v Reiter,* ***130 Mich App 409****; 343 NW2d 574 (1983).*

7 ◂**Ignotov**▸ testified that after his parental rights were terminated he paid $1,750 of his back child support obligation of $2,811 pursuant to a settlement worked out by another lawyer.

8 Compare *Daugert v Pappas,* 104 Wash 2d 254; 704 P2d 600 (1985), with *Jenkins v St Paul Fire & Marine Ins Co,* 422 So 2d 1109 (La, 1982), *Romanian American Interests, Inc v Scher,* 94 AD2d 549; 464 NYS2d 821 (1983), *Glidden v Terranova,* 12 Mass App 597; 427 NE2d 1169 (1981), and *Winter v Brown,* 365 A2d 381 (DC App, 1976).

9 Expert testimony regarding settlement value may in some cases be required where the client seeks to recover on that basis and the claim in the underlying action or proceeding is for money damages.

Boyle, J. **Return to top**

I concur in the result reached by Justice Levin.

The Court of Appeals in the case at bar clearly erred when it required the plaintiff to establish that "*the* proximate cause of his injury was defendant's failure to appear at the termination hearing." ◂***Ignotov***▸ *v Reiter,* ***130 Mich App 409****, 412; 343 NW2d 574 (1983)* (emphasis added). It is well-established that in Michigan the burden is on the plaintiff to establish only that the defendant's negligence is *a* proximate cause of the plaintiff's damages. *Kirby v Larson,* ***400 Mich 585****, 605; 256 NW2d 400 (1977)*; *Sedorchuk v Weeder,* ***311 Mich 6****, 10-11; 18 NW2d 397 (1945)*; *Barringer v Arnold,* ***358 Mich 594****, 599-600; 101 NW2d 365 (1960)*; **SJI2d 30.03**

This Court has defined proximate cause as "a cause as operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred." *Nielsen v Henry H Stevens, Inc,* ***368 Mich 216****, 220; 118 NW2d 397 (1962).* Moreover,

> [t]he general rule, expressed in terms of damages, and long followed in this State, is that in a tort action, the tort-feasor is liable for all injuries resulting directly from his wrongful act, whether foreseeable or not, provided the damages are the legal and natural consequences of the wrongful act, and are such as, according to common experience and the usual course of events, might reasonably have been anticipated. Remote, contingent, or **[Page 401]** speculative damages are not considered in conformity to the general rule. [*Sutter v Biggs,* ***377 Mich 80****, 86; 139 NW2d 684 (1966).* Citations omitted.]

The trial court in the case at bar found that a proximate cause of plaintiff's injury was defendant's negligence in failing to notify plaintiff of the hearing on the petition to terminate plaintiff's parental rights. The court also found that a proximate cause of plaintiff's injury was the plaintiff's negligence in failing to notify defendant that he would contest the petition regardless of plaintiff's refusal to settle according to his ex-wife's last settlement offer. These findings were supported by the record. Therefore, I agree with Justice Levin that the trial court did not clearly err on the finding of proximate cause.

Unlike Justice Levin, however, I believe the record establishes that damages were awarded for the loss of plaintiff's parental rights, not "the lost opportunity to resolve the matter by settlement." The trial court in its decision specifically awarded damages to ◂**Ignotov**▸ for "the loss of his child." Moreover, this case is unlike most cases involving malpractice in connection with the settlement of or failure to settle a case. See generally Anno: *Legal malpractice in settling or failing to settle client's case*, 87 ALR3d 168. This case did not involve Reiter's failure to disclose a settlement proposal to ◂**Ignotov**▸, or the failure of Reiter to offer an authorized settlement proposal to ◂**Ignotov**▸'s ex-wife. Therefore, Reiter's misconduct did not directly result in the loss of an opportunity to settle.

The trial court's award for the instant plaintiff's loss of parental rights had a basis in the record. I would reverse the judgment of the Court of Appeals and reinstate the judgment of the trial court.

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Riley, J. Return to top

I respectfully dissent from the opinions of my colleagues and would affirm the conclusion reached by the Court of Appeals in ◂***Ignotov***▸ *v Reiter, **130 Mich App 409**; 343 NW2d 574 (1983).*

In an action for legal malpractice, the plaintiff has the burden of proving:

> "(1) the existence of the attorney-client relationship; (2) the acts which are alleged to have constituted the negligence; (3) that the negligence was the proximate cause of the injury and; (4) the fact and extent of the injury alleged." *Basic Food Industries, Inc v Grant, **107 Mich App 685**, 690; 310 NW2d 26 (1981), lv den **413 Mich 913** (1982).*[1]
>
> This Court recognized in *Grant* that the element of proximate cause is often problematic:
>
> "'The recovery sought is usually the value of the claim in suit in the proceeding in which the negligent act occurred, if the client was a plaintiff in that action, or, if he was a defendant, the amount of the judgment imposed upon him, and, in accordance with general rules as to proximate cause, it is generally held that before such recovery can be had the client must establish that, **[Page 403]** absent the act or omission complained of, the claim lost would have been recovered or the judgment suffered avoided. Accordingly, the client seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding.' 45 ALR2d 5, § 2, p 10.
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> * * *
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> "From the authorities cited above, it would appear that the 'suit within a suit' concept has vitality only in a limited number of situations, such as where an attorney's negligence prevents the client from bringing a cause of action (such as where he allows the statute of limitations to run), *where the attorney's failure to appear causes judgment to be entered against his client*[2] or where the attorney's negligence prevents an appeal from being perfected. In such cases, it is at least arguably true that the suit within a suit requirement serves to insure that the damages complained of due to the attorney's negligence are more than mere speculation." (Footnote omitted.) *Grant, supra,* pp 691, 693. [◂***Ignotov***▸, *supra,* 411-412. Emphasis added.]

The plaintiff's action clearly falls within the aforementioned emphasized language, "where the attorney's failure to appear causes judgment to be entered against his client. …" It is the defendant's failure to appear on behalf of the plaintiff that the plaintiff is claiming caused him to suffer **[Page 404]** damages, i.e., loss of parental rights.[3] Therefore, I am persuaded that the "suit within a suit" concept is applicable in this instance. Pursuant to the "suit within a suit" concept, the plaintiff must prove, inter alia, that the defendant's negligence was a proximate cause of his damages. Included within the element of "proximate cause" is the requirement that the plaintiff establish cause in fact. Moreover, even if cause in fact is established, there remains the question of proximate cause, whether the defendant should be legally responsible for the injury to the plaintiff. I believe that, restricted to the question of cause in fact, the "but for" test should be implemented in this case: "An act or omission is not regarded as a cause of an event if a particular event would have occurred without it." Prosser & Keeton, Torts (5th ed), § 41, p 265. Accordingly, pursuant to the "suit within a suit" concept, the plaintiff must establish, as part of the proximate cause element, that, but for the negligence complained of, the plaintiff would have been successful in the defense of the action in **[Page 405]** question. In applying the "suit within a suit" concept to the facts of this case, the Court of Appeals held:

> Plaintiff here failed to establish that the proximate cause of his injury was defendant's failure to appear at the termination hearing. Plaintiff presented no evidence to show that he would have appeared at the hearing willing to work out an alternative settlement to prevent the termination of his parental rights. Although the trial judge concluded that plaintiff might have finally realized that defendant's advice "was correct and that if he wanted to cease halt [sic] the termination of his parental rights he must recognize the legal fact that he had an obligation to pay back and future support," there was no evidence in the record to support this contention. [◂***Ignotov***▸, *supra*, 412-413.]

