

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT MILLER,

Plaintiff / Counter-Defendant /
Appellee / Cross-Appellee,

v

ZURICH INSURANCE COMPANY,

Defendant / Counter-Plaintiff /
Third-Party Plaintiff / Appellee /
Cross-Appellant,

and

PARKER MOTOR FREIGHT, INC.,

Third-Party Defendant/Appellant.

UNPUBLISHED
September 2, 2003

No. 235698
Leelanau Circuit Court
LC No. 99-005024-NZ

Before: Whitbeck, C.J., and White and Donofrio, JJ.

PER CURIAM.

Third-party defendant Parker Motor Freight (Parker) appeals as of right the circuit court's grant of summary disposition in plaintiff's favor, and the court's confirmation of a \$775,000 arbitration award in plaintiff's favor. The circuit court's grant of summary disposition was based on its determination that plaintiff, a tractor-trailer driver employed by Parker, was covered under an uninsured motorist endorsement to a commercial auto policy issued by defendant Zurich Insurance Company¹ (Zurich) to Parker. Defendant Zurich cross-appeals the circuit court's denial of its cross-motion for summary disposition, the grant of summary disposition to plaintiff, the confirmation of the arbitration award, and the determination that plaintiff was not obligated to pay the \$150,000 deductible under the policy. We affirm.

¹ Zurich's appellate brief states that Zurich American Insurance Company is the proper party in this appeal, as the successor in interest of Zurich Insurance Company's American operations. However, the order from which this appeal was taken names Zurich Insurance Company.

Parker is a commercial truck company based in Grand Rapids, Michigan, that operates principally in Michigan, Illinois, Indiana and Ohio. Beginning in October 1995, Zurich insured Parker vehicles under a commercial auto policy, including several hundred tractors and trailers. Parker thereafter renewed the Zurich policy annually, including for the October 1, 1998-October 1, 1999 year.

On October 17, 1998, plaintiff was driving a tractor-trailer owned by Parker and insured by Zurich when a hit and run driver struck the tractor-trailer. Plaintiff's right arm and wrist were shattered as a result, requiring extensive medical treatment and surgical procedures. The hit and run driver was never identified.

By letter dated May 30, 1999, plaintiff's counsel requested a copy of Parker's insurance policy in effect on the date of plaintiff's accident. By letter dated June 18, 1999, Christopher Dowling, a Zurich claims specialist, wrote plaintiff's counsel:

We have enclosed a blank copy of the standard Michigan Uninsured Motorists Coverage Endorsement.

This Endorsement is standard and would be part of Parker Motor Freight's Truckers Coverage TRK 8374172-02.

The blank standard Michigan Uninsured Motorists Coverage Endorsement provided:

MICHIGAN UNINSURED MOTORISTS COVERAGE

A. Coverage

1. We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle." The damages must result from "bodily injury" sustained by the "insured" caused by an "accident." The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "uninsured motor vehicle."

The Michigan Uninsured Motorists Coverage endorsement included the following arbitration provision:

[E.] 4. The following condition is added:

ARBITRATION

a. If we and an "insured" disagree whether the "insured" is legally entitled to recover damages from the owner or driver of an "uninsured motor vehicle" or do not agree as to the amount of damages that are recoverable by that "insured", then the matter may be arbitrated. However, disputes concerning coverage under this endorsement may not be arbitrated. Either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will

select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction. Each party will pay the expenses it incurs and bear the expenses of the third arbitrator equally.

b. Unless both parties agree otherwise, arbitration will take place in the county in which the “insured” lives. Local rules of law as to arbitration procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding.

By letter dated June 21, 1999, Zurich (via Dowling) wrote plaintiff’s counsel:

Thank you for your June 17, 1999 letter.

Mr. Miller is only 2 months post surgical repair of his wrist.

I would suggest that we put off discussing Mr. Miller’s “uninsured” motorist claim until such time that he has recovered from his surgery.

Perhaps we can save ourselves the expense of arbitration resolving this claim ourselves. If not, then we can certainly present this matter for arbitration.

By letter dated June 22, 1999 to Dowling at Zurich, plaintiff’s counsel demanded arbitration:

I am writing, in compliance with your insurance policy procedures, to demand arbitration regarding this matter. I am enclosing a copy of the police accident report.

