STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA C. RUZAK,

Plaintiff-Appellee/Cross-Appellant,

v

USAA INSURANCE AGENCY, INC.,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
June 24, 2008

No. 274993
Grand Traverse Circuit Court
LC No. 06-025177-NI

Before: Gleicher, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

In this declaratory action involving the applicable limits of automobile insurance liability coverage, defendant appeals as of right the trial court's order denying its motion for summary disposition under MCR 2.116(C)(10) and granting summary disposition to plaintiff. Plaintiff cross appeals. We reverse the trial court's order granting summary disposition to plaintiff because the contested provision was unambiguous, was not unconscionable, and did not violate public policy. However, because the record is insufficient to determine whether defendant added the contested provision to the policy after plaintiff's husband bought the policy and, if so, whether defendant provided actual notice of the reduced coverage, we remand for a determination regarding the application of the renewal rule to the present case.

On October 21, 2004, plaintiff, a passenger in a truck driven by her husband, Jay Ruzak, was injured after Jay lost control of the truck and the truck sideswiped a utility pole and collided with a tree. Defendant was Jay's automobile insurer, and the policy generally provided liability coverage limits of $300,000 per person with a maximum of $500,000 per accident. However, the policy also contained the following provision in the exclusion subsection of the liability coverage section:

> There is no coverage for [bodily injury] for which a covered person becomes legally responsible to pay a member of that covered person's family residing in that covered person's household. This exclusion applies only to the extent that the limits of liability for this coverage exceed $20,000 for each person or $40,000 for each accident.

Based on this exclusion, defendant informed plaintiff that her claim was limited to $20,000.

Plaintiff then sued Jay and defendant, alleging breach of contract, fraud, and negligent and innocent misrepresentation against defendant.[1] She also sought declaratory relief concerning the limits of Jay's insurance policy. Subsequently, defendant and plaintiff filed cross-motions for summary disposition. While the trial court found that the challenged provision was unambiguous and complied with the coverage required by the no-fault act, MCL 500.3101 *et seq.*, it ultimately refused to enforce the challenged provision. According to the trial court, the challenged provision was "repugnant," "reprehensible," and unconscionable. On appeal, defendant argues that the trial court erred in refusing to enforce the challenged provision because it was unambiguous and not in contravention of public policy. On cross-appeal, plaintiff asserts that the trial court properly refused to enforce the challenged provision because it was ambiguous, violated public policy, was unconscionable, and because she and Jay never received notice of the provision.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 416; 668 NW2d 199 (2003). It also reviews de novo the construction and interpretation of contracts. *Id.* at 416-417. This Court construes an insurance policy in accordance with well-settled principles of contract construction; however, "insurance contracts remain subject to statutory regulations." *Id.* at 417-418. "[I]f a clause in an insurance policy is clear and does not contravene public policy, it must be enforced as written." *Id.* at 418. See also *Rory v Continental Ins Co*, 473 Mich 457, 461, 491; 703 NW2d 23 (2005) (an unambiguous insurance policy must be enforced as written unless a contractual provision violates law or public policy, or a traditional contractual defense bars the application of the provision).

We agree with the trial court that the challenged provision is unambiguous. A contractual provision is ambiguous if it irreconcilably conflicts with another provision or "when it is *equally* susceptible to more than a single meaning." *Mayor of the City of Lansing v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) (emphasis in original). The residual liability provision of the no fault act, MCL 500.3131, provides that residual liability insurance coverage need not be greater than that required by MCL 500.3009(1). Pursuant to MCL 500.3009(1), "[a]n automobile liability . . . policy insuring against loss resulting from liability imposed by law for property damage, bodily injury . . . shall not be delivered" unless the policy contains a minimum liability limit of $20,000 per person and $40,000 per accident. Because the coverage amounts in the contested provision equal the liability amounts required by MCL 500.3009(1), we conclude that the contested provision is susceptible to only one meaning: claims by a family member are excluded from coverage beyond the minimum limits of $20,000 per person and $40,000 per accident. Although the contested provision may be inartfully worded and clumsily arranged, it is nonetheless unambiguous and, therefore, it must be enforced as written. See *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999).[2]

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[1] The trial court dismissed with prejudice plaintiff's negligence claim against Jay.