The particular damage alleged by the plaintiff was the loss of parental rights. Therefore, as part of the plaintiff's burden of proof to establish liability on behalf of the defendant, the plaintiff had to prove cause in fact, i.e., but for the attorney's negligence the plaintiff would have retained his parental rights.[4] While I disagree with the Court of Appeals use of "the proximate cause" language, I believe that the record clearly shows that the plaintiff has not established causation in this case. Thus, I agree with the Court of Appeals determi- **[Page 406]** nation that the plaintiff failed to carry his burden of proof. I would affirm.
Brickley and Cavanagh, JJ., concurred with Riley, J.
Archer, J., took no part in the decision of this case.

FOOTNOTES

[1] I agree with Justice Boyle that under element three, the language "the proximate cause" should be, in accordance with Michigan law, "a proximate cause." *Kirby v Larson*, ***400 Mich 585****; 256 NW2d 400 (1977)*. Nevertheless, I do not believe that this mandates a different conclusion than that reached by the Court of Appeals in the instant case. While the plaintiff is required to prove the defendant's negligence was a proximate cause of his damages, an essential aspect of the element of proximate cause is the requirement that the plaintiff establish cause in fact. Only after it is established that the defendant's conduct has in fact been a cause of the plaintiff's damages is it necessary to address the question whether the defendant should be held legally responsible for the damages, i.e., is there proximate cause. See *Moning v Alfono*, ***400 Mich 425****; 254 NW2d 759 (1977),* and Prosser & Keeton, Torts (5th ed), §§ 41, 42. Consequently, because I believe that the plaintiff has failed to prove that the defendant's negligence was the cause in fact of his damages, the erroneous application by the Court of Appeals of "the proximate cause" to the facts of this case, instead of "a proximate cause," does not change the correctness of their conclusion.

[2]

> A client's burden of proving injury as a result of his attorney's negligence is especially difficult to meet when the attorney's conduct prevented the client from bringing his original cause of action or the *attorney's failure to appear caused judgment to be entered against him as a defendant.* In addition to proving negligence, a client must show that *but for* his attorney's negligence he would have been successful in the original litigation; in effect, he must prevail in two distinct suits. [Note, *Attorney malpractice*, 63 Colum L R 1292, 1307 (1963). Emphasis added. See *Basic Food Industries, supra*, 692.]

3 It appears that Justice Levin considered but did not embrace the "suit within a suit" doctrine, reasoning that damages were awarded because the defendant deprived the plaintiff of the opportunity to settle the case, and not on the basis that the client would have been successful had the case gone to judgment. *Ante*, p 399. With regard to any lost opportunity to settle this case prior to trial, I am in agreement with Justice Boyle to the extent that "[t]his case did not involve Reiter's failure to disclose a settlement proposal to **Ignotov**, or the failure of Reiter to offer an authorized settlement proposal to **Ignotov**'s ex-wife." (Citing 87 ALR3d 168.) *Ante*, p 401. Regarding any lost opportunity of settlement because of Reiter's failure to appear, I believe Justice Levin's rationale improperly circumvents the "case within a case" doctrine. In *Basic Food Industries, supra*, 693, the Court of Appeals stated that the doctrine had limited application but did encompass a situation where the attorney's failure to appear caused judgment to be entered against the client. Concomitant with the attorney's failure to appear is also the lost potential for settlement. Thus, I do not believe that an attorney's failure to appear, causing judgment to be entered against a client, should be distinguished from the loss of any settlement opportunity because of the same failure to appear for the purposes of the "suit within a suit" doctrine.

4 The plaintiff's burden of establishing that the defendant's negligence was a cause in fact of the injury is not affected by the defense of comparative negligence.

> There is some debate over what is to be compared under comparative negligence, negligence or causation. The problem in certain respects is one of terminology. Causation in fact is an absolute concept, which by its nature is incapable of being divided into comparative degrees—it either exists or it does not. The adoption of comparative negligence, therefore, should not affect this preliminary determination. [Prosser & Keeton, Torts (5th ed), § 67, p 474. See authority cited in footnotes.]

Castillo v Alexander
171 Mich App 679, 430 NW2d 751

Submitted December 8, 1987, at Lansing.
Decided April 29, 1988.
Docket No(s) 98185.
Disposition: Affirmed.

Counsel:
O'Farrell, Smith & Popielarz (by *Rod O'Farrell*), for plaintiff.

Otto & Otto (by *James C. Howell*), for defendant James E. Alexander.

Charles F. Filipiak, for third-party defendant Mary Helen Barrera.

Douglas I. Buck, II, for third-party defendant Ralph Barrera.

Judges:
Opinion by Per Curiam. Before: Danhof, C.J., and Shepherd and C. L. Bosman,* JJ.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Per Curiam. Return to top

Plaintiff appeals as of right from a January 16, 1987, order granting defendant's motion for entry of judgment pursuant to a mediation award. We affirm.

Plaintiff filed a complaint alleging serious impairment of a body function arising from a multicar collision on September 24, 1983. The case was mediated pursuant to **MCR 2.403** and on June 5, 1986, the mediation panel awarded plaintiff the sum of $2,000. All parties accepted the mediation award, with plaintiff's acceptance occurring on June 11, 1986. Several days after accepting the award, plaintiff notified her attorney that she **[Page 681]** changed her mind and wished to reject the award. On June 20, 1986, plaintiff's counsel hand delivered to the court administrator a letter indicating plaintiff's desire to revoke her acceptance. Plaintiff did not notify the defendants of her desire to revoke acceptance. On that same date, plaintiff's attorney received from the mediation clerk a notice dated June 18, 1986, which informed plaintiff's attorney that all parties accepted the award. Defense counsel prepared a stipulation and order for dismissal, and releases and settlement drafts were forwarded to plaintiff's counsel for execution pursuant to the mediation acceptance.

On November 17, 1986, the court administrator sent a letter to all parties involved because the necessary documents for closing the court file had not yet been received. Defense counsel's first indication that plaintiff wished to set aside the mediation occurred on November 24, 1986, when plaintiff filed a motion to set the matter for trial. On that same date, defendants filed a motion for entry of judgment and satisfaction of judgment. The trial court held that plaintiff's initial acceptance of the mediation award was binding and this appeal followed.

The sole and narrow issue on this appeal is whether a party, after accepting the award of mediation, has a right to rescind its acceptance by filing a rejection if done within twenty-eight days after service of the mediation panel's evaluation. We hold that rescission of the acceptance in such a case is not a matter of right.

This Court in *Coolman v D B Snider, Inc*, ***129 Mich App 233***; *341 NW2d 484 (1983)*, held that a trial court had the discretion to set aside a party's acceptance of a mediation award upon proper motion prior to the entry of a judgment on the award. See also *MGM Brakes Division of Indian* ***[Page 682]*** *Head, Inc v Uni-Bond, Inc*, ***417 Mich 905***; *330 NW2d 853 (1983)*, dealing with the former Wayne County Court Rule 403.