I have selected Dean Robb as one arbitrator, and I would appreciate receiving notice of your selection within the time limit.

I agree there may be some advantage to discussing settlement of this matter instead of incurring the arbitration expense. Nonetheless, I started the arbitration scheduling process so we have some goal time-limits.

By letter dated July 12, 1999, plaintiff’s counsel wrote James Sullivan:

I understand you are going to be representing Zurich for purposes of arbitrating the uninsured motorist’s claim with regard to Robert Miller. I’ve selected Dean Robb as an arbitrator and I would appreciate hearing from you as to your selection for an arbitrator. I’d like to propose we arbitrate the case September, 1999.

By letter dated August 10, 1999, Jerry Swift, counsel for Zurich, wrote Messrs. Sullivan and Robb (arbitrators), stating:

It is my understanding that the two of you have been appointed arbitrators for the captioned matter. This is to inform you that I have been retained by Zurich-American to defend the same.

Since this is a new file and there are summer vacations with which to contend, I am requesting that this matter not be scheduled for hearing before the end of October. That should give me adequate time to conduct discovery.

By letter dated August 17, 1999, plaintiff's counsel wrote the three arbitrators and Zurich's counsel:

All parties are available on Monday, November 8, 1999, for the arbitration of the above uninsured claim. Therefore, we have scheduled the arbitration for 1:00 p.m. on the 8th. . . .

By letter dated October 12, 1999, Swift, counsel for Zurich sent plaintiff's counsel what he "believe[d] to be the UM portions of the applicable policy." The enclosed form was the same as Dowling had sent plaintiff's counsel on June 18, 1999, i.e., a blank "Michigan Uninsured Motorists Coverage Form," quoted *supra*.

Enclosed is what I believe to be the UM portions of the applicable policy. I intend to do some further research this week and will get back with you regarding possible stipulations on how the coverage is to be interpreted and the presentation of damages.

In our recent phone conversation, you mentioned that you had been talking with Steve Parker regarding the possibility of Mr. Miller's return to work and the jobs, if any, that are available within Mr. Miller's restrictions. I assume that you are not aware that Parker Motor Freight is self-insured with regard to this particular claim. Accordingly, even though Zurich Insurance Company is administering the claim, the actual party that is legally responsible for any judgment rendered in the arbitration is Parker Motor Freight and, therefore, it is the real party in interest. Also, we are general counsel for Parker Motor Freight, irrespective of the UM claim. . . .

The parties agreed to arbitrate the matter, and to a hearing on December 3, 1999. However, by letter dated and faxed on December 1, 1999, Parker notified plaintiff's counsel that Zurich had denied coverage and that the arbitration was "canceled." Plaintiff's counsel responded by fax that he refused to cancel the arbitration, and would file suit that day seeking UM coverage and alleging breach of contract.

By letter faxed to plaintiff's counsel and the arbitrators on December 2, 1999, Zurich's counsel stated:

Until such time as the coverage questions with regard to the captioned matter are resolved, Zurich Insurance Company will not engage in arbitration of Mr. Miller's UM claim. Further, by copy of this letter, the authority of either Mr. Sullivan or Mr. Crowley to act as a defense arbitrator. . . is hereby withdrawn and revoked until such time as the coverage issues are resolved

Please note that the arbitration process in this matter is not statutory arbitration, but common law arbitration. The latter allows a party to withdraw from the

arbitration process until such time an arbitration award is made. . . . Zurich is not at this time saying it will never arbitrate Mr. Miller’s claim for UM benefits, but it is saying that the arbitration of his claim is premature until such time as it is determined that Zurich is required to provide coverage.

The arbitration proceeded on December 3, 1999, as scheduled. Zurich’s counsel appeared and placed objections on the record, which the arbitrators overruled. Zurich’s counsel cross-examined plaintiff’s witnesses and examined his own witnesses. The issue of damages (but not of coverage) was arbitrated, and the arbitrators unanimously rendered an award in plaintiff’s favor of \$775,000.

Plaintiff moved to confirm the arbitration award and for summary disposition on the issue of UM coverage. The circuit court granted both motions and denied Zurich’s cross-motion for summary disposition. The circuit court’s judgment and order awarded plaintiff \$775,000 (per the arbitration award), statutory interest of \$153,783.81, and \$200 in costs.