[2] We agree with the trial court that plaintiff's construction of the challenged provision—that there is no liability coverage when the policy limits exceed the statutory minimum of $20,000/$40,000—is "strained" and that plaintiff "has essentially reworded [the provision] in an

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In reaching our conclusion, we reject plaintiff's argument that the location of the contested provision renders the provision ambiguous. While the contested provision is listed as an exclusion to liability, it is not an "exclusion," defined as "[a]n insurance-policy provision that excepts certain events or conditions from coverage," Black's Law Dictionary (7th ed), but rather a limitation on coverage. However, because the challenged provision is susceptible to only one interpretation, the location of the provision does not render it ambiguous. See *Farm Bureau Mut Ins Co, supra* at 568. We also reject plaintiff's argument that the insurance policy, when read as a whole, is ambiguous and internally inconsistent. The declaration page states that "*[t]he limits shown* [$300,000 per person and $500,000 per accident] *may be reduced by policy provisions*" (emphasis added). The insurance policy itself states that, "*subject to all the terms of this policy*," defendant "will provide the coverages and limits of liability for which a premium is shown in the Declarations" (emphasis added). The policy contains numerous exclusions where liability coverage is not provided or is limited. Accordingly, the plain language of the insurance policy, including the declaration page, refutes plaintiff's argument that every part of the policy implies that defendant will provide liability coverage in the amount of $300,000 per person and $500,000 per accident on each claim. In addition, although a similar provision is contained as a definition rather than an exclusion in the section outlining the uninsured/underinsured motorists coverage, this coverage and liability coverage apply in different contexts. Defendant must provide liability coverage when "any covered person becomes legally liable because of auto accident." Defendant must provide uninsured/underinsured motorists coverage when "a covered person is legally entitled to recover from the owner or operator of an" uninsured or underinsured motor vehicle. Moreover, the declaration page provides separate limits of coverage for uninsured/underinsured motorists coverage. We decline plaintiff's invitation to discern ambiguity solely because an insured might interpret the policy different than provided by the policy's plain language. See *Farm Bureau Ins Co, supra* at 567.

Although the trial court found that the contested provision was unambiguous, it refused to enforce the provision because the provision was unconscionable and violated public policy. However, we conclude that the trial court improperly substituted its own policy choice in resolving this matter in favor of plaintiff. A court may not merely impose its personal public policy choices. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 55; 672 NW2d 884 (2003). Public policy must ultimately be clearly rooted in the law," *Terrien v Zwit*, 467 Mich 56, 67; 648 NW2d 602 (2002), i.e., the state and federal constitutions, statutes, administrative rules and regulations, public rules of professional conduct, and the common law, *Morris & Doherty, supra*, 259 Mich App 55.

Here, there was no evidence that clearly demonstrated that the contested provision transgresses the law. While plaintiff argues that the contested provision is void because it entirely eliminates liability coverage for bodily injury suffered by a family member of the insured, this argument lacks merit. Family members have the statutory minimum coverage because the policy is written in conformity with the residual liability coverage provisions of MCL 500.3131 and MCL 500.3009(1). If the first provision of the exclusion stood alone, it

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attempt to create an ambiguity and to take advantage of the fact that it is against the public policy of this state to include a provision in an insurance policy that excluded coverage for bodily injury to any insured or a member of the insured's family."

would violate public policy. See *Farmers Ins Exch, supra* at 418 ("[I]t has been against the public policy of this state to include a provision in an insurance policy that excludes coverage for bodily injury to any insured or a member of the insured's family"). However, as noted, the exclusion provides the minimum statutory coverage.

