TIMOTHY F. LONG, Plaintiff-Appellant,

v.

MERCURY INSURANCE GROUP, Defendant-Respondent.

No. A-3238-10T1.

Superior Court of New Jersey, Appellate Division.

Argued September 28, 2011.
Decided January 17, 2012.

Michael J. Pender argued the cause for appellant (Targan & Pender, P.C., attorneys; Mr. Pender, on the briefs).

Gina M. Stanziale argued the cause for respondent (**Methfessel** & **Werbel**, attorneys; Ms. Stanziale, on the brief).

Before Judges Lihotz, Waugh and St. John.

NOT FOR PUBLICATION

PER CURIAM.

Plaintiff Timothy F. Long appeals from the summary judgment dismissal of his declaratory judgment action seeking underinsured motorist (UIM) coverage under his personal automobile insurance policy, issued by defendant Mercury Insurance Group. We reverse, concluding the policy's UIM exclusion when read with its other provisions, was sufficiently ambiguous such that the insured would not have clearly understood the limits of the coverage purchased.

The underlying facts are not disputed. On January 15, 2009, plaintiff, acting in the course of his employment, was operating a vehicle owned and insured by his employer, Admiral Nissan (Admiral), when Maureen Porter failed to stop at a stop sign and crossed into his lane of travel. As a result of the ensuing automobile accident, plaintiff suffered a shoulder injury necessitating surgery.

After notifying defendant and Admiral's insurance carrier, plaintiff accepted $15,000 to settle his underlying negligence action. The sum received represented the liability limits of Porter's automobile insurance policy. Plaintiff also recovered $20,000 from Admiral's commercial vehicle insurance carrier. This amount was the difference between the UIM policy limit covering Admiral's commercial vehicle ($35,000) and the sum tendered by Porter ($15,000). Although plaintiff was not a named insured under Admiral's commercial insurance policy, he was nevertheless an insured under the policy and entitled to coverage under its UIM provisions.

Plaintiff next submitted to defendant a $65,000 claim as a named insured under the terms of his personal automobile liability policy. The sum sought represented the difference between his $100,000 UIM policy limits less the $35,000 he had received from Porter and Admiral. Defendant denied the claim and declined to submit the matter to arbitration, relying on an exclusion found among the UIM provisions.

The thirty-eight page personal automobile policy issued to plaintiff by defendant includes various descriptive headings designating separate sections addressing individual coverage issues. Part III begins on page twenty-four and addresses UIM and uninsured motorists (UM) coverage. Part III's "Limits of Liability" provision states: "[t]he amount of coverage is shown on the declarations page[.]" The declaration page details the UIM bodily injury coverage as "$100,000 Each Person, $300,000 Each Accident."

The Part III UIM bolded titles include: "Who is an Insured"; "Deciding Fault and Amount"; and "Limits of Liability." Exclusion 5 is located on page twenty-eight, under the section captioned, "When Coverage Does Not Apply[,]" which lists eighteen provisions when "[t]here is no coverage for property damage or bodily injury[.]" Exclusion 5 states:

> When Coverage Does Not Apply

> There is no coverage for property damage or bodily injury:
>
> ....
>
> 5. For you while occupying a vehicle insured under another policy on which you are an insured.

Plaintiff initiated this declaratory judgment action asserting defendant wrongfully denied coverage of a valid claim. Defendant moved for summary judgment. The motion judge determined the policy exclusion at issue was "narrowly construed, specific, and in no way ambiguous or contrary to public policy." He further found plaintiff's situation fit "squarely within the exclusion" and concluded the contractual provisions precluded plaintiff's recovery. The court granted summary judgment for defendant and dismissed plaintiff's complaint. This appeal ensued.