II

The principal dispute is whether Zurich’s 1998-1999 policy² afforded UM coverage to plaintiff on October 17, 1998. Plaintiff contends UM coverage was in effect because the written policy incontestably provided \$1,000,000 in Michigan UM coverage on October 17, 1998, as did other documentary evidence pre-dating plaintiff’s injury, including the declarations pages, Parker’s express acceptance of Michigan UM coverage on the “accept/reject” forms, the list of endorsements including Michigan UM coverage, and the Michigan UM endorsement itself. Plaintiff argues that Parker and Zurich improperly rely on writings post-dating the injury to argue that there was no UM coverage: a “final confirmation” written after the injury, which preceded the actual insurance documents that reaffirmed \$1,000,000 in UM coverage for the 1998-1999

² The policy provided: **Description Of Covered Auto Designation Symbols**

45	Owned ‘Autos’ Subject To A Compulsory Uninsured Motorists Law	Only those ‘autos’ you own that, because of the law in the state where they are licensed or principally garaged, are required to have and cannot reject Uninsured Motorists Coverage. This includes those ‘autos’ you acquire ownership of after the policy begins provided they are subject to the same state uninsured motorists requirement.
46	Specifically Described ‘Autos’	Only those ‘autos’ described in Item Three of the Declarations for which a premium charge is shown . . .

policy period, and a purported policy amendment by Zurich that was not issued until more than one year after plaintiff's injury, in November 1999.

The circuit court's opinion, which is not challenged on the facts, states:

The controversy herein arises out of what Zurich terms a "scrivener's error" or a "typo" in the original policy issued by Zurich to Parker in 1995. The final confirmation letter or insurance binder for the initial October 1, 1995 to October 1, 1996 policy year states that there is UM coverage (reject wherever possible). Every renewal confirmation letter or proposal up until the October 28, 1998 renewal letter contained the same UM coverage. Yet, each of the policies that was issued for 1995-1996, 1996-1997, 1997-1998 and 1998-1999 state in the declarations that the policies include Symbol 46 UM coverage with a limit of \$1,000,000 and that a premium therefore is "included" in the total premium amount. Paul Kubala [Zurich's underwriter for Parker policy] admitted at his deposition that if there is a variance between the final confirmation and the declaration page of a policy, "it's Zurich's fault." (DT p 130.) And that he "most definitely" should have caught the discrepancy before the policy went out. (DT p 132.) To add further confusion, consistent with Symbol 46 coverage, Zurich sent out and Parker executed accept/reject forms accepting UM coverage in Michigan. Then in October of 1998 [sic November of 1999], *after and admittedly because of Miller's accident*, the policy was formally amended to provide Symbol 45 coverage: "On this renewal, the insured has elected to reject UM/UIM wherever possible and just have the minium [sic] otherwise."

To even further complicate matters, the Symbol 46 policies state that there is UM coverage for all vehicles listed in Item 3. But admittedly, no vehicles were listed in Item 3, except for the initial policy period of 1995-1996. Miller argues that (1) Parker provided a list of vehicles when the initial 1995-1996 policy was issued and on an annual basis sent an updated list to its agent who forwarded it to Zurich and that the vehicle he was driving at the time of the accident was first put into service in 1997; or, alternatively, (2) this inconsistency creates an ambiguity that should be resolved in his favor. Zurich, on the other hand, argues that the policy is not ambiguous and (1) the lists of vehicles it received from Parker were not for this purpose and (2) since the policy provides UM coverage for vehicles listed in Item 3, and no vehicles are listed in Item 3, the policy does not provide UM coverage. [Emphasis added.]

The circuit court concluded that the varying indications regarding UM coverage rendered the policy ambiguous.

A

We review the circuit court's summary disposition determinations de novo.³ *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Whether contract language is ambiguous is a question of law this Court reviews de novo. *Farm Bureau Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999).

Where no ambiguity exists, this Court enforces the contract as written. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

An insurance contract is ambiguous when its provisions are capable of conflicting interpretations. In *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982), we explained:

A contract is said to be ambiguous when its words may reasonably be understood in different ways.

If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading leads one to understand there is no coverage under the same circumstances the contract is ambiguous and should be construed against its drafter and in favor of coverage.

