STATE OF MICHIGAN

COURT OF APPEALS

ROBERT M. MARSHALL,

Plaintiff-Appellee,

v

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
November 17, 2009

No. 289602
Dickinson Circuit Court
LC No. 08-015152-CK

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting plaintiff's motion for summary disposition. We reverse and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was injured in an automobile accident involving an underinsured motorist. Although he timely claimed his first-party benefits, he did not separately notify defendant of his underinsured motorist claim until more than one year had passed since the accident. Defendant denied his request based on the following policy language:

> Any person seeking Uninsured[1] Motorist Coverage must:
>
> a. present the claim for compensatory damages in compliance with the Duties After Accident or Loss listed on page 4 of this policy and all other terms and conditions of this coverage and the policy; and
>
> b. present to us a written notice of the claim for Uninsured Motorist Coverage within one year after the accident occurs.
>
> A suit against us for Uninsured Motorist Coverage may not be commenced more than one year after the accident that caused the injuries being claimed, unless there has been full compliance with all the Duties After Accident or Loss listed on

[1] Although the policy refers to this as *uninsured* motorist coverage, the parties do not dispute that it also covered *underinsured* motorists.

page 4 of this policy and all other terms and conditions of this coverage and the policy.

The referenced "Duties" on page 4 of the policy include standard requirements including prompt notification of how, when, and where the accident happened, names and addresses of the other people involved, and cooperation with defendant in the investigation and settlement of the claim.

Plaintiff sued when defendant denied his request for benefits. Defendant asserted that plaintiff had failed to provide written notice of his claim for underinsured motorist benefits within one year of the accident, and that plaintiff could not bring suit because more than a year had elapsed since the accident. The parties filed cross-motions for summary disposition.

The trial court found that the cases cited by defendant, *McGraw v Farm Bureau Gen Ins Co*, 274 Mich App 298; 731 NW2d 805 (2007); *Gillespie v Farm Bureau Mut Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued July 27, 2006 (Docket No. 268649); and *McDonald v Farm Bureau Ins Co*, 480 Mich 191; 747 NW2d 811 (2008), had not addressed the issue of whether the provision was unconscionable, so they did not control. The trial court, citing *Northwest Acceptance Corp v Almont Gravel, Inc*, 162 Mich App 294; 412 NW2d 719 (1987), then found the one-year limit unconscionable because of the parties' disparate bargaining power and because plaintiff had "no realistic alternative but to go without the goods or services." The court based its conclusion on (1) plaintiff's not being allowed to see the contract language before accepting the policy, (2) plaintiff had no real alternative but to accept the contract term because "virtually all Michigan policies" at the time had a one-year limit, (3) plaintiff's bargaining power "pales in comparison to that of Defendant," and (4) defendant failed to revise plaintiff's policy despite knowing at the time the policy was renewed that the Commissioner had prohibited new policies from including a limit of less than three years, finding them "illusory," "unreasonable," "misleading," and "deceptive." The trial court also found the contract illusory and impossible to perform.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The interpretation of clear contractual language is an issue of law that we also review de novo on appeal. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

The trial court erred in not enforcing the unambiguous language of the contract. The facts of this case are identical to those in *McGraw*, where this Court upheld an identical one-year provision when the plaintiff failed to give notice of his claim for underinsured motorist benefits within one year. Although this Court's opinion in *McGraw* does not address unconscionability, the issue was implicitly decided because this Court found the contract enforceable.

Similarly, in *Gillespie*, this Court found that the plaintiffs' argument that the policy was ambiguous was "essentially that the one-year limitation period is so short that it is nearly impossible to comply and that the insured's ability to comply may be impeded by actions of the insurer over which the insured has no control. This is a 'reasonableness' challenge disguised as an ambiguity argument." *Gillespie*, *supra*, slip op at 2. The *Gillespie* Court did not discuss unconscionability, but rejected the plaintiffs' attempt at an end-run around *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005).

Likewise, *McDonald* did not expressly discuss unconscionability, but vehemently asserted that courts are not to rewrite unambiguous policies where the Commissioner has already approved them: "OFIS determines whether an insurance contract is valid. If it is, it is then the responsibility of this Court to enforce the valid contract as written." *Rory*, *supra* at 202. This administrative review sets insurance policies apart from other contracts which courts may find unconscionable. The Commissioner made the policy decision to let existing policies (including the one here at issue) remain in effect, without imposing any requirement that the clause be changed when the policy is renewed or any other limits on those existing, unrevised policies. Thus, plaintiff's policy was valid, and under *McDonald*, courts are required to enforce it as written.

By the express terms of the policy, had plaintiff complied with the notice provision in the contract, the one-year limit on commencing suit would not have applied. Thus, the trial court's conclusion that compliance with the policy was impossible and the contract illusory was erroneous. There has been no showing that plaintiff was unable to provide satisfactory notice within one year. The trial court erred in declaring the provision unenforceable.

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

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Donald S. Owens