Our review of the trial court's decision is governed by well-established principles. When reviewing the grant of summary judgment, we "`view the facts in the light most favorable to plaintiff.'" Livsey v. Mercury Ins. Group, 197 N.J. 522, 525 n.1 (2009) (quoting Sciarrotta v. Global Spectrum, 194 N.J. 345, 348 (2008)). Also, because the interpretation of an insurance contract is a question of law, Polarome Int'l, Inc. v. Greenwich Ins. Co., 404 N.J. Super. 241, 260 (App. Div. 2008), certif. denied, 199 N.J. 133 (2009), we undertake a de novo review of the motion judge's application of the law, noting the motion judge's "interpretation of the law and legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

When interpreting the contract, we "examine the plain language of the policy and, if the terms are clear, they `are to be given their plain, ordinary meaning.'" Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251, 270 (2008) (quoting Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001)). Our analysis also requires that any interpretation "fulfill the expectations of the parties," Passaic Valley Sewerage Comm'rs v. St. Paul Fire and Marine Ins. Co., 206 N.J. 596, 608 (2011), interpret "the policy as written" and "avoid writing a better insurance policy than the one purchased." President v. Jenkins, 180 N.J. 550, 562 (2004). In the event of an ambiguity in the insurance contract provisions, we "interpret the contract to comport with the reasonable expectations of the insured, even if a close reading of the written text reveals a contrary meaning." Zacarias, supra, 168 N.J. at 595. "Ambiguous policies are those that are `overly complicated, unclear, or written as a trap for the unguarded consumer.'" Passaic Valley, supra, 206 N.J. at 608 (quoting Zacarias, supra, 168 N.J. at 604).

"Although the relationship of the insurer and insured is contractual, the source of the obligation to offer UIM coverage is statutory." Zirger v. Gen. Acc. Ins. Co., 144 N.J. 327, 333 (1996). In this State, insureds have the option of purchasing UIM coverage related to the limits chosen for liability coverage. N.J.S.A. 17:28-1.1b. The statute provides UIM coverage "shall be provided as an option by an insurer to the named insured electing a standard automobile insurance policy" with limits up to $250,000 per person and $500,000 per accident for bodily injury, $100,000 per accident for property damage, or a single limit policy with up to $500,000 in coverage. Ibid. (emphasis added). See also Pizzullo, supra, 196 N.J. at 265; Taylor v. Nat. Union Fire Ins. Co., 289 N.J. Super. 593, 601 (App. Div.), certif. denied, 145 N.J. 376 (1996).

"The purpose of UIM coverage `is to provide as much coverage as an insured is willing to purchase, up to the available limits, against the risk of an underinsured claim.'" Gambino v. State Farm Ins. Co., 348 N.J. Super. 204, 207 (App. Div. 2002) (quoting Nikiper v. Motor Club of Am. Cos., 232 N.J. Super. 393, 399 (App. Div.), certif. denied, 117 N.J. 139 (1989)). The legislative mandate, requiring carriers to offer UIM coverage, reveals an "evident perception that in terms of obtaining an adequate recovery from a negligent driver, the victim, especially one sustaining serious injuries, is placed at financial risk not only by uninsured drivers but also by underinsured drivers," especially those carrying only the minimum statutory liability coverage. Longworth v. Van Houten, 223 N.J. Super. 174, 177 (App. Div. 1988).

Here, plaintiff maintains the Law Division judge's enforcement of Exclusion 5 was error because the provision — shifting recovery to another UIM policy — deviates from the Legislature's intent as evidenced by a 2007 amendment and, also, because it is contrary to plaintiff's reasonable expectations of the coverage he purchased. Before we begin our analysis, it is helpful to recite some additional historic background regarding our current UIM statute.

Prior to the 2007 statutory amendment, which we discuss in detail below, several cases examined commercial insurance contract clauses limiting recovery by stepping it down to the limits under an insured's personal automobile policy. The Court "expressed its clear willingness to enforce unambiguous step-down provisions as a matter of contract between insurers and insureds[.]" Pinto v. N.J. Mfrs. Ins. Co., 183 N.J. 405, 407 (2005), superseded by statute as stated in, Hand v. Phila Ins. Co., 408 N.J. Super. 124, 132 (App. Div. 2009), certif. denied, 200 N.J. 506 (2010). See also Murawski v. CNA Ins. Co., 183 N.J.

