

2005

Liberty Mutual Insurance Company v. Burdene and Unior Shores : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Liberty Mutual Insurance Company v. Burdene Shores*, No. 20050291 (Utah Court of Appeals, 2005).
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IN THE UTAH COURT OF APPEALS

Liberty Mutual Insurance Company,

Plaintiff and Appellee,

vs.

Burdene and Unior Shores,

Defendants and Appellants.

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District Court No. 050100099

Court of Appeals No. 20050291-CA

Brief of Appellee

Appeal from the Order and Final Judgment to Dismiss Defendant Burdene Shores's
Counterclaim of Bad Faith; and

Appeal from the Order and Final Judgment Granting Plaintiff Liberty Mutual Insurance
Company's Motion for Summary Judgment on its Declaratory Judgment Action; and

Appeal from the Order Denying Defendant Burdene Shores's Rule 56(f) Motion

Fourth Judicial District Court, Utah County, State of Utah
Honorable Judge Derek P. Pullan

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District Court No. 050100099

Court of Appeals No. 20050291-CA

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2002).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

I.

ISSUES ON APPEAL

A. Whether the trial court properly dismissed Burdene Shores's counterclaim for bad faith, concluding that Mrs. Shores was a third-party claimant and Liberty Mutual owed her no duty of good faith and fair dealing.

B. Whether the trial court correctly ruled that an insurer may limit coverage for members of an insured household in an automobile policy of insurance above the statutory mandated coverage amounts.

C. Whether the trial court correctly ruled that the household exclusion in the Liberty Mutual policy of insurance clearly and unmistakably communicated to the insureds the circumstances under which coverage would be limited under the policy.

D. Whether the trial court correctly ruled that the household exclusion in the Liberty Mutual policy of insurance is not in violation of public policy or state statute.

E. Whether the trial court abused its discretion in denying Mrs. Shores's Rule 56(f) motion for a continuance to conduct further discovery.

F. Whether the trial court correctly ruled that the validity of the household exclusion is a legal issue to be decided by the court.

II.

STANDARDS OF REVIEW

A motion for summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); *Webster v. Sill*, 675 P.2d 1170 (Utah 1983). ““In reviewing a grant of summary judgment, an appellate court views “the facts in a light most favorable to the losing party below” and gives “no deference to the trial court’s conclusions of law: those conclusions are reviewed for correctness.””” *Black v. Allstate Ins. Co.*, 100 P.3d 1163, 1166 (Utah 2004) (citations omitted).

“A trial court’s ruling on a motion for continuance under rule 56(f) is reviewed under an abuse of discretion standard.” *Riddle v. Celebrity Cruises, Inc.*, 105 P.3d 970, 973 (Utah Ct. App. 2004).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, RULES AND REGULATIONS**

Utah Constitution article I, § 18

“No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.”

Utah Code Ann. § 31A-1-102(7) (2002)

“The purposes of the Insurance Code are to maintain freedom of contract and enterprise.”

Utah Code Ann. § 31A-22-304(1)(a) (2002)

(See Addendum to the Brief of Appellee)

Rule 56(a) of the Utah Rules of Civil Procedure

(See Addendum to the Brief of Appellee)

Rule 56(c) of the Utah Rules of Civil Procedure

(See Addendum to the Brief of Appellee)

Rule 56(f) of the Utah Rules of Civil Procedure

(See Addendum to the Brief of Appellee)

STATEMENT OF THE CASE

I.

NATURE OF THE CASE

This case involves the validity of a household exclusion in Liberty Mutual’s automobile insurance policy issued to Unior and Burdene Shores.

II.

COURSE OF PROCEEDINGS AND DISPOSITION IN THE TRIAL COURT

On February 9, 2004, Liberty Mutual filed a complaint for declaratory relief in the Fourth Judicial District Court seeking to enforce a “step down” or “household exclusion” in its automobile policy of insurance which would limit liability coverage to \$25,000. (Complaint for Declaratory Relief; R.6). On February 13, 2004, the trial court granted Liberty Mutual’s ex parte request to deposit \$25,000 into the court trust fund to be held pending the outcome of the litigation. (Order to Deposit Money in Court; R.7).