Yet if a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear.

[*Id.*, 460 Mich at 566.]

Zurich's final confirmation letter pertaining to the 1998-1999 policy stated "Symbol 45" UM coverage, see n 2, *supra*, as did final confirmations for several preceding years' policies. However, as the circuit court noted, the declarations sheet of the 1998-1999 policy (and all the preceding policies' declarations sheets) stated that there was UM coverage under "Symbol 46," with a \$1,000,000 limit per accident or loss, applicable to vehicles listed in Item Three. The 1998-1999 declarations sheet also states that a premium for the UM coverage was included in the total premium amount. Further, the 1998-1999 policy included the Michigan UM endorsement,⁴

³ The circuit court looked beyond the pleadings in considering both the UM coverage issue and the motion to confirm arbitration. Thus, our review is under MCR 2.116(C)(10), and we examine the pleadings and documentary evidence submitted to determine whether genuine issues of fact exist. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

⁴ The Michigan UM Coverage endorsement included in the 1998-1999 policy stated:

MICHIGAN UNINSURED MOTORISTS COVERAGE

(continued...)

and Parker expressly accepted Michigan UM coverage on the “accept/reject” forms Zurich provided. The policy thus did not admit of but one interpretation, and the circuit court properly determined the policy was ambiguous.

B

In November 1999, after the 1998-1999 policy had expired, and more than one year after plaintiff’s accident, Zurich issued an “amendment”⁵ of the 1998-1999 policy to reflect Symbol

(...continued)

For a covered “auto” licensed or principally garaged in, or “garage operations” conducted in, Michigan, this endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM

GARAGE COVERAGE FORM

MOTOR CARRIER COVERAGE FORM

TRUCKERS COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

* * *

LIMIT OF INSURANCE \$ 1,000,000 Each “Accident”

* * *

A. COVERAGE

1. We will pay all sums the “insured” is legally entitled to recover as compensatory damages from the owner or driver of an “uninsured motor vehicle”

* * *

B. WHO IS AN INSURED

1. You.

* * *

3. Anyone else “occupying” a covered “auto” or a temporary substitute for a covered “auto”. . . .

⁵ The amendment was set forth in an endorsement stating that it was typed on November 18, 1999, and provided: “It is hereby understood and agreed that the symbol for uninsured motorists . . . is amended to read 45.”

45 coverage (applicable only to autos subject to a compulsory uninsured motorists law, and thus not applicable in Michigan). Parker contends that even in the absence of an agreed reformation of an insurance contract, it was entitled to reform the policy on the basis of mutual mistake. We disagree.

Parker and Zurich maintained that the Symbol 46 entry on the declarations sheet was a typographical error, and that they, as the parties to the insurance contract, could “reform” the policy to reflect their mutual intent, which, they maintained, had all along been Symbol 45 coverage.

Plaintiff counters that even if Zurich had asserted mistake as a defense and sought reformation below, reformation is not available in light of the many documents confirming Michigan UM coverage and contradicting Parker’s and Zurich’s post-accident claim that the parties to the policy had such an agreement.

In *Goldman v Century Ins Co*, 354 Mich 528, 532-533; 93 NW2d 240 (1958), the Supreme Court explained the heavy burden one seeking to reform an insurance contract bears:

[W]e are keenly aware that, after a loss suffered, regret and remorse may readily convert what may have been at best an unexpressed contemplation into an express (and ignored) command. Thus it is that proofs of mistake must be of substantial and material fact, shared by and common to both parties, and, above all, established beyond cavil by clear and satisfactory evidence.

We agree with plaintiff that the documentary evidence submitted below is such that reasonable minds could differ on whether the parties had a common intent as to UM coverage and, if so, what that common intent was. Zurich and Parker strongly rely on after-the-fact deposition testimony given by Zurich agents to support that the parties had a crystal clear intent not to afford UM coverage. This includes deposition testimony of James Cunningham, Parker’s Chief Financial Officer, Paul Kubala, Zurich’s underwriter, and Deborah Yunk, Parker’s insurance agent. However, the deposition testimony is not unequivocal and the deponents often had an inability to recall.