MCR 2.403(L)(1) and (2) state:

> (1) Each party must file a written acceptance or rejection of the panel's evaluation with the mediation clerk within 28 days after service of the panel's evaluation. The failure to file a written acceptance or rejection within 28 days constitutes acceptance.
>
> (2) There may be no disclosure of a party's acceptance or rejection of the panel's evaluation until the expiration of the 28-day period, at which time the mediation clerk shall send a notice indicating each party's acceptance or rejection of the panel's evaluation.

Plaintiff contends that the mediation award should be set aside because the mediation clerk announced the parties' elections prior to the expiration of the twenty-eight-day period provided for response. **MCR 2.403(L)(2)**. The purpose behind **MCR 2.403(L)(2)** is to guard against the potential of a party imposing sanctions set forth in the rule based solely on their knowledge of another party's acceptance or rejection. Although plaintiff correctly points out that the mediation clerk violated **MCR 2.403(L)(2)** by notifying the parties of their unanimous acceptance of the mediation award before expiration of the twenty-eight-day response period, this notification, if error, is harmless because it did not affect the parties' decision to either accept or reject the mediation award.

Plaintiff assumes that under **MCR 2.403(L)** parties are entitled to change their minds within the twenty-eight-day period, despite submission of an acceptance or rejection notice to the mediation **[Page 683]** clerk. Defendant asserts, and this Court agrees, that the twenty-eight-day response period is designed to provide the parties with sufficient time to consider the award and notify the mediation clerk of their acceptance or rejection of the award. The rule was not intended to provide the parties with a period of time during which they can request that the mediation clerk disregard their initial election and change it to the other alternative. A party is not entitled to alter its decision once it has notified the mediation clerk of its acceptance or rejection of a mediation award. The principles of finality compel us to consider plaintiff's original acceptance as binding upon her. *Small v Zeff*, ***155 Mich App 288***, *291-292; 399 NW2d 63 (1986)*. The trial court did not err by granting defendant's motion for entry of judgment pursuant to mediation under **MCR 2.403(L)**.

Affirmed.

Frankenmuth Mutual Insurance Company, Inc v Continental Insurance Company
Michigan Educational Employees Mutual Insurance Company v Transamerica Insurance Corporation of America
450 Mich 429, 537 NW2d 879

Argued April 6, 1995
Decided August 22, 1995.
Calendar Nos. 10-11.
Docket No(s) 98342, 99439.
Lower Court Docket No(s) 138157.
Disposition: Reversed.

Counsel:
Douglas I. Buck, II, for plaintiff Frankenmuth Mutual Insurance Company.

Nelson & Kreuger, P.C. (by *Jon J. Schrotenboer),* for plaintiff Michigan Educational Employees Mutual Insurance Company.

Plunkett & Cooney, P.C. (by *Mary Massaron Ross),* for defendant Continental Insurance Company.

Highland & Zanetti, P.C. (by *J. R. Zanetti, Jr.,* and *Duncan H. Brown),* for defendant U.S.A.A. Casualty Insurance Company.

Dilley, Dewey, Damon & Condon, P.C. (by *Jonathan S. Damon),* for defendant Transamerica Insurance Corporation of America.

Judges:
Opinion by Weaver, J. Brickley, C.J., and Boyle and Riley, JJ., concurred with Weaver, J.Concurring opinion by Cavanagh, J.Dissenting opinion by Levin, J. Mallett, J., concurred with Levin, J.

Weaver, J. Return to top

The issue presented in these consolidated cases is the allocation of defense costs among multiple no-fault insurers, each of whom to some degree may be liable for a loss arising out of a single automobile accident. Although the dissent's pro-rata rule is alluring for its simplicity, as applied, it fails to adequately give meaning to the intent of the policy language and will serve only to further agitate a sufficiently litigious area of the law.[1] We take this opportunity to clarify who should bear defense costs where seemingly overlapping duties to defend multiple insureds arise.

The duty to defend is defined by policy language,[2] and, logically, the burden of the cost of defense should follow the duty to defend. The approach outlined herein in no way seeks to erode an insurer's duty to defend its insured and should not be applied to leave the insured without the coverage due. Rather, this approach attempts to give meaning to frequently obtuse policy language, while establishing a consistent

analytical framework. For the following reasons, we affirm the decision of the Court of Appeals in *Frankenmuth* and reverse the Court of Appeals decision in *MEEMIC.*

I

A. *FRANKENMUTH MUTUAL v CONTINENTAL*

Eric Bosco was killed when he was hit by a truck driven by Chris Bauermeister, an employee **[Page 434]** of Flint Tent and Awning. The truck was owned by Kenneth Cook, president of Flint Tent and Awning, and Bauermeister was a permissive user. Continental Insurance provided $500,000 coverage for the truck, Cook as its owner, and Bauermeister as a permissive user. Flint Tent and Awning carried a $250,000 policy with Frankenmuth. In addition to his no-fault coverage with Continental, Cook carried a $1 million umbrella policy with Auto-Owners Insurance Company. Bauermeister carried his own no-fault and umbrella insurance with USAA Casualty Insurance Company for $100,000 and $1 million respectively. However, the question before us affects only the liabilities of Continental and Frankenmuth.

The Bosco family filed suit, and Frankenmuth immediately provided a defense for Flint Tent and Awning. Continental refused to participate in the defense, but subsequently acknowledged that it was the primary insurer. Frankenmuth brought this action against Continental seeking a declaratory judgment that Continental, as primary insurer, was obligated to provide a defense up to its policy limits and that Continental should reimburse Frankenmuth for defense costs incurred before settlement. The trial court agreed with Frankenmuth and ordered Continental to reimburse Frankenmuth. The Court of Appeals affirmed, and Continental appealed.

B. *MEEMIC v CHALFANT*

Trevor Chalfant was seriously injured in a one-car accident. Either Jack Perry or Michael Hinkle was driving the car, but neither will admit doing so. The car was owned by Hinkle's father who carried a $100,000 insurance policy with Michigan Educational Employees Mutual Insurance Com- **[Page 435]** pany (MEEMIC). Perry's father carried a $250,000 policy with Transamerica that covered his son's permissive use of vehicles not owned by the Perry family.

Meemic, as the insurer of the vehicle, assumed the defense on behalf of the Hinkles and Perry. Meemic then filed an action seeking to pay the limits of its policy and be excused from the defense. Meemic named Transamerica as a defendant and sought reimbursement for the cost of defending Perry before MEEMIC'S offer of settlement. The circuit court held that it was MEEMIC'S responsibility to defend the Hinkles and Perry until MEEMIC had paid its policy limit and that Transamerica would be obligated only after that time. Meemic appealed, and the Court of Appeals reversed, holding that Transamerica was obligated to share in Perry's defense costs incurred before MEEMIC paid its policy limit. Transamerica appealed.