On March 17, 2004, Liberty Mutual filed an amended complaint for declaratory relief. (Amended Complaint for Declaratory Relief; R.18). On March 25, 2004, Defendant Burdene Shores filed an answer to Liberty Mutual’s amended complaint and included a counterclaim against Liberty Mutual. (Answer and Counterclaim; R.80). Mrs. Shores’s counterclaim included Count I for declaratory judgment and Count II for bad faith refusal to settle. (*Id.*; R.63-78). Unior Shores also filed an answer that included a bad faith counterclaim.

Liberty Mutual subsequently filed a motion to dismiss Mrs. Shores’s bad faith counterclaim. (Plaintiff Liberty Mutual Insurance Company’s Motion to Dismiss Defendant Burdene Shores’s Bad Faith Counterclaim; R.106). After a hearing on the Motion, the trial court granted Liberty Mutual’s motion to dismiss on August 27, 2004. (Order and Final Judgment to Dismiss Burdene Shores’s Counterclaim of Bad Faith; R.230).

On September 16, 2005, Liberty Mutual filed a motion for summary judgment on its declaratory judgement action, and for a dismissal of the declaratory judgment claim in Mrs. Shores's counterclaim, as well as any declaratory cause of action alleged in Mr. Shores's counterclaim against Liberty Mutual. (Plaintiff Liberty Mutual Insurance Company's Motion for Summary Judgment on Declaratory Judgment Action; R.233). On December 10, 2004, the trial court heard oral argument on Liberty Mutual's motion for summary judgment. (Order and Final Judgment Granting Liberty Mutual's Motion for Summary Judgment on Declaratory Judgment Action, and Denying Defendant Burdene Shores's Rule 56(f) Motion; R.443). On the same day of the hearing, Mr. Shores filed a motion for summary judgment. (Unior Shores's Motion and Memorandum for Summary Judgment; R.429).¹ In addition, at the beginning of the hearing on December 10, 2004, Mrs. Shores orally made a motion for a continuance under Rule 56(f) of the Utah Rules of Civil Procedure to conduct further discovery before a decision on Liberty Mutual's motion for summary judgment. (Order and Final Judgment; R.433-47).

The trial court subsequently granted Liberty Mutual's motion for summary judgment on its amended complaint for declaratory relief and further dismissed the causes of action for declaratory relief alleged in Unior and Burdene Shoreses' counterclaims. (Order and Final Judgment; R.443, 437-38). In addition, the trial court denied Mrs. Shores's Rule 56(f) motion for a continuance to conduct further discovery. (*Id.*; R.443, 437).

¹ Mr. Shores did not file a memorandum in opposition to Liberty Mutual's motion for summary judgment. (Plaintiff Liberty Mutual Insurance Company's Response to Defendant Unior Shores's Motion for Summary Judgment; R.433-35).

Mr. and Mrs. Shores subsequently filed their notices of appeal. (Notice of Appeal; R.452).

STATEMENT OF FACTS

1. On September 9, 2003, Burdene Shores was involved in an automobile accident in which she was a passenger and her husband, Unior Shores, was driving the motor vehicle. (Order and Final Judgment Granting Plaintiff Liberty Mutual Insurance Company's Motion for Summary Judgment on Declaratory Judgment Action, and Denying Defendant Burdene Shores' Rule 56(f) Motion; R.442). Mrs. Shores allegedly sustained personal injuries in the collision. (*Id.*).

2. The automobile involved in the collision was insured under a personal automobile policy issued by Liberty Mutual, with coverage from January 12, 2003, to January 12, 2004. (Amended Complaint for Declaratory Relief at 2; R.17; LibertyGuard Auto Policy; R. 256, 271). Mr. and Mrs. Shores are both named insureds under the policy. (*Id.*). The policy provides bodily injury liability coverage of \$100,000 for each person and \$300,000 per accident. (Order and Final Judgment at 2; R.442; LibertyGuard Auto Policy; R.256).