The contested provision is also not unconscionable. While the trial court peppered its written opinion with use of the language of unconscionability, it never provided an analysis with respect to the defense of unconscionability. A contract or one of its provisions will be considered unconscionable only where both procedural and substantive unconscionability are present. *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 143; 706 NW2d 471 (2005). Procedural unconscionability arises when the party with little or no bargaining power has no realistic alternative to acceptance of the term. *Id.* at 144. "If, under a fair appraisal of the circumstances, the weaker party was free to accept or reject the term, there was no procedural unconscionability." *Id.* "Substantive unconscionability exists where the challenged term is not substantively reasonable." *Id.* The standard for substantive unconscionability is whether "a term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience." *Id.* However, substantive unconscionability does not exist merely where "it [the contract provision] is foolish for one party and very advantageous to the other." *Id.*

In the instant case, there was no evidence that Jay had no other options regarding automobile insurance and that his only choice was to accept the terms as presented in defendant's policy. Under a fair appraisal of the circumstances, Jay was free to accept the policy terms or reject them and to obtain automobile insurance through another provider. Thus, we conclude that procedural unconscionability was not present. *Id.* In addition, substantive unconscionability is not present because the inequity of the term is not so extreme as to shock the conscious. *Id.* "An insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy." *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161; 534 NW2d 502 (1995). As already stated, the limited scope of coverage in the contested provision comports with the minimum coverage requirements of MCL 500.3131 and MCL 500.3009(1).

Plaintiff contends on cross appeal that defendant never notified plaintiff or Jay when the contested provision was added to the insurance policy, and thus, the provision should not apply. An insured has an obligation to read an insurance policy issued, and the insured must raise any questions regarding the coverage of the insurance policy to the insurer within a reasonable time. *Harts v Farmers Ins Exch*, 461 Mich 1, 8 n 4; 597 NW2d 47 (1999). A narrow exception exists to this rule where "a policy is renewed without actual notice to the insured that the policy has been altered." *Koski v Allstate Ins Co*, 213 Mich App 166, 170; 539 NW2d 561 (1995), rev'd on other grounds 456 Mich 439 (1998); *Parmet Homes, Inc v Republic Ins Co*, 111 Mich App 140, 145; 314 NW2d 453 (1981). "Where a renewal policy is issued without calling the insured's attention to a reduction in coverage, the insurer is bound to the greater coverage in the earlier policy." *Koski, supra* at 171. Generally, determination whether notice of a policy change was adequate is a question of law for the court. *Koski, supra* at 170.

However, plaintiff did not raise this precise issue below,[3] and, consequently, the record as developed does not provide the Court with an adequate basis to dispose of the issue. The record does not establish whether the original policy Jay purchased from defendant in the late 1960s contained the contested provision.[4] Further, even if defendant added the contested provision to the insurance policy after it was originally bought by Jay, the record does not establish what information, if any, was provided by defendant to plaintiff and Jay notifying them of the contested provision. In light of the fact that this issue was not raised below, the averments of plaintiff and Jay that neither recalled anyone from defendant informing them of the contested provision do not establish that defendant never informed them of the alleged reduction in coverage. Defendant never had the opportunity to refute plaintiff's assertion that it never informed plaintiff or Jay of the contested provision. Due process requires an opportunity for an opposing party to respond to an issue. See *In re Duane v Baldwin Trust*, 274 Mich App 387, 399; 733 NW2d 419 (2007). We, therefore, remand for a determination regarding the application of the renewal rule to the present case. The trial court shall determine whether defendant added the contested provision to the insurance policy after the policy was initially purchased by Jay and, if so, whether defendant provided actual notice of the reduction in coverage to plaintiff and Jay.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra

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[3] Although plaintiff claimed before the trial court that defendant never informed her or Jay of the contested provision, plaintiff never asserted that the renewal rule prohibited enforcement of the provision.

[4] To support the claim that the contested provision was added after Jay originally purchased the insurance policy, plaintiff cites to the averment of Rebecca Mainez, a product analysis for defendant, that the contested provision has been a part of Jay's insurance policy "since at least 1999." While Mainez's averment clearly does not establish that the contested provision was added to the insurance policy in 1999, defendant does not claim on appeal that the contested provision was not added to Jay's insurance policy sometime after the policy was initially purchased in the late 1960s.