423, 426 (2005) (affirming the enforceability of UIM step-down provisions in commercial policies); N.J. Mfrs. Ins. Co. v. Breen, 153 N.J. 424, 432 (1998) (holding in the absence of a statutory prohibition to the contrary, an insurance company has a right to impose whatever conditions it desires prior to assuming its obligations); Magnifico v. Rutgers Cas. Ins. Co., 153 N.J. 406, 418 (1998) (expressing an unwillingness to ignore the unambiguous insurance contract provisions and holding insurers and insureds to the terms of their contract); French v. N.J. Sch. Bd. Ass'n Ins. Group, 149 N.J. 478, 492 (1997) (stating parties to an insurance contract should make clear and disclose their intentions regarding exclusions); Aubrey v. Harleysville Ins. Cos., 140 N.J. 397, 405 (1995) (holding the "right to recover UIM benefits depends on the UIM limits chosen by the insured").

In Pinto, supra, an employee injured while using his employer's vehicle, was found subject to a step-down clause in the employer's commercial vehicle policy that limited UIM recovery to the employee's personal automobile UIM limits rather than the higher limits in the employer's commercial policy. 183 N.J. at 412. Under the employer's commercial vehicle policy, the employee was found not to be a named insured, only an insured, and therefore the employer's reasonable intention, which included a desire to make the policy less expensive by limiting the extended coverage to named insureds, controlled. Id. at 417. The Court, following the general rules of insurance contract interpretation, enforced the contract as written, limiting the employee's recovery. Id. at 407.

The Legislature reacted to the Court's opinion by adding subsection f to N.J.S.A. 17:28-1.1, known as the "Scutari Amendment." The amendment provides:

> A policy that names a corporate or business entity as a named insured shall be deemed to provide the maximum... underinsured motorist coverage available under the policy to an individual employed by the corporate or business entity, regardless of whether the individual is an additional named insured under that policy or is a named insured or is covered under any other policy providing... underinsured motorist coverage.
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> [N.J.S.A. 17:28-1.1f.]

The statutory section explicitly rejects the step-down practice upheld in Pinto and changed existing law by assuring the expansive coverage of an employer's automobile liability policy was fully extended to its injured employees. Ibid. We later found the statutory provision was "intended to reform all commercial vehicle insurance policies in existence on [its] effective date... and to provide an immediate remedy to those making a claim for coverage under their employer's UM/UIM policy provisions as of that date." Hand, supra, 408 N.J. Super. at 141.

Construing the adoption of N.J.S.A. 17:28-1.1f as an expression of a public policy to eliminate any attempted step-down provisions placed in insurance contracts, plaintiff argues the trial court's enforcement of Exclusion 5 was error, as a matter of law. Conversely, defendant maintains the policy clause contravenes no statutory prohibitions and urges we not disturb the trial court's enforcement of the unequivocal contractual provision limiting coverage under the clearly defined circumstances found applicable here.

In Pinto and Murawski, as well as other step-down cases decided prior to the addition of N.J.S.A. 17:28-1.1f, enforcement of the clause turned on the fact that the injured employee was not a named insured under the employer's policy. See, e.g., Botti v. CNA Ins. Co., 361 N.J. Super. 217, 226-27 (App. Div. 2003) (distinguishing between a named insured and an insured under a commercial automobile liability policy); Progressive Cas. Ins. Co. v. Brightstone Waterproofing, Inc., 295 N.J. Super. 581, 584 (App. Div. 1996) (finding the employee was not identical with the corporation as a named insured under the policy's UM endorsement), appeal dismissed, 152 N.J. 7 (1997). Here, however, we are interpreting plaintiff's own policy, on which he is a named insured.

Exclusion 5 is designed to limit the scope of defendant's risk attached to the insurance contract by denying additional benefits once an insured is eligible to recover UIM benefits as an insured under another policy. Clearly, the provision differs from the step-down practice proscribed by the 2007 statutory amendment. See N.J.S.A. 17:28-1.1f. It is a limitation on recovery, somewhat the reverse of the prior practice. Here, plaintiff's demand for coverage under his employer's commercial vehicle policy was not denied, but was confined to the limits of the employer's policy precluding benefits for supplemental UIM coverage under his personal automobile policy.