II

To determine how defense costs should be allocated, it is first necessary to determine the nature of each insurer's duty to defend its insured in the circumstances at issue. It is not disputed that Continental and MEEMIC, as insurers of the vehicles involved in single vehicle accidents, are the primary insurers in these cases.[3] Nor do these cases involve "true" excess insurers.[4] "True" excess insurance is analogous to umbrella insurance **[Page 436]** in that a single insured by specific design layers coverage.[5] The logical rule that we adopt in "true" excess insurance cases is that the "true" excess insurer is liable for defense costs only after the primary insurer is excused under the terms of its policy.[6]

In both cases before us, the additional insurers are not "true" excess insurers; rather, their duty to defend and thus their responsibility for defense costs is triggered by their insureds' coincidental involvement in the underlying accidents. The issue we must resolve is the allocation of defense costs between these additional insurers where there is a clearly designated primary insurer.

In *Frankenmuth,* Continental argues that Frankenmuth is a primary coinsurer and thus should be liable pro rata for the costs of the defense before Continental paid its policy limit. Likewise in *MEEMIC,* MEEMIC argues that Transamerica should be liable on a pro-rata basis for the costs of the defense. Continental and MEEMIC cite *Celina Mut Ins Co v Citizens Ins Co of America, **133 Mich App 655**; 349 NW2d 547 (1984),* for the proposition that when it is clear that a settlement will exceed the limits of the primary insurer's policy, the "excess" insurer should be forced to **[Page 437]** participate in the costs of the defense from the beginning. We disagree.

One difficulty with the pro-rata approach is determining how the insurers' interests align so that defense costs can be fairly apportioned. In cases where it is clear that a primary insurer's policy limits will be exceeded, the primary's goal will likely be to avoid liability altogether, while the excess insurer's goal will be to reduce the plaintiff's damages. The resolution of this issue will no doubt generate additional litigation, contrary to the goal of Michigan's no-fault insurance system.[7] Further, requiring an excess insurer to participate pro rata on notice that the claim might exceed the primary insurer's limits effectively forces the excess insurer to be a coinsurer despite the language of its policy. Such a result is contrary to the excess insurer's reasonable expectations.[8] Finally, a pro-rata approach ignores the language of insurance policies that typically anticipate the involvement of other insurance.

III

Once it is clear that the additional insurers are not "true" excess insurers, our inquiry must proceed to the terms and conditions of the policies involved. Where the status of the primary insurer is clear, as in these single car accident cases, the primary insurer is liable for the defense and its costs until its limit is paid. Additional insurers who by the terms of their policies also cover some loss arising from the single car accident are coincidental excess insurers. The duty of these coinci- **[Page 438]** dental excess insurers may vary depending on the terms of their policies.

In circumstances not presented today, it may be difficult to clearly designate a primary insurer. In such circumstances, the next inquiry should be whether the terms of the policies at issue cover the same loss, the same risk, and the same subject matter. If there is exactly concurring coverage, it might be appropriate to prorate the costs of defense. However, where there is a policy more specifically tailored to the circumstances of the claim, it would be appropriate to designate that policy as the primary insurer and for that insurer to defend to the limits of its policy and be responsible for the accompanying defense costs.

This Court has held that where there are competing other insurance clauses, we will endeavor to reconcile them.[9] Similarly, where there are disputes regarding the potentially conflicting duties to defend and to bear defense costs between multiple insurers for multiple insureds, we hold that the policies at issue should be honored to the greatest extent possible.

In *Frankenmuth,* Cook's truck appears to be a "temporary substitute automobile" as defined in the Frankenmuth policy.[10] Therefore, under the **[Page 439]** "other insurance" clause of the Frankenmuth policy, Frankenmuth is an excess insurer under the facts of this case. Given this policy language, we hold that Frankenmuth's duty to defend is analogous to a "true" excess insurer and, therefore, Frankenmuth should not be liable for defense costs until Continental is excused under the terms of its policy.

In *MEEMIC*, Perry bought the insurance policy from Transamerica with terms to cover the situation in which a family member is involved in an accident while driving a nonowned automobile.[11] The Transamerica policy makes clear that when the "Other Automobile" provision of its policy was triggered, Transamerica would be the excess insurer. Therefore, it is again appropriate to apply the rule for "true" excess insurers. The proper outcome in *MEEMIC* is for MEEMIC to have defended and paid the defense costs until it paid its limit. Thus, Transamerica is liable for the defense and costs incurred only after MEEMIC is excused under the terms of its policy.

IV

A single rule applied pro forma cannot address the multiple variations of policies that we may **[Page 440]** face. On the facts of these cases, we affirm *Frankenmuth*, but reverse *MEEMIC* and reinstate the circuit court decision.

Brickley, C.J., and Boyle and Riley, JJ., concurred with Weaver, J.

FOOTNOTES

1 We have acknowledged that it is a priority to give meaning to policy language. See, e.g., *St Paul Fire & Marine Ins Co v American Home Assurance Co*, ***444 Mich 560***; *514 NW2d 113 (1994)*.

2 *Stockdale v Jamison*, ***416 Mich 217***, *224; 330 NW2d 389 (1982)*.

3 *Turner v Auto Club Ins Ass'n*, ***448 Mich 22***, *34; 528 NW2d 681 (1995)*.

4 "True" excess coverage occurs where a single insured has two policies covering the same loss, but one policy is written with the expectation that "the primary will conduct all of the investigation, negotiation and defense of claims until its limits are exhausted . …" 7C Appleman, Insurance Law & Practice, § 4682, p 28. See also *Hartford Accident & Indemnity Co v Continental Nat'l American Ins Co*, 861 F2d 1184, 1187 (CA 9, 1989). Further, the rates of a "true" excess insurer are ascertained only after the excess insurer has given due consideration to the terms of the underlying primary policies. 46 CJS, Insurance, § 1138, p 542.

5 *Texas Employers Ins Ass'n v Underwriting Members of Lloyds*, 836 F Supp 398, 407 (SD Tex, 1993). See also German & Gallagher, *Allocation of the duties of defense between carriers providing coverage to the same insured*, 47 Ins Counsel J 224-261 (1980).

6 Although there is no contractual relationship between a primary and a "true" excess insurer, it is commonly understood that the primary insurer owes the "true" excess insurer the same standard of care it owes to the insured. This duty has been grounded in both the doctrine of equitable subrogation and tort law. See Jerry, Understanding Insurance Law, pp 622-623.

7 See, e.g., *Shavers v Attorney General*, ***402 Mich 554***, *578-579; 267 NW2d 72 (1978)*.

8 See 46 CJS, Insurance, § 1152, pp 569-570. See also *Signal Cos v Harbor Ins Co*, 27 Cal 3d 359, 370-371; 165 Cal Rptr 799; 612 P2d 889 (1980).

9 *St Paul Ins Co v American Home Assurance Co*, n 1 *supra* at 562.

10 The Frankenmuth policy carried by Flint Tent and Awning states:

> "[T]emporary substitute automobile" means any automobile, truck or trailer, not owned by the named Insured [Flint Tent and Awning], while temporarily used with the permission of the owner [Cook] as a substitute for the owned automobile … .
>
> * * *
>
> If the Insured [Flint Tent and Awning] has other insurance against a loss … the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability, stated in the Declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance *with respect to temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible insurance.* [Emphasis added.]