3. As a result of the accident and her injuries, Mrs. Shores filed a lawsuit against her husband in a separate action for negligence in an attempt to collect benefits under the liability coverage of the Liberty Mutual policy. (Order and Final Judgment at 3; R.441).

4. Liberty Mutual's policy contains a "step-down" or "household exclusion" in an endorsement to the policy, Endorsement PP 01 93 040 2. (Amended Complaint for Declaratory

Relief at 2-3; R.16-17; LibertyGuard Auto Policy; R. 245). At the top of the Endorsement is written, “THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.” (*Id.*). The title also provides that it is an “AMENDMENT OF POLICY PROVISIONS -UTAH.” (*Id.*). The provision then states as follows:

I. Part A - Liability Coverage

Part A is amended as follows:

....

B. The following exclusion is added:

We do not provide Liability Coverage for any “insured” for “bodily injury” to you to the extent that the limits of liability for this coverage exceed the applicable minimum limits for liability specified by UTAH CODE ANN. Section 31A-22-304. The applicable minimum limits are:

1. \$65,000 for each accident, if the limit of liability for this coverage is a single limit that applies for each accident; or
2. \$25,000 for each person/\$50,000 for each accident, if the limit of liability for this coverage is indicated as a split limit.

(LibertyGuard Auto Policy; R.245).

5. The above-referenced exclusion operates to limit the amount Mrs. Shores can recover under the policy for her husband’s negligence to \$25,000. The policy provision limiting insurance to “\$25,000 for each person” is equal in amount to the Utah statutory minimum coverage found in Utah Code Ann. § 31A-22-304 (2002).

6. The Liberty Mutual policy of insurance was delivered to Mr. and Mrs. Shores on or about January 16, 2003. (Answer and Counterclaim at 3; R.78).

7. Mrs. Shores previously demanded that Liberty Mutual pay \$100,000 in liability limits under the Liberty Mutual automobile policy as a result of the aforementioned accident. (Order and Final Judgment at 3; R.441). Liberty Mutual denied Mrs. Shores's demand based on the household exclusion but offered to pay \$25,000 in exchange for a release. (*Id.*).

8. As a result of this dispute in coverage, Liberty Mutual filed its complaint for declaratory relief on February 9, 2004, seeking to enforce the household exclusion in its automobile policy. (Complaint for Declaratory Relief; R.6).

SUMMARY OF THE ARGUMENT

I. Mrs. Shores was not in privity of contract with Liberty Mutual in her claim against the policy for liability coverage. Mrs. Shores was a third-party claimant rather than a first-party claimant because her claim against the policy arose out of her husband's negligence. Therefore, under Utah law, Liberty Mutual owed her no duty of good faith and fair dealing. As a result, the trial court correctly dismissed Mrs. Shores's counterclaim for bad faith.

II. Utah Code section 31A-21-308(1) does not require Liberty Mutual to list an insured as a separate risk in its insurance policy. Mrs. Shores misconstrues the statute. The household exclusion is not a differing risk but is an exclusion to the liability coverage of the policy. Furthermore, even if the household exclusion did constitute another risk, section 31A-21-308(1) permits insurers to limit the coverage available to an insured, as long as that limitation is clearly stated. Liberty Mutual's policy clearly provides that Mr. Shores's coverage was limited to \$25,000 for bodily injury under the household exclusion.

III. Mrs. Shores erroneously argues that the household exclusion violates public policy found in Utah case and statutory law. To the contrary, the household exclusion is supported by all three measures of public policy, including case law, statutory law, and the constitutional right to contract. The Utah Appellate Courts have consistently held that insurers are free to limit and exclude coverage in automobile insurance policies in amounts that are above the statutory minimum limits required by state law. The majority of Courts from around the country have upheld household exclusions where the coverage is not reduced below the mandatory limits set by state law. This is consistent with the policies and guidelines set forth in the Utah Insurance Code and Utah State Constitution which seek to promote and maintain freedom of contract and enterprise.

