

DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street Denver, CO 80202	
Plaintiff: Kalisha Greene v. Defendants: Sarah Parker; State Farm Mutual Automobile Insurance Company; and GEICO Casualty Company.	DATE FILED: May 30, 2019 3:22 PM CASE NUMBER: 2018CV32527 ▲ COURT USE ONLY ▲ <hr/> Case Number: 18 CV 32527 Division/Ctrm: 368
ORDER re: MOTION FOR A DETERMINATION OF A QUESTION OF LAW	

This matter is before the Court on Plaintiff and Defendant Parker's motion for a determination of a question of law. Plaintiff and Defendant Parker seek a determination that State Farm's policy provides primary coverage for Plaintiff's injuries. They argue that the GEICO policy maintained by Defendant Parker provides for excess coverage in this case. Therefore, they contend that State Farm must provide insurance coverage as the primary insurer.

State Farm argues that an escape clause in its policy eliminates coverage in this case. At best, State Farm argues that its liability is co-primary with GEICO.

The Court has reviewed the briefing and exhibits submitted on this motion. The Court has also reviewed the entire file and the applicable authorities. The Court determines that there is no coverage in this case under the State Farm policy pursuant to the escape clause.

I. Factual Background

This insurance coverage dispute arises out of an accident that occurred on Dec. 11, 2017. Defendant Parker collided with Plaintiff. Plaintiff sustained a fractured tibia and foot and a knee injury. It is undisputed that Defendant Parker was driving her sister's vehicle with her sister's permission at the time of the accident.

There are two potential insurance policies at issue in this action. Plaintiff had a policy of insurance with GEICO. Defendant Parker's sister had an auto policy with State Farm that insured the vehicle.

As relevant here, the GEICO policy contains the following excess coverage clause:

OTHER INSURANCE

If there is other applicable liability insurance available, any insurance we provide shall be excess over any other applicable liability insurance. If more than one policy applies on an excess basis, we will not owe more than our pro-rata share of the total liability coverage available.

See Page 5 of Exhibit F.

The State Farm policy contains a provision that provides coverage for a permissive user of an insured vehicle when the permissive user “is not insured for vehicle liability coverage by any other insurance policy . . .” *See* policy of insurance, liability coverage, ex. C, at p. 552, ¶ 4. This provision is an escape clause, as it “declare[s] that the insurer is not liable if there is valid and collectible insurance covering the risk.” *See Shelter Mut. Ins. Co. v. Mid-Century Ins. Co.*, 246 P.3d 651, 660 n.2 (Colo. 2011) (citing 15 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 219:36, at 42 (3d ed. 1999)).

Plaintiff and Defendant Parker argue that this escape clause is void and unenforceable. Therefore, they argue that coverage is available under the State Farm policy, making GEICO the excess insurer.

State Farm argues that there is other insurance available to Defendant Parker under the GEICO policy. Therefore, under the escape clause, State Farm contends that there is no coverage available under its policy.

II. Analysis

A. Applicable Law

In *Shelter Mut. Ins. Co.* the Colorado Supreme Court analyzed the enforceability of competing “other insurance” clauses. *Shelter Mut. Ins. Co.* sets forth the framework for considering the enforceability of the escape clause and how the policies should be applied in this context.

Like this action, *Shelter Mut. Ins. Co.* involved an accident where a driver with permission to use the vehicle had an insurance policy that contained an excess coverage provision similar to the GEICO policy at issue here. The owner of the vehicle also had automobile insurance with an excess coverage provision. The issue in that case was how to reconcile competing excess coverage provisions. The Supreme Court held that the provisions were mutually repugnant and therefore void. The Supreme Court held that in such circumstances both insurers are co-primary and that they must share the losses on a dollar-for-dollar basis until the policy limits of one insurer have been exhausted. *Id.* at 655-56.

This action presents a different scenario. Here, State Farm argues that the escape clause should be enforced. Therefore, it argues that there is no coverage under its policy. As discussed next, the analysis in *Shelter Mut. Ins. Co.* resolves this question.

In *Shelter Mut. Ins. Co.* the Supreme Court rejected the notion that Colorado's mandatory insurance laws created a requirement for designating one policy primary to the other. The Supreme Court held that "[h]ow insurers apportion liability through other-insurance clauses, like excess or escape clauses, does not affect insureds' coverage." *Id.* at 660. Therefore, these clauses are enforceable as they do not interfere with Colorado's mandatory insurance laws.

The Supreme Court recognized that escape and excess clauses are two sides of the same coin: "Through an excess clause an insurer initially accepts liability but then tries to shift it to another insurer, while through an escape clause an insurer initially disclaims liability but then accepts it in the absence of other insurance." *Id.* at 664. The Supreme Court held that these clauses are valid so long as the insured remains covered. *Id.* at 664 (citing *N.H. Ind. Co. v. Budget Rent-A-Car Sys. Inc.*, 64 P.3d 1239, 1242 (Wash. 2003) (upholding escape clauses and finding that they are not contrary to public policy)). Therefore, the Supreme Court viewed an escape clause in the same manner it viewed an excess clause.

Once the Supreme Court recognized that excess clauses are valid and enforceable, the Court held that insurance companies enjoy freedom of contract to allocate risk for a particular loss using conditions and exclusions in the policies. *Id.* Familiar contract principles apply when analyzing the language of the policies to determine how insurers allocate risk. *Id.*, at 663.

B. Application of *Shelter Mut. Ins. Co.* to the Clauses at Issue Here

Applying these principles here, the Court concludes that the escape clause is valid. As the Supreme Court held in *Shelter Mut. Ins. Co.*, these clauses are valid as long as the insured has coverage. That is the case here.

The excess clause in the GEICO policy states that it will cover excess losses if there is another policy in effect. The converse of this clause is that it will be primary if there is no other insurance available.

A plain reading of the State Farm policy reveals that Defendant Parker is only covered as an "insured" if there is no other policy in place. *See* policy of insurance, liability coverage, ex. C, at p. 552, ¶ 4. There is coverage available through the GEICO policy. The excess clause is triggered only if there is other insurance available. However, that coverage is not available under the State Farm policy.

Therefore, the Court concludes that the escape clause is valid. There is no coverage under this policy because coverage is available to Defendant Parker under the GEICO policy.

Plaintiff relies on decisions issued before *Shelter Mut. Ins. Co.* to argue that the escape clause is not valid and should not be enforced. However, the authorities cited by Plaintiff do not apply here. *See Brna v. Farmers*, 897 P.2d 851 (Colo. App. 1994) and *Bukulmez v. Hertz Corp.*, 710 P.2d 1117 (Colo. App. 1985), *rev'd on other grounds sub nom. Blue Cross v. Bukulmez*, 736 P.2d 834 (Colo. 1987). These cases were decided before *Shelter Mut. Ins. Co.* They employ reasoning that the Supreme Court rejected in *Shelter Mut. Ins. Co.* *See id.* (declining to follow *Finizio v. American Hardware Mutual*

Ins. Co., 967 P.2d 188 (Colo. App. 1988). Therefore, these authorities are no longer good law.

Because the Court concludes that the escape clause makes coverage unavailable under the State Farm policy the Court does not need to address State Farm's argument that, at best, there is co-primary liability.

SO ORDERED AND DATED this 30th day of May, 2019.

BY THE COURT:



Andrew P. McCallin
District Court Judge