11 The Transamerica policy at v(a) defines other automobiles as those used by "residents of the same household [Perry's son] as the Named Insured [Perry]" with permission of the owner. The policy then states:

> [T]he insurance with respect to … other automobiles under (a) of Insuring Agreement v or under part (A) of Insuring Agreement VI shall be excess insurance over any other valid and collectible insurance.

Cavanagh, J. (*concurring in part and dissenting in part*). **Return to top**

I agree with Justice Levin that defense costs should be borne by the primary and "excess" insurers pro rata on the basis of their shares of the underlying liability. I, therefore, agree that the decision of the Court of Appeals in *MEEMIC v Chalfant* should be reversed. I also agree that the same principle would apply in *Frankenmuth Mut v Continental* if Continental had acted equitably. However, because Continental wrongly refused to provide a defense to its insured, I would not allow Continental to profit now.

As Justice Levin recognizes, Michigan law permits contribution between insurers on the theory of equitable subrogation. Equitable subrogation must be employed because the insurers have no contract between themselves; their obligations run to their insureds, not each other. Thus, equitable subrogation may be employed to compensate an insurer for costs it incurs in defending an insured when another insurer is also contractually required to provide the defense.

Nevertheless, it is a well-established equitable maxim that those who seek equity must do so with "clean hands." *Stachnik v Winkel, **394 Mich 375**, 382; 230 NW2d 529 (1975).* Any wilful act that transgresses equitable standards of conduct is sufficient to allow a court, on its own motion, to deny a party equitable relief. *Id.* at 386.

Accordingly, I would affirm the decision of the Court of Appeals in *Frankenmuth.* A primary **[Page 441]** insurer who wrongly fails to provide a defense may not use equitable subrogation to force the excess insurer, who provided the entire defense in the first place, to pay a pro-rata share of the defense costs. Continental should bear the costs of the underlying action because equity should provide relief only to those with clean hands.

Levin, J. (*dissenting*). Return to top

The questions presented in these cases consolidated on appeal concern the allocation between "primary" insurers of the cost of defending an insured where the operation of "other insurance" clauses renders one insurance policy excess coverage and the other primary coverage, and the liability exceeds the primary policy coverage limits so that both insurers must pay.[1]

The facts of these cases represent two sides of a single coin. In *Frankenmuth Mut Ins Co, Inc v Continental Ins Co,* the primary insurer, Continental, wrongly refused to provide a defense for an insured. An excess insurer, Frankenmuth, undertook the defense and now seeks contribution from the primary insurer for the costs incurred by it in defending the lawsuit during the period when the primary insurer owed a defense.

In *Michigan Educational Employees Mut Ins Co v Chalfant*, the primary insurer, MEEMIC, provided a defense. It seeks contribution from the excess insurer, Transamerica Insurance Corporation of America, for part of its defense costs.

We conclude in both cases that the defense costs should be borne by the primary and excess insur- **[Page 442]** ers pro rata, on the basis of their shares of the aggregate underlying liability as determined by settlement or adjudication. We would reverse the decisions of the Court of Appeals in both cases, and would remand the cases for proceedings consistent with this opinion.

I

In *Frankenmuth,* a bicyclist, Eric Bosco, was killed in a collision with a pick-up truck. The driver, Chris Bauermeister, was operating the vehicle for his employer, Flint Tent and Awning, Inc. The truck was owned by Kenneth Cook, then president of Flint Tent and Awning.

The personal representative of Bosco's estate commenced a wrongful death action. Appellant Continental insured Cook, the truck's owner. Appellee USAA Casualty Insurance Company insured Bauermeister, the driver of the truck. Appellee Frankenmuth was the insurer of Flint Tent and Awning.

The policies declared that primary coverage was provided if the accident involved a vehicle owned by the named insured, and excess coverage respecting a nonowned vehicle. Neither Frankenmuth nor Continental limited its duty to defend when the coverage was excess. The Continental policy provided that its duty to defend ended when "the applicable limit of the company's liability has been exhausted by payment of judgments or settlements."

The parties now agree that, as insurer of the truck's owner, Continental was the primary carrier for all defendants. Frankenmuth and USAA provided only excess coverage. Initially, Continental defended only the owner, and refused to defend **[Page 443]** the driver or the company in the underlying litigation. Continental subsequently agreed to defend the driver, but not the company.[2]

Frankenmuth entered an appearance on behalf of both the driver and the company. Frankenmuth commenced this action, seeking a declaratory judgment that Continental also owed a defense to the company, and to recover costs Frankenmuth incurred defending the company and the driver.

In May, 1990, a year after the declaratory judgment was sought, Continental paid its $500,000 policy limits in partial settlement of the underlying litigation.[3] A jury returned a $1,045,000 verdict for Bosco's personal representative. After setting off Continental's partial settlement, no-fault benefits, and adding interest, the net amount was $613,569.

In the declaratory judgment action, the court ruled that Continental had been the primary insurer for all three defendants. The court ordered Continental to reimburse Frankenmuth for the $12,413 Frankenmuth expended defending the driver and the company before the partial settlement with Continental. In effect, this ruling made Continental solely responsible until it paid its policy limits for the cost of defending all three insureds.

Continental did not challenge the ruling that it was primary insurer for all defendants, and liable to indemnify them in the underlying action to its $500,000 policy limits. It appealed the allocation of defense costs. The Court of Appeals affirmed.[4]

[Page 444]

II

In *MEEMIC*, Trevor Chalfant was seriously injured when an automobile in which he was a passenger left the road. The car was driven by either defendant Michael Hinkle or defendant Jack Perry; each claims the other was driving. Hinkle's father, Charles Hinkle, owned the vehicle. Chalfant filed an action against Perry and both Hinkles. Meemic undertook the defense of all three defendants, hiring separate attorneys to defend the Hinkles and Perry. Transamerica also covered Perry under a policy with a $250,000 limit. The parties agree that MEEMIC provided primary coverage to all three defendants, Transamerica providing only excess.

Neither the MEEMIC nor the Transamerica policy limited the duty to defend when its coverage was excess.[5] Meemic's policy provided that it would not defend after its policy limits had been paid. Meemic filed a declaratory judgment action, seeking a determination that it would be excused from the underlying lawsuit upon payment of its $100,000 policy limit to Chalfant. It also sought reimbursement from Transamerica for costs incurred defending Perry. The circuit court ruled that MEEMIC had an obligation to provide a defense to the defendants only until MEEMIC reached a settlement of the claims against the Hinkles. Thereafter, the court ruled, Transamerica would owe a duty to defend Perry. The court also denied MEEMIC'S motion for reimbursement of its defense costs.

[Page 445] Meanwhile, the underlying dispute was settled by mediation. In accordance with the panel's $150,000 decision for Chalfant, MEEMIC paid $100,000 and Transamerica paid $50,000. The court's ruling that MEEMIC could be dismissed from the lawsuit upon paying its policy limits in partial settlement therefore became moot.

Meemic appealed the decision regarding defense costs, and the Court of Appeals reversed.[6] The Court of Appeals ruled that Transamerica had a duty to defend Perry, commencing when MEEMIC filed the declaratory judgment action. It ruled that Transamerica was liable for a pro-rata share of defense costs when both insurers had a duty to defend, namely, after the filing of the declaratory judgment action, and all defense costs after MEEMIC'S duty ended upon payment of policy limits.