The policy itself and other documentary evidence summarized above contradict Parker’s argument. In addition, we note that by letter dated and faxed September 3, 1999, Paul Kubala, underwriter for Zurich in its Chicago Office, wrote to Catherine Benton at Zurich regarding Parker Motor Freight’s 1999 renewal of its policy:

To: Catherine Benton/ZI/USA/Zurich

Subject: Parker Motor Freight—10/1/99-10/1/2000 renewal – Y2K

Hi Cathy:

I just faxed to you the signed Y2K Questionnaire along with our historical profitability analysis on this trucking account. . . .

This is a family (parents and 8 children) operated trucker HQ in Grand Rapids, MI. which has been in business for over 70 years. This is probably the best common carrier trucking operation that I have seen for its size. Zurich wrote it new in 10/1/95 and we are going into our 5th year. . . .

* * *

Two weeks ago (8/16) I was notified that our Grand Rapids claim office will be taking up a current incurred Auto claim from 30,000 to possible 300,000 *due to UM/UIM*-this of course is not reflected on the 7/30/99 loss run. It seems that one of the tractor drivers was hit in the rear wheel by a hit and run driver in the morning as he was making a turn, causing our vehicle to overturn. Our driver injured both hands and is undergoing remediation therapy to see if he can continue to drive. *Unfortunately this trucker carried UM/UIM to policy limits of 1M—they have now been convinced to reduce this limit to 100K,* and a separate BAP policy would be issued for the PP for the 1M (which insured still wants for PP)-still under the loss sensitive program however.

Let me know if you require anything else to make your decision. [Emphasis added.]

Further, on September 22, 1999, Paul Kubala at Zurich sent Parker's "Final Confirmation" to Deborah Yunck of AON, Parker's insurance broker, stating in the cover letter:

Here is the Final Confirmation from which our Policies, Premium Invoices and Agreements are being prepared and trust that this is satisfactory.

On this renewal, the Insured has elected to reject UM/UIM wherever possible and just have the minimum otherwise (we will shortly mail to you the selection/rejection forms for the Insured's signature).

Under these circumstances, we conclude that the circuit court did not err in rejecting the contention that Zurich could retroactively reform or amend the 1998-1999 policy to deny coverage to plaintiff.

C

Parker further contends that even with Symbol 46 coverage, the clear and unambiguous terms of the Zurich policy reveal that there is no UM Coverage available to plaintiff, because Symbol 46 coverage is expressly defined as providing coverage for those autos described in Item Three of the declarations sheet, and no vehicles were listed in Item Three.

Plaintiff responds that Zurich's failure to list specific vehicles on the declarations sheet does not abrogate the coverage provided by the Michigan UM endorsement contained in the 1998-1999 policy. Plaintiff maintains that Parker sent Zurich a list of over 200 vehicles every year, and that in the first policy year (1995-1996), this dilemma was resolved by the notation "SEE SCHEDULE . . ." Plaintiff contends that the fact that Zurich forgot to include a similar notation in renewal years does not make Michigan UM coverage vanish, particularly since the

1998-1999 version is a renewal of an earlier version that did have the “SEE SCHEDULE. . .” language under Item Three. Plaintiff notes that ordinarily, renewal insurance policies renew the coverage existing under the original policy and do not modify the coverage. Plaintiff also contends that if the omission of vehicles in Item Three of the declarations sheet has significance, it creates an ambiguity that must be resolved against the insurer.

The initial Zurich policy (1995-1996) incorporated the list of vehicles Parker provided by stating “SEE SCHEDULE . . .” An “Underwriting Submission” prepared for Parker by insurance broker/agent Willis Corroon (the predecessor to AON), dated September 6, 1995, states “Commercial Automobile Coverage” includes Uninsured/Underinsured Motorist coverage for \$1,000,000 each occurrence. Attached to the Underwriting Submission is a list of 148 Parker trucks, with vehicle descriptions, VIN numbers, licenses, driver names, etc. Also attached to the Underwriting Submission is a list of Parker’s drivers, their commercial driver license numbers and dates of birth. The Underwriting Submission states “This document is a general outline of coverages proposed, and as such it is offered as information only; the actual policy, if written, to prevail. This document is not a Binder.”

