

DAVID MOODY BY NOAH MOODY, HIS NEXT FRIEND
v. AMERICAN FIDELITY ASSURANCE COMPANY
ET AL

5-5952

481 S.W. 2d 700

Opinion delivered June 19, 1972

1. INSURANCE—EXCESS INSURANCE—PRESUMPTION AS TO USE OF TERM.—Appellate court must assume the legislature used the term “excess insurance” in accordance with its commonly accepted meaning where the term has been used commonly and so constructed many times.
2. INSURANCE—EXCESS INSURANCE—LIABILITY OF INSURER.—Medical coverage provided by insurer pursuant to Ark. Stat. Ann. § 81-716 held to constitute excess insurance whereby insurer was not liable for any part of medical expenses paid by other insurance sources.

Appeal from Pope Circuit Court, *Russell C. Roberts*, Judge; affirmed.

Laws & Schulze for appellant.

Williams & Gardner, for appellees

CONLEY BYRD, Justice. This is an action by Noah Moody as next friend of his minor son David Moody, a newspaper delivery boy, to recover upon a policy issued by appellee American Fidelity Assurance Company to appellee Arkansas Democrat Company, a corporation, pursuant to Ark. Stat. Ann. § 81-716 (Supp. 1971). With reference to medical coverage that statute provides:

“ . . . and this hospital and medical expense protection shall be excess insurance coverage or indemnity over and above any other collectable insurance.”

It is admitted that as a result of an accident to David Moody while delivering newspapers, medical expenses of \$1,163.75 have been incurred. \$914.50 have been paid by other insurance sources and American Fidelity has tendered \$249.25. Upon this admission the trial court ruled that the medical insurance protection provided pursuant to Ark. Stat. Ann.

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§ 81-716 constituted "excess insurance" and dismissed appellant's complaint. We agree.

The term "excess insurance" has been used so commonly and been construed so many times that we must assume that the legislature used it in accordance with its commonly accepted meaning. See 44 Am. Jur. 2d *Insurance* § 1815 where in commenting on "excess insurance" it is said:

"As contradistinguished from a prorata or proportionate recovery clause, insurance policies occasionally provide that as to a particular coverage, it shall be 'excess' insurance only. Under such a policy and as to such a coverage the insurance company issuing the policy is not liable for any part of the loss or damage which is covered by other insurance, but is liable only for the amount of loss or damage in excess of the coverage provided by the other policy or policies of insurance. An excess insurer was not liable under its policy to contribute to expenses incurred by the plaintiff in successfully defending a suit where the only obligation under its contract was to contribute to either a judgment or a settlement."

In accordance with the constant legal definition given to the term "excess insurance," we agree with the trial court that under the statute American Fidelity is not liable for any part of the medical expense covered by other insurance.

Affirmed.