We need not address that issue as we confine our review to well-established contract and insurance law principles. When reading Exclusion 5 with the other policy provisions and UIM statute, we find an ambiguity exists preventing plaintiff from clearly understanding the significant limitations imposed on the particular UIM coverage he purchased. Consequently, we "interpret the

contract to comport with the reasonable expectations of the insured" and find coverage exists. Zacarias, supra, 168 N.J. at 595.

"[UIM] coverage is first-party coverage insuring the policyholder and others who have the status as `insureds' under the policy[.]" Craig & Pomeroy, N.J. Auto. Ins. Law, 26:1 (2011). We emphasize that the purchase of this voluntary, additional protection, "is `personal' to the insured[,]" and "linked to the injured person, not the covered vehicle." Aubrey, supra, 140 N.J. at 403. Exclusion 5 ignores this proposition and seeks to join UIM coverage to a covered vehicle with a lower limit, rather than the insured who purchased the coverage, thus conflicting with the precise statutory language requiring coverage to be offered "by an insurer to the named insured." (emphasis added). In light of such a significant alteration, the insurance policy must make clear its intention to exclude a category of claims that claimants would otherwise believe were covered. Breen, supra, 153 N.J. at 432.

"[W]e have long recognized, insurance policies are contracts of adhesion `between parties who are not equally situated.'" Pizzullo, supra, 196 N.J. at 269 (quoting Meier v. N.J. Life Ins. Co., 101 N.J. 597, 611 (1986)). "Because of the substantial disparity in the sophistication of the parties, and because of the highly technical nature of insurance policies, we have long `assume[d] a particularly vigilant role in ensuring their conformity to public policy and principles of fairness.'" Id. at 270 (quoting Gibson v. Callaghan, 158 N.J. 662, 669-70 (1999)). Consequently, insurance contracts "are subject to special rules of interpretation." Polarome Int'l, supra, 404 N.J. Super. at 258. This includes that "`the insured's reasonable expectations are brought to bear on misleading terms and conditions of insurance contracts and genuine ambiguities are resolved against the insurer.'" Morrison v. Am. Int'l Ins. Co. of Am., 381 N.J. Super. 532, 537 (App. Div. 2005) (quoting Di Orio v. N.J. Mfrs. Ins. Co., 79 N.J. 257, 269 (1979)).

Exclusion 5 confines plaintiff's recovery to instances of injury when occupying his own vehicle or a vehicle not subject to UIM coverage. This imposes a major limitation on the principles and goals of the UIM statute and the anticipated scope of UIM coverage. For example, the statute expresses the availability of seeking coverage under more than one policy. N.J.S.A. 17:28-1.1c (stating when multiple policies are available to insured, stacking the policies is precluded). Similarly, the policy's UIM provisions include a section, "If There Is Other Coverage," presented in the bold typeset setoff by underlining that states:

> 2. If the insured sustains bodily injury that arises out of the ownership, maintenance or use of an underinsured motor vehicle, and other underinsured motorist coverage applies:
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> a. we are liable only for our share of the loss. Our share is that percent of the damages that the limit of liability of this coverage bears to the total of all underinsured motorists coverage applicable to the accident.

Other limitations in this section would not suggest plaintiff's claims were precluded. In fact, the policy states that "a named insured" who is "[n]ot occupying a vehicle owned by that insured, then any recovery for... bodily injury... for that insured may equal but not exceed the highest applicable limit for any one vehicle under any insurance providing coverage to that insured as a named insured." This language suggests the policy's UIM coverage is extended when occupying a vehicle the named insured does not own, precisely the facts at hand.