The “Binder Coverage Schedule” of the Insurance Binder pertaining to the initial policy Zurich issued Parker, prepared December 5, 1995, and effective from October 1, 1995 to October 1, 1996, states that UM Truckers’ coverage was for “owned autos only” with a \$1,000,000 limit. “Item Three” of the 1995-1996 declarations sheet, which is entitled “SCHEDULE OF COVERED AUTOS YOU OWN:” states thereafter: “SEE SCHEDULE OF COVERED AUTOS YOU OWN.”

Under these circumstances, we conclude that a reasonable fact-finder could infer that the failure to list vehicles in Item Three of the 1998-1999 declarations sheet was inadvertent and thus did not preclude Symbol 46 coverage, given that the initial Zurich policy (1995-1996) incorporated Parker’s owned vehicles by stating under the declarations sheet’s Item Three “See Schedule . . .,” and given that Parker supplied Zurich with such lists of vehicles annually.

We conclude that plaintiff presented documentary evidence from which a fact-finder could conclude that the Symbol 46 coverage on the 1998-1999 declarations sheet was not a typographical error, and was not a product of mutual mistake between the insured and insurer.

We also conclude that the failure of the 1998-1999 policy’s declarations sheet to list vehicles under Item Three does not preclude coverage, because plaintiff presented evidence that the initial Zurich policy (1995-1996) incorporated schedules of Parker’s vehicles, that policies in subsequent years were renewals of that initial policy, and that it was only in 1999, after plaintiff’s accident, that a clear modification of the Parker policy was made to exclude UM coverage for Parker’s tractors and trailers.

We note that neither Parker nor Zurich argue on appeal that there should be a trial; rather, both argue that summary disposition in Miller’s favor was error and that summary disposition should have been granted in their favor. At argument, counsel candidly conceded that the controlling issue is whether Parker and Zurich were entitled to judgment in their favor as a matter of law, and that if this Court determines that they were not so entitled, the result after a bench trial would be the same as on motions. Thus, having determined that defendants were not

entitled to prevail on their motions for summary disposition, we affirm the circuit court on the coverage issue.

III

Parker also asserts that the arbitration award was rendered pursuant to common-law arbitration, and that Zurich was thus entitled to unilaterally cancel the arbitration, and the award cannot be judicially enforced pursuant to MCR 3.602.

A

“The Michigan arbitration statute [MAA] provides that an agreement to settle a controversy by arbitration under the statute is valid, enforceable, and irrevocable if the agreement provides that a circuit court can render judgment on the arbitration award.” *Hetrick v Friedman*, 237 Mich App 264, 268; 602 NW2d 603 (1999), quoting *Tellkamp v Wolverine Mut Ins Co*, 219 Mich App 231, 237; 556 NW2d 504 (1996), citing MCL 600.5001. Parties who want their arbitration governed by MCL 600.5001 *et seq.*, must clearly evince that intent in a contractual provision providing for a circuit court to enter judgment on the arbitration award. *Hetrick, supra* at 268. Those agreements that do not invoke such magical language are subject to the rules governing common-law arbitration. *Id.*

B

The circuit court concluded that the arbitration provision was subject to statutory arbitration under the MAA and granted plaintiff’s motion to confirm the award. This was error. The policy’s arbitration provision contains no language clearly evidencing an intent of the parties to have a court enter judgment on an award. The provision contains no language incorporating MCR 3.602 or the MAA, and *Tellkamp, supra*, on which plaintiff relied, did not squarely address the issue whether inclusion of the language “local rules of law and procedure” in an arbitration provision rendered the agreement statutory. Further, the circuit court improperly interpreted *Hetrick, supra*, as discarding the unilateral revocation rule applicable to common law arbitrations. While the *Hetrick* Court expressed disapproval of the unilateral revocation rule, it explicitly stated that its discussion and disapproval of the unilateral revocation rule was unnecessary to its disposition, and recognized that the unilateral revocation rule remains viable in Michigan. *Hetrick*, 237 Mich App at 270, 276.

We conclude that under *Hetrick, supra*, Zurich was entitled to unilaterally revoke the agreement to arbitrate. We conclude, however, that it did not do so. Two days before the scheduled arbitration, Parker notified plaintiff’s counsel that Zurich had denied coverage and that the arbitration was “canceled.” Plaintiff’s counsel responded that he would not cancel the arbitration and would file a court action seeking UM coverage. The following day, Zurich’s counsel wrote:

Until such time as the coverage questions with regard to the captioned matter are resolved, Zurich Insurance Company will not engage in arbitration of Mr. Miller’s UM claim. Further, by copy of this letter, the authority of either Mr. Sullivan or Mr. Crowley to act as a defense arbitrator. . . is hereby withdrawn and revoked until such time as the coverage issues are resolved . . .