IV. The trial court correctly found that the household exclusion in the Liberty Mutual automobile insurance policy clearly and unmistakably communicates to the insureds the circumstances under which coverage will be limited under the policy. Liberty Mutual's household exclusion unambiguously limits the amount of motor vehicle liability coverage to \$25,000 when an insured spouse brings a personal injury claim against his or her insured spouse for negligence. The provision is clear, does not omit terms, and is not subject to multiple meanings. Moreover, the law does not require Liberty Mutual to place the household exclusion on the declarations page, nor is it ambiguous because it reduces the coverage stated on the declarations page.

V. The trial court did not abuse its discretion in denying Mrs. Shores's Rule 56(f) motion for a continuance to conduct further discovery. The trial court was correct in denying the motion because Mrs. Shores did not adhere to the proper procedure in bringing the motion. The motion was raised for the first time at the hearing on Liberty Mutual's motion for summary judgment and no affidavit accompanied the motion. Second, the validity of the household exclusion is a legal question to be decided by the Court. As a result, no amount of discovery would have enabled the Shores to defeat Liberty Mutual's motion for summary judgment. Third, the evidence shows that there were no misrepresentations by Liberty Mutual's agent as to the terms of the policy. The coverage was the same under the Liberty Mutual policy as the Shoreses' previous policy with Metlife. The Metlife policy also contained a household exclusion which would have limited the available liability coverage the same as the exclusion in the Liberty Mutual policy. Fourth, the Rule 56(f) motion was also properly denied because the law in Utah does not require an insurance agent to disclose exclusions at the time of sale. The law also does not permit a court to invalidate a clear provision in an insurance policy even where the insurance agent knows that the insureds have a different expectation of coverage and helps to create those expectations. Finally, the Liberty Mutual policy was delivered to the Shores shortly after it became effective, at which time they had an obligation to review the policy and raise any concerns about coverage.

ARGUMENT

I.

AS A THIRD PARTY TO AN INSURANCE CONTRACT, MRS. SHORES'S COUNTERCLAIM FOR BAD FAITH IS NOT RECOGNIZED BY UTAH LAW.

Mrs. Shores argues that the trial court improperly dismissed her counterclaim against Liberty Mutual for bad faith refusal to settle when it found that there was no privity of contract between Liberty Mutual and Mrs. Shores. Brief of Appellant Burdene Shores at 16-23. Contrary to Mrs. Shores's arguments, Utah law supports the trial court's dismissal of Mrs. Shores's counterclaim.

We start with the well-established law in Utah which holds that "there is no duty of good faith and fair dealing imposed upon an insurer running to a third-party claimant." *Pixton v. State Farm Mut. Auto. Ins. Co.*, 809 P.2d 746, 749 (Utah Ct. App. 1991). In *Pixton*, the plaintiff's automobile collided with another causing her physical injury. The injured plaintiff subsequently brought an action against the insurance company of the tortfeasor for breach of an implied covenant of good faith and fair dealing. *Id.* at 748. In *Pixton*, the Court noted:

Contrasting first-party situations with third-party situations, we note that in a first-party situation the insurer agrees to pay claims submitted by the insured for losses suffered by the insured. In a third-party situation, however, the insurer agrees to defend the insured against claims made by third-parties against the insured and to pay resulting liability up to a specified amount.

Id. at 748 n.1 (citing *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 798 n.2 (Utah 1985)).

In third-party situations, a fiduciary duty arises from the duty of good faith to the insured, not directly to the third-party claimant. As the Utah Court of Appeals explained, “[i]n order to maintain an action under a contractual theory of insurer bad faith, the parties must be in privity of contract at the time of the alleged wrong.” *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 958 (Utah Ct. App. 1989) (citing *Ammerman v. Farmers Ins. Exch.*, 430 P.2d 576, 577 (Utah 1967)). While “an insured ha[s] a right to expect his liability insurance company to represent the insured’s interests by acting reasonably and in good faith in settling third-party claims against its insured,” if there is no privity of contract between the plaintiff and the insurance company, it owes no duty. *Pixton*, 809 P.2d at 749 (citing *Ammerman*, 430 P.2d at 578).