Other than Exclusion 5, found on page twenty-eight, deep into the thirty-eight page policy, defendant does not identify any alternative notice signaling what we conclude is a major limitation to the anticipated UIM coverage purchased. The declarations sheet, recognized by the Supreme Court as "`the one page most likely to be read and understood by the insured,'" Pizzullo, supra, 196 N.J. at 272 (quoting Zacarias, supra, 168 N.J. at 603-04), omits mention of this constraint. The Court has cautioned "in some circumstances, the failure to identify a relevant exclusion on the declarations page may contribute to the creation of an ambiguity in an otherwise clear policy of insurance." Id. at 272-73. We conclude this matter presents one such instance.

An insured's reasonable expectation when voluntarily purchasing UIM insurance is to obtain insurance covering "damages that the insured is entitled to recover from the underinsured tortfeasor, less the amount of the tortfeasor's coverage." Zirger, supra, 144 N.J. at 334. An insured would not reasonably believe UIM coverage depends on the fortuitous event of which vehicle he occupied. Such an understanding is reinforced by "New Jersey Auto Insurance Buyer's Guide" (The Guide), which is mandated to accompany all policies for auto insurance. See N.J.S.A. 39:6A-23 and N.J.S.A. 39:6A-8.1. The Guide, prepared by the State Department of Banking and Insurance, is designed to aid understanding of policy provisions and coverage choices. Regarding UIM coverage, The Guide explains:

> UNDERINSURED MOTORIST COVERAGE — Pays you if you are in an auto accident caused by a driver who is insured, but who has less coverage than your underinsured motorist coverage. Damages greater than the limits

> of the other driver's policy are covered by your policy up to the difference between the limits of your underinsured motorist coverage and the other driver's policy limit.
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> [The Guide at 8, available at http://www. state.nj.us/dobi/division_consumers/pdf/auto guide02.pdf (last visited December 15, 2011).]

There is no expectation that additional coverage bought and paid for would be tied to a vehicle and become a nullity simply because the insured occupied a vehicle with a lower UIM coverage limit when injured. This "hidden pitfall" defeats enforcement of Exclusion 5 because it is not understood by reading the declarations sheet or readily discernable without "strenuous study" of the interplay of the exclusion and other UIM provisions describing coverage. Zacarias, supra, 168 N.J. at 601.

We are aware of the increasing cost of automobile insurance and the laudable goal of offering alternatives to consumers such that informed choices can be made to decrease the cost of coverage. This is especially true of UIM coverage, which is optional. We agree that a carrier seeking to confine its UIM liability to circumscribed instances, as is attempted by Exclusion 5, may certainly do so as so long as the average policyholder is informed of the extensive limitation of the purchased coverage and, given the choice of paying the higher premium for more extensive coverage, declines to do so. The exclusion, perhaps simply worded, was not prominently presented, despite its importance in circumscribing the availability of UIM coverage. See, Skeete v. Dorvius, 184 N.J. 5, 9 (2005). ("It is the placement of the notice and not its specificity that is the issue."). Also, Exclusion 5 is ambiguous when compared with other policy provisions addressing the availability of UIM coverage.

For these reasons, we conclude Exclusion 5 is ambiguous. See Nav-Its, Inc. v. Selective Ins. Co. of Am., 183 N.J. 110, 118 (2005) (requiring ambiguity to be construed in favor of insured); Polarome Int'l, supra, 404 N.J. Super. at 259 (same). We construe the policy language in "`accord with the objectively reasonable expectations of the insured[,]'" Nav-Its, supra, 183 N.J. at 118 (quoting Doto v. Russo, 140 N.J. 544, 556 (1995)), who would reasonably expect, as a named insured, that he would have the ability to claim UIM coverage up to the stated limits purchased under his own policy. See Universal Underwriters Ins. Co., Recreational Prods. Ins. Div. v. N.J. Mfrs. Ins. Co., 299 N.J. Super. 307, 320 (App. Div.) (rejecting interpretation of policy provisions that would defeat the insured's reasonable expectation of coverage), certif. denied, 151 N.J. 173 (1997).

Reversed and remanded for further proceedings consistent with our opinion.