Please note that the arbitration process in this matter is not statutory arbitration, but common law arbitration. The latter allows a party to withdraw from the arbitration process until such time an arbitration award is made. . . . Zurich is not at this time saying it will never arbitrate Mr. Miller’s claim for UM benefits, but it is saying that the arbitration of his claim is premature until such time as it is determined that Zurich is required to provide coverage.

This letter did not revoke the agreement to arbitrate; rather, it objected to the arbitration as being premature in light of the coverage issue. In fact, the letter specifically noted that Zurich was not saying it would never arbitrate the claim. After this letter was written, Zurich’s counsel attended the arbitration, and participated fully. The arbitrators did not address the coverage issue, and only addressed the issues expressly left to arbitration under the insurance contract. We conclude that Zurich did not effectively revoke this common-law arbitration agreement. It never stated that it revoked the contractual agreement to arbitrate the issues whether Miller was “legally entitled to recover damages from the owner or driver of an ‘uninsured motor vehicle’ [and] the amount of damages that are recoverable.” It merely objected to the procedure of arbitrating before the coverage issue was resolved, and, notwithstanding that objection, it proceeded to fully participate in the arbitration. Once the coverage issue was decided, the basis of Zurich’s objection evaporated. Thus, the circuit court did not err in confirming the arbitration award.⁶

IV

On cross-appeal⁷ Zurich maintains that the circuit court construed the policy contrary to the intent and understanding of the insurer and the insured, and in favor of plaintiff, a non-party;

⁶ Plaintiff contends as an alternative ground for affirming the circuit court that the policy is subject to the Federal Arbitration Act (FAA), 9 USC § 1 *et seq.*, because it involves interstate commerce, and that under the FAA, the agreement to arbitrate is irrevocable. While we need not reach the question whether the FAA applies in light of our decision that the agreement to arbitrate was not revoked, we note that plaintiff’s argument appears to be strong. The FAA governs actions in both federal and state courts arising out of contracts involving interstate commerce. *Kauffman v Chicago Corp*, 187 Mich App 284, 286; 466 NW2d 726 (1991). State courts are bound under the Supremacy Clause, US Const, art VI, § 2, to enforce the substantive provisions of the federal act. *Id.* In *Allied-Bruce Terminix Cos v Dobson*, 513 US 265; 115 S Ct 834; 130 L Ed 2d 753 (1995), the United States Supreme Court interpreted the phrase in § 2 of the FAA, “a contract evidencing a transaction involving commerce,” as intending to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause. Plaintiff argues that the insurance policy is “a contract evidencing a transaction involving commerce” under § 2 because the policy covers trucks operating in several states, the contracting parties are in different states--Illinois (Zurich) and Michigan (Parker), the policy itself includes UM coverage in four states, and Parker accepted or rejected UM coverage for every state.

⁷ Zurich also contends that the circuit court erred in granting plaintiff’s motion for summary disposition and in denying its cross-motion for summary disposition, where the policy
(continued...)

that the facts demonstrate that plaintiff is not entitled to assert estoppel to expand the scope of coverage under the policy to include his claim; and that plaintiff has no vested interest in the policy entitling him to coverage nor is he entitled to coverage as a third-party beneficiary.

We do not agree that the circuit court found that Zurich was estopped⁸ from denying coverage. The circuit court hinged its determination that UM coverage existed on its conclusion that the insurance policy was ambiguous. The court noted that Zurich created the ambiguity and that Parker failed to read the policies and question the inconsistencies, but did so in the context

(...continued)

unambiguously excludes coverage for Miller's claim. Zurich further asserts that even if the policy could be construed as ambiguous, the parol evidence reflecting Zurich's and Parker's intentions at the time of contracting demonstrates there is no coverage for Miller's claim. We addressed and rejected these two issues in Section II, *supra*.