III

Some courts hold that both the primary and excess insurers have a duty to defend the insured that is personal to each. These courts preclude allocation of defense costs by contribution in the absence of a contractual agreement between the insurers.[7] This approach has been criticized, because it

> would simply provide a premium or offer a possible windfall for the insurer who refuses to defend, and thus, by leaving the insured to his own resources, enjoys a chance that the costs of defense will be provided by some other insurer at no [Page 446] expense to the company which declines to carry out its contractual commitments.[8]

Michigan permits contribution between insurers on a theory of equitable subrogation. *Commercial Union Ins Co v Medical Protective Co, 426 Mich 109, 119; 393 NW2d 479 (1986)*. Equitable subrogation is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other." *Id.*, p 117.

Where there is only one insurer, an insured constrained to undertake his own defense can recover those costs from the insurer.[9] Where there is more than one insurer, the doctrine of equitable subrogation allows an insurer who has provided a defense to "stand[] in the shoes" of the insured,[10] and recover from the insurer who wrongly failed to defend.

IV

Courts that allow contribution between insurers have done so in a number of different ways, depending on the facts of the cases. Woven through these factual variations are two somewhat conflicting analytic approaches.

Some courts require the primary insurer to bear the entire cost of defending the insured, even **[Page 447]** when the liability exceeds the primary coverage.[11] These courts ignore that the excess insurer also has assumed a duty to defend the insured.[12]

The duty to defend is broader than and independent of the duty to pay for covered liabilities.[13] The duty to defend is triggered whenever the facts set forth in the pleadings would require coverage,[14] or an "unpleaded fact or set of facts [known by the insurer to be true] would bring the claim within the coverage of the policy."[15]

Some courts have reasoned that the excess insurer's duty to defend is not extinguished merely because another insurer is providing a defense.[16] Appleman has criticized this latter group of cases because "[i]t cannot, even remotely, be suggested that the quality of the defense being given to the **[Page 448]** insured will be improved somehow simply because it is shared with another carrier."[17]

Expecting the excess carrier to join the primary carrier in defending as soon as the excess carrier's duty to defend arises is often unrealistic. The duty to defend arises when the facts set forth in the pleadings, or unpleaded facts known to the insurer, would subject the insurer to liability.[18] But in the ordinary case, where a complaint seeks damages in excess of plaintiff's expected recovery, an excess carrier should not be expected to enter a lawsuit in which its coverage is unlikely to be implicated.

It would be even more problematic to require an excess insurer to take part on the basis of unpleaded facts known to it. Insurers would become entangled in disputes concerning when the excess insurer knew or should have known that its coverage would be required.

In both these scenarios, seeking to determine when the excess insurer should or must become involved does nothing to further the prompt, effective defense of the insured. The primary carrier should already be providing a defense.

We distinguish, however, between requiring an excess insurer to tender a defense, and requiring it to defray the costs of another insurer who has done so. The insurer providing the defense is not entitled to "stand[] in the shoes" of the insured until it has fully discharged its own duty to provide a defense for the insured.[19] It, therefore, may not require the nondefending insurer to actually **[Page 449]** join in conducting the defense.[20] As one court observed,

> Whatever may be the right ultimately to saddle off a part of the cost of defense actually undertaken once payment has been made and a right comparable to subrogation is being asserted, it is contrary to the very nature of the contract that the insurer can scout around in the hopes that it can find someone whose defense the assured is compelled to accept.[21]

But once an insurer has completed its defense, it is equitably subrogated to the rights of the insured and ought to be able to recover costs from the insurer who has avoided its duty to defend.

Thus, in applying equitable subrogation, we begin with the premise that both insurers owe an overlapping duty to defend the insured. While one insurer may not require the other to join in defense with it or in its place, an insurer who has provided a defense may seek contribution from the nondefending insurer. This approach, in the words of the Court of Appeals, "provides no obstacle to **[Page 450]** an effective defense [of the insured] and leads to a more equitable distribution of the cost of litigation among the insurers."[22]

V

Whatever analytic framework courts espouse, they apply contribution differently, depending on the facts of the case. As a United States district court observed, "it must be emphasized that the holding in any particular case addressing the issue of allocation of defense costs between primary and excess insurers must be considered in light of the particular facts of each case and the various policies involved."[23]

A

Where, as in MEEMIC, the primary insurer provides a defense and the excess coverage is also reached, courts generally have allocated defense costs on a pro-rata basis, according to each insurer's share of the underlying liability.[24]

The Court of Appeals applied this approach in **[Page 451]** *Celina Mut Ins Co v Citizens Ins Co of America*, ***133 Mich App 655****; 349 NW2d 547 (1984)*.[25] Where, however, the liability falls entirely within the policy limits of the primary coverage, courts have consistently required the primary insurer to bear the entire cost of defense.[26]

B

Where, as in *Frankenmuth*, the excess insurer undertakes the defense, courts have taken two approaches to requiring contribution when the extent of liability involves both primary and excess insurers. Some courts require the primary insurer to bear the entire cost of defending the insured.[27] Courts taking this approach generally **[Page 452]** reach this conclusion without discussion. They seem to assume that by standing in the insured's shoes through equitable subrogation, the excess insurer is entitled to recover the full defense costs that the insured could recover.[28]

This approach ignores that the excess insurer has also assumed a duty to defend the insured. Many courts have recognized the shared duty, and have allocated defense costs to both insurers, where the liability was large enough to implicate both primary and excess coverage. They generally have done so on a pro-rata basis according to the parties' respective shares of the underlying liability.[29]

The issue in *Frankenmuth* is further complicated because, after first refusing to provide a defense, Continental eventually took over the driver's defense from Frankenmuth. By paying its policy limits to settle, Continental concluded its duty to defend.[30] Frankenmuth's defense costs thereafter were incurred when only it owed a duty to defend. Some courts in that situation have nevertheless allocated defense costs according to the total liability, without regard to whether the costs were incurred before or after the partial settlement;[31] and we agree that is the correct approach. There is authority to the contrary, how- **[Page 453]** ever, where courts have allocated all defense costs to the primary insurer until its duty to defend is concluded through payment, and have saddled the excess insurer with the full defense costs incurred thereafter.[32]

We would adopt the former approach for the reasons set forth in part VI. We would hold that even where the primary insurer has paid its policy limits in partial settlement of a claim, contribution between primary and excess insurers should turn on their respective shares of the final liability.[33]

VI

In each of the instant cases, the excess insurer accepts responsibility for all defense costs after the primary insurer has paid its limits in partial settlement of the underlying claim. They seek to avoid bearing part of the defense costs for the period during which the primary insurer was also responsible for defense.

But in both cases both insurers owed a duty to defend the insured. Allocating defense costs on the basis of the shares of the final underlying liability encourages primary insurers to continue providing a defense even when it becomes clear that their policy limits will, or are likely to, be exceeded. A temporal rule would encourage a primary insurer to pay and leave prematurely, which might disrupt **[Page 454]** the defense of the insured,[34] possibly engendering additional litigation between the insurers and, in some cases, the insured.