Similar to the facts in *Pixton*, Burdene Shores is a third-party claimant in this action against Liberty Mutual. Mrs. Shores is a third-party claimant because her claim against the policy for liability coverage arises out of her husband’s negligence. Because she is not in privity of contract, the insurer owes her no fiduciary duty which would impose upon it a duty of good faith and fair dealing.

The case of *Sperry v. Sperry*, 990 P.2d 381 (Utah 1999), is directly on point. In *Sperry*, the plaintiff claimed that because she was a named insured under the policy, she was a first-party claimant and owed a duty of good faith in all her dealings with the insurance company, even when she was suing a co-insured to obtain liability coverage under the policy. *Sperry*, 990 P.2d at 383. Specifically, plaintiff was suing her husband for the wrongful death of her son based on her husband’s negligent driving, and she included a claim for bad faith against the insurer. *Id.*

The *Sperry* Court concluded that plaintiff had no standing to bring an action against the insurer. In arriving at its decision, the *Sperry* court stated as follows: “Annette’s [plaintiff] wrongful death claim was not based upon her own coverage but on Robert’s [plaintiff’s husband] liability coverage for negligence. Therefore, she is properly considered a third party for good faith purposes.” *Id.* at 384 (citing *Rumley v. Allstate Indem. Co.*, 924 S.W.2d 448, 450 (Tex. Ct. App. 1996) (“[B]ecause the plaintiff’s claim was not based ‘upon benefits payable to her under the policy, but upon her husband’s tort liability to her for his negligence . . . she assumed the posture of a third-party claimant’ by bringing a liability claim against her husband.”)).

Mrs. Shores attempts to confound the clarity of *Sperry* by arguing that she has a reduced right of recovery because of the household exclusion. Brief of Appellant Burdene Shores at 16-23. Mrs. Shores further asserts that these alleged limited rights of recovery somehow circumvent her tort action and render her a first-party claimant against Liberty Mutual. *Id.*

In *Sperry*, there was in fact a household exclusion provision and the insurer initially agreed to pay less in bodily injury coverage because of that provision. *Sperry*, 990 P.2d at 382. The insurer later determined that the household exclusion did not apply. *Id.* Contrary to Mrs. Shores’s arguments, the existence of the household provision was completely irrelevant to the holding. The Court in *Sperry* never made any mention that the injured party’s status could change because of the household exclusion and the potential reduced right of recovery. Furthermore, the plaintiff in *Sperry* never made this argument, and there is simply no support for Mrs. Shores’s position that her case can be distinguished from *Sperry* because Liberty Mutual

maintains that the household exclusion applies. The existence or non-existence of the household exclusion doesn't make a difference. The fact remains that plaintiff in *Sperry* was attempting to recover under the bodily injury coverage of the policy for the negligence of her husband. As such, she was a third-party claimant and had no standing to bring an action against the insurer.

Perhaps a more in-depth discussion of Mrs. Shores's status as an insured and injured party may be helpful. As mentioned above, Mrs. Shores may occupy both the position of a first-party claimant under a contract theory because she is insured by Liberty Mutual, and she may also assume the position of a third-party claimant under a tort theory because her husband negligently caused her injury. Here, Mrs. Shores is clearly not asserting any of her contract rights in bringing the bad faith claim. Any contractual rights under the policy would be extended based on the payment of damages to those injured by Mrs. Shores's own negligence while operating her insured vehicle, or payment to her directly for injuries she sustained due to the negligence of an uninsured or underinsured operator of a motor vehicle.

The present claim does not fit into these categories. A review of Mrs. Shores's counterclaim for declaratory relief shows that she occupies the position of third-party claimant. In the counterclaim, Mrs. Shores asserts that she was injured in a motor vehicle accident in which her husband, Mr. Shores, was driving, and that he was responsible for the injuries. Counterclaim at 4 (R.77). Mrs. Shores then demands payment under the liability coverage of the Liberty Mutual policy. *Id.* at 9 (R.72). Mrs. Shores is attempting to recover for her own personal

injuries under the liability coverage of the Liberty Mutual policy. The only way to recover liability coverage for the negligence of an insured is as a third-party claimant.

The presence of the household exclusion in the Liberty Mutual policy