⁸ Zurich states on appeal:

While not explicitly stating so, the trial court essentially determined that because Zurich and Parker failed to catch the typographical error in the Policy regarding Symbol 46 coverage, Zurich is estopped to deny coverage for Miller's claim. A "coverage by estoppel" argument was also raised by Miller in various trial court pleadings. Because Zurich has never represented to Miller that his UM claim would be covered under the Policy, because Miller never detrimentally relied on any action or statement by Zurich indicating that he was entitled to coverage under the Policy, and because estoppel cannot be used to expand the scope of coverage under the Policy, any claim of "coverage by estoppel" must fail.

Zurich is apparently referring to the portion of the circuit court's opinion that states:

Ambiguities must be construed against the insurer

* * *

In the instant case, the lack of clarity and precision in the insurance contract was caused by Zurich's repeated issuance of policies that did not comport with their final confirmation letters and by Parker's failure to read the policies and question the inconsistencies. Of all the parties involved, the Plaintiff Miller is the only one without any culpability. As a third-party beneficiary of the policy, Miller should not be denied benefits because Zurich failed to properly issue the policy and Parker failed to review and question the coverage. Zurich and Parker had more than four years to correct their "mistake," but they failed to do so.

In accordance with generally accepted principles of contract interpretation, the Court construes that ambiguity created by Zurich and acquiesced in by Parker against the insurer Zurich and in favor of coverage. The Court holds that the insurance policy in force and effect on the date of the subject accident provided UM coverage for Plaintiff Miller.

of how the ambiguity was perpetuated over four years, without either Zurich or Parker catching what they now purport was a mistake. The circuit court's reference to Zurich's culpability and Parker's acquiescence were unnecessary to its discussion of whether the policy is ambiguous.

Because Zurich acknowledges on appeal that the circuit court did not address the issue of the vesting of Miller's rights,⁹ this Court need not address that issue. We also need not address Zurich's argument regarding third party beneficiary theory, because the court's allusions to third party beneficiary status were unnecessary to its determination of UM coverage.¹⁰ We note that plaintiff was an insured under the policy's definition, quoted *supra*; the policy's declarations sheet and various other documents stated Symbol 46 UM coverage, but other documents indicated otherwise; and the circuit court properly concluded the insurance policy was ambiguous.

V

Zurich's final claim is that the circuit court erred in concluding that Parker, rather than plaintiff, was obligated to pay the \$150,000 deductible under the policy.¹¹ Because Zurich failed to cite authority in support of its argument, and Zurich's reply brief does not counter any of plaintiff's arguments on this issue, we deem the issue waived. *Alford v Pollution Control*, 222 Mich App 693, 699; 565 NW2d 9 (1997).

Further, the circuit court's interpretation is supported by the policy. The deductible provision is contained in an endorsement. The "Named Insured" is Parker Motor Freight, Inc. The endorsement states: "This endorsement applies between you and us. You will reimburse us for deductible amounts that we pay on your behalf." The clear import of this endorsement is that Parker is responsible for the deductible.

In sum, the circuit court properly concluded that the insurance policy language was ambiguous as to UM coverage. The evidence submitted below supported that the parties' intent on the issue was not clear, such that genuine issues of fact remained regarding whether UM coverage was intended under the 1998-1999 insurance policy. The circuit court thus properly denied Parker's cross-motion for summary disposition regarding UM coverage. Neither Parker nor Zurich argue on appeal that there should be a trial. Rather, both argue that summary

⁹ Zurich's appellate brief states:

In the trial court, Miller made much of the fact that his "rights" in the Policy vested at the time of the accident and that somehow this entitled him to UM coverage. *While the trial court did not address this issue*, it appeared to make a similar finding that Miller is a "third party beneficiary" of the Policy and therefore is entitled to coverage. [Emphasis added.]

¹⁰ As Parker notes on appeal, "If there is a determination that there is UM coverage, it is only because of an ambiguity in the contract, not because a promise was made."

¹¹ Parker makes this claim as well, although it is not identified in its statement of issues.

disposition should have been granted in their favor. Having rejected the argument that Parker and Zurich were entitled to judgment as a matter of law, we affirm the circuit court's decision on the coverage issue.

Regarding the arbitration, because Zurich did not clearly revoke the agreement, the circuit court's confirmation of the arbitration award was proper.

Affirmed.

/s/ William C. Whitbeck

/s/ Helene N. White

/s/ Pat M. Donofrio