We emphasize that this decision to prorate according to total liability only would include defense costs where the insurers' respective interests closely align so that they would pursue compatible strategies on behalf of the insured.[35] This decision would not extend to "true" excess policies, where the duty to defend is limited.[36]

VII

In *Frankenmuth*, the record is insufficient to determine the total defense costs incurred by Frankenmuth and Continental. Similarly in *MEEMIC*, it is not clear how much MEEMIC expended in defense. In both cases, the Court of Appeals took a different approach than we would adopt. We would reverse and remand both cases to the circuit court for proceedings consistent with this opinion.

On remand, the circuit courts should determine the total sum spent by both insurers on the costs of defense. This figure should be allocated to each insurer according to its portion of the underlying liability.

VIII

The majority, although acknowledging that Frankenmuth and Transamerica are not "true" **[Page 455]** excess insurers, adopts for the instant cases the same rule that the majority opines, in dicta, would be

applicable to true excess insurers: The excess insurer "is liable for defense costs only after the primary insurer is excused under the terms of its policy."[37]

The majority rejects the pro-rata approach that we would adopt on the basis that adoption of that approach would require a determination at some time during the course of litigation of when it becomes clear that a settlement or adjudication will exceed the limits of the primary insurer's policy. The majority argues that the pro-rata approach would become a source of "additional litigation, contrary to the goal of Michigan's no-fault insurance system."[38]

The majority's argument reveals a misunderstanding of the pro-rata approach. We propose a determination, after the conclusion of the underlying litigation, allocating all the costs that have already been incurred—not a determination during the course of litigation of the often murky question when something that is inherently unclear became or becomes "clear."

We do not propose that an excess insurer be required at any time to enter into and participate in providing an ongoing defense at the same time as the primary insurer is providing a defense. Confusion and redundant expense might result from requiring, as distinguished from permitting, an excess insurer to enter into the fray. Allocating costs after the conclusion of the litigation on the basis of the insurers' shares of the aggregate un- **[Page 456]** derlying liability, as ultimately determined by settlement or adjudication, avoids any need to determine before settlement or adjudication whether the excess insurer will in fact become obligated to pay because the settlement or adjudication exceeded the primary insurer's policy limit.

The majority also argues that the approach we advocate "forces the excess insurer to be a co-insurer despite the language of its policy. Such a result is contrary to the excess insurer's reasonable expectations."[39] The "language of the policy" is not spelled out in the majority opinion. If the reference is to provisions stating that under certain circumstances the insurer's coverage is excess, the argument ignores that the obligation to defend and the obligation to provide coverage are separate and distinct.[40] It is again relevant that the approach we advocate is, in most situations, in accord with the weight of authority.[41]

We would reverse and remand to the circuit court in both cases for proceedings consistent with this opinion.

Mallett, J., concurred with Levin, J.

FOOTNOTES

1 In *St Paul Fire & Marine Ins Co v American Home Assurance Co, **444 Mich 560**; 514 NW2d 113 (1994)*, this Court ruled that multiple conflicting "other insurance" clauses would be reconciled. In that case, the insured's liability fell *within the limits* of the policy ruled to provide primary coverage. As a result, the primary insurer bore the entire cost of defense. *Id.,* p 563. These cases address the duties to defend of multiple insurers where the liability *exceeds the limit* of the primary policy.

2 USAA did not provide a defense for any defendant.

3 As part of the settlement, the plaintiff in the underlying litigation agreed to seek satisfaction of any judgment only from the remaining insurers, not the assets of any defendants.

4 Unpublished opinion per curiam, entered September 14, 1993 (Docket No. 138157).

5 Transamerica's argument that its policy did not create a duty to defend ignores the plain language of its policy. Part v makes coverages A and B, for which Transamerica has agreed to defend, applicable when the insured drives an unowned automobile with permission of its owner.

6 204 Mich App 440; 516 NW2d 93 (1994).

7 See, e.g., *Nordby v Atlantic Mut Ins Co,* 329 NW2d 820, 824 (Minn, 1983); *Maryland Casualty Co v American Family Ins Group,* 199 Kan 373, 385-386; 429 P2d 931 (1967).

[8] *Continental Casualty Co v Zurich Ins Co,* 57 Cal 2d 27, 37; 17 Cal Rptr 12; 366 P2d 455 (1961). See also 7C Appleman, Insurance Law & Practice, § 4682, p 33 ("[i]f the recovery of costs remains uncertain it is an open invitation to abandon the insured to his own devices—hardly what he had bargained for when he paid his premiums"); Keeton & Widiss, Insurance Law, § 9.1, p 994.

9 *Continental Casualty,* n 8 *supra.*

10 *Commercial Union, supra,* p 118.

11 See, e.g., *Hobbs v Fireman's Fund American Ins Cos,* 339 So 2d 28, 39 (La App, 1976) (the primary insurer was liable for all attorney fees, although there was an excess insurer with a duty to defend); *American Surety Co of New York v Canal Ins Co,* 258 F2d 934, 937 (CA 4, 1958) (the nondefending primary insurer was liable to the excess insurer for the entire cost of tendering a defense).

12 This observation does not apply to "true" excess policies—i.e., umbrella policies—where the insurer has not contracted to provide any defense for the insured. *Guaranty Nat'l Ins Co v American Motorists Ins Co,* 981 F2d 1108, 1109 (CA 9, 1992) (noting that a true excess policy "is issued in anticipation of the existence of the underlying [primary] policy and is priced in the belief that the excess carrier will not have to provide a defense").

13 *Guerdon Industries v Fidelity & Casualty Co of New York, **371 Mich 12**, 18; 123 NW2d 143 (1963).*

14 *Id.*

15 *Kangas v Aetna Casualty & Surety Co, **64 Mich App 1**, 5; 235 NW2d 42 (1975).*

16 See, e.g., *Guaranty Nat'l Ins Co v American Motorists Ins Co,* 758 F Supp 1394, 1397 (D Mont, 1991), aff'd 981 F2d 1109 (CA 9, 1992) (see n 12). See also *St Paul Mercury Ins Co v Huitt, 336 F2d 37, 44 (CA 6, 1964)* (stating that the insured may call on both insurers to tender a defense, but not addressing the issue of contribution between insurers); *Universal Underwriters Ins Co v Wagner,* 367 F2d 866, 877, n 22 (CA 8, 1966) (noting in dicta that both insurers appeared to have a duty to defend).

17 Appleman, n 8 *supra,* § 4682.

18 See ns 13-14.

19 *Commercial Union, supra,* p 118 quoting *Commercial Union Assurance Cos v Safeway Stores,* 26 Cal 3d 912, 917-918; 164 Cal Rptr 709; 610 P2d 1038 (1980) (explaining that the theoretical basis of equitable subrogation is that the excess insurer has *discharged the insured's* liability in the underlying litigation).

20 Where the liability is expected to fall near the limit of the primary coverage, the incentives of the primary insurer and the excess insurer may conflict. No matter how large the settlement with the plaintiff in the underlying lawsuit, the primary insurer is only liable to its policy limits. The defending primary insurer therefore has an incentive to reduce its litigation costs—and thus total costs— by reaching a generous settlement with the plaintiff in the underlying lawsuit.

