

STATE OF MICHIGAN
COURT OF APPEALS

STEPHANIE MARIE BRADLEY,
Plaintiff-Appellant,

FOR PUBLICATION
September 28, 2010

V

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

No. 292716
St. Clair Circuit Court
LC No. 08-002220-NF

Defendant-Appellee.

Advance Sheets Version

Before: MURPHY, P.J., and HOEKSTRA and STEPHENS, JJ.

HOEKSTRA, J. (*dissenting*).

Because I disagree with the majority’s conclusion that defendant is required to show prejudice from plaintiff’s failure to join defendant in a lawsuit with Sandra Bowen and William Bowen, III, I respectfully dissent.

This Court is obligated to follow the most recent pronouncement of the Supreme Court on a principle of law. *Washington Mut Bank, FA v ShoreBank Corp*, 267 Mich App 111, 119; 703 NW2d 486 (2005). The Supreme Court’s most recent pronouncement on how an insurance policy is to be construed is found in *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005). Pursuant to *Rory*, an insurance policy is subject to the same rules of contract construction that apply to other species of contract. *Id.* at 461. The rules of contract construction provide that an unambiguous contract provision is to be enforced as written unless the provision violates law or public policy or one of the traditional contract defenses applies. *Id.* at 461, 468, 470.

Plaintiff’s insurance policy includes uninsured-motor-vehicle coverage. Because such coverage is not required by the no-fault act, MCL 500.3101 *et seq.*, the rights and limitations of that coverage are purely contractual. *Rory*, 473 Mich at 465-466. The provision for uninsured-motor-vehicle coverage in plaintiff’s insurance policy requires that if the parties are unable to agree about whether plaintiff is legally entitled to collect compensatory damages from the owner or driver of an uninsured motor vehicle or the amount of those damages, plaintiff “shall . . . file a lawsuit” against defendant, the owner and the driver of the uninsured motor vehicle, and any third party who may be liable for plaintiff’s injuries. The term “shall” denotes mandatory conduct. *Nuculovic v Hill*, 287 Mich App 58, 62; 783 NW2d 124 (2010). This joinder provision is unambiguous; it required plaintiff to join defendant, Sandra Bowen, and William Bowen, III,

in a lawsuit seeking uninsured-motor-vehicle benefits. Because the joinder provision is unambiguous, it must be enforced as written. *Rory*, 473 Mich at 461.¹

I agree with the majority that *Rory* did not overrule the specific legal principle stated in *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998), that “an insurer who seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring notice immediately or within a reasonable time must establish actual prejudice to its position.” “[T]o overrule is to declare that a rule of law no longer has precedential value.” *Sumner v Gen Motors Corp (On Remand)*, 245 Mich App 653, 665; 633 NW2d 1 (2001); see also Black’s Law Dictionary (7th ed) (defining “overrule” as “to overturn or set aside (a precedent) by expressly deciding that it should no longer be controlling law”). In *Rory*, the Supreme Court did not address whether, and consequently did not declare that, the prejudice principle stated in *Koski* was no longer a controlling legal principle.

Nonetheless, I disagree with the majority’s decision to require defendant to show prejudice from plaintiff’s failure to comply with the joinder provision. Prejudice is not a traditional contract defense. See *Rory*, 473 Mich at 470 n 23 (“Examples of traditional defenses include duress, waiver, estoppel, fraud, or unconscionability.”). Moreover, this Court is mandated to enforce an unambiguous contractual provision as written. *Id.* at 461. The majority, by requiring defendant to show prejudice from plaintiff’s failure to comply with the joinder provision, fails to enforce the joinder provision as written. The joinder provision contains no prejudice exception. With its decision to apply the prejudice principle stated in *Koski* to the joinder provision, the majority fails to follow the Supreme Court’s most recent pronouncement on how to construe an insurance policy.²

¹ I find no merit to plaintiff’s argument that certain elements of the provision for uninsured-motor-vehicle coverage violate public policy. First, the provision does not strip plaintiff of her right to a jury trial because it expressly provides that if the parties are unable to reach an agreement regarding uninsured-motor-vehicle benefits, plaintiff must file a lawsuit. Second, while the provision states that defendant is not bound by any judgment obtained without its written consent, this would clearly not pertain to a judgment obtained directly against defendant itself as a party to a lawsuit. I also find no merit to plaintiff’s argument that the insurance policy is an unconscionable adhesion contract.

² I acknowledge that in *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429; 761 NW2d 846 (2008), this Court applied the prejudice principle of *Koski*. Ultimately, however, the Court concluded that the defendant insurance company was prejudiced by the plaintiff’s failure to provide prompt notice of suits, claims, or demands. Thus, there was no reason for the Court to address whether *Koski* and its prejudice principle remained binding precedent. Indeed, the Court never cited *Rory*, and it did not address the effect of *Rory* on the prejudice principle stated in *Koski*. In this context, while *Tenneco* is binding precedent, MCR 7.215(C)(2), *Tenneco* is not controlling on the question presented in this case.

Because plaintiff did not join defendant in a lawsuit with Sandra Bowen and William Bowen, III, plaintiff failed to comply with the unambiguous terms of her insurance policy. For this reason, I would affirm the trial court's order granting summary disposition to defendant.

/s/ Joel P. Hoekstra