This problem, however, is minimized by two factors. First, the excess insurer in such situations has an incentive to follow the settlement negotiations closely to protect its own interests. Second, the primary carrier has a duty to exercise good faith to settle within its policy limits. *Commercial Union, supra,* p 119. In applying this duty, the reasonableness of the defending primary insurer's conduct is judged without

considering the costs of defense. Syverud, *The duty to settle*, 76 Va L R 1113, 1141 (1990). It therefore may not use the minimization of its own defense costs to justify agreeing to a larger settlement.

[21] *American Fidelity & Casualty Co v Pennsylvania Threshermen & Farmers' Mut Casualty Ins Co*, 280 F2d 453, 459-460 (CA 5, 1960).

22 *Celina Mut Ins Co v Citizens Ins Co of America*, ***133 Mich App 655***, *661; 349 NW2d 547 (1984)*.

23 *Guaranty Nat'l Ins* (district court), n 16 *supra* at 1396. Similarly, in *Signal Cos v Harbor Ins Co*, the California Supreme Court stated:

> We expressly decline to formulate a definitive rule applicable in every case in light of varying equitable considerations which may arise, and which affect the insured and the primary and excess carriers, and which depend upon the particular policies of insurance, the nature of the claim made, and the relation of the insured to the insurers. [27 Cal 3d 359, 369; 165 Cal Rptr 799; 612 P2d 889 (1980).]

24 *Celina*, n 22 *supra*, p 663; *Guaranty Nat'l Ins* (district court), n 16 *supra*, p 1398; *American Fidelity*, n 21 *supra; Nabisco Inc v Transport Indemnity Co*, 143 Cal App 3d 831; 192 Cal Rptr 207 (1983); 14 Couch, Insurance, 2d (rev ed), § 51:36, pp 446-447. But see, *Hobbs*, n 11 *supra*. Courts refusing to accept equitable subrogation at all, of course, do not permit contribution in these cases. See, e.g., *Nordby*, n 7 *supra*.

25 *Celina* claimed to be applying the "minority rule." Our examination of case law leads us to doubt the usefulness of the term "majority" or "minority." The facts of the cases cited as examples of such "rules" vary wildly. See, e.g., Ostrager & Newman, Handbook on Insurance Coverage Disputes, § 11.05[c] (mentioning the "traditional rule" that an excess insurer is not required to contribute to the insured's defense when the primary insurer is required to defend, but adding a lengthy list of cases that "suggest that in certain circumstances" an excess carrier is required to do so); anno: *Allocation of defense costs between primary and excess insurance carriers*, 19 ALR4th 107-135 (dividing case law according to facts).

26 *St Paul Fire & Marine*, n 1 *supra*, p 563; *P L Kanter Agency, Inc v Continental Casualty Co, 541 F2d 519, 523 (CA 6, 1976)* (applying Michigan law); *American Fidelity Ins Co v Employers Mut Casualty Co*, 3 Kan App 2d 245, 255-256; 593 P2d 14 (1979) (stating that the primary carrier is solely responsible for the defense where the claim falls within the limits of the primary policy, but that both insurers are liable for a pro-rata share of the cost of defending a claim exceeding the limit of the primary policy).

Meemic argues that *St Paul* supports its position. We disagree. The passage from *St Paul* simply stated that an excess insurer would not be liable for defense costs or indemnification where the underlying liability did not exceed the primary coverage. It did not suggest how the defense costs might be allocated when both coverages were reached.

27 See, e.g., *American Surety Co of New York v Canal Ins Co*, n 11 *supra; Republic Mut Ins Co v State Farm Mut Automobile Ins Co*, 413 F Supp 649, 654 (SD W Va, 1976); *State Farm Mut Automobile Ins Co v Foundation Reserve Ins Co*, 78 NM 359; 431 P2d 737 (1967) (affirming the trial court judgment of full costs for the excess insurer); *Aetna Casualty & Surety Co v Coronet Ins Co*, 44 Ill App 3d 744, 750-751; 358 NE2d 914 (1976); *Fidelity & Casualty Co of New York v Secured Casualty Co*, 87 Ohio Law Abs 459; 180 NE2d 297, 301-302 (1961).

28 *Fidelity & Casualty Co of NY,* n 27 *supra.*

29 *Continental Casualty,* n 8 *supra,* pp 37-38; *Hartford Accident & Indemnity Co v Civil Service Emp Ins Co,* 33 Cal App 3d 26; 108 Cal Rptr 737 (1973); *American Fidelity Ins Co,* n 26 *supra.* A few courts have also decided arbitrarily to split the defense costs in half. See, e.g., *Central Nat'l Ins Co v LeMars Mut Ins Co of Iowa,* 294 F Supp 1396, 1402 (SD Iowa, 1968); *Viani v Aetna Ins Co,* 95 Idaho 22; 501 P2d 706 (1972), overruled on other grounds *Sloviaczek v Estate of Puckett,* 98 Idaho 371; 565 P2d 564 (1977).

30 According to the terms of its policy.

31 *Aetna Casualty & Surety Co v Certain Underwriters,* 56 Cal App 3d 791, 803-805; 129 Cal Rptr 47 (1976).

32 *Santa Clara Co v United States Fidelity & Guaranty Co,* 859 F Supp 396, 400 (ND Cal, 1994), vacated on reconsideration on other grounds 868 F Supp 274 (ND Cal, 1994).

33 In some cases, this approach may result in a primary insurer paying for defense costs incurred after its contractual duty to defend ended by payment of its policy limits. It is important to remember, however, that the allocation of defense costs is not governed by contract, but by "'equitable principles designed to accomplish ultimate justice in the bearing of a specific burden.'" *Signal Cos,* n 23 *supra,* p 369, quoting *American Auto Ins Co v Seaboard Surety Co,* 155 Cal App 2d 192, 195-196; 318 P2d 84 (1957).

34 Appleman, n 8 *supra,* p 32.

35 Keeton & Widiss, n 8 *supra,* p 995. Cf. *Republic Mut,* n 27 *supra,* p 654 (permitting contribution of an excess insurer's defense costs, but denying compensation for investigation expenses because the excess insurer would have investigated the accident without regard to whether the primary insurer provided a defense).

36 *Guaranty Nat'l Ins Co,* n 12 *supra.*

37 *Ante,* p 436.

38 *Ante,* p 437. While both the instant cases involve automobile insurance policies, the principles involved are not limited to automobile policies. The very same issues can arise in other insurance contexts. The "goal of Michigan's no-fault insurance system" is a makeweight.

39 *Ante,* p 437 and n 8. The majority cites Corpus Juris Secundum and a decision of the California Supreme Court involving a true excess insurer.

*Allstate Ins Co v Keillor (After Remand), **450 Mich 412**; 537 NW2d 589 (1995),* is another case decided today involving the reasonable expectations doctrine.

40 In *MEEMIC,* the majority requires the primary insurer to pay the entire cost of defense with the result that Transamerica, which also had a contractual obligation to provide a defense, contributes nothing to the cost of defense even though Transamerica paid one-third, $50,000, of the mediation settlement.

41 See n 24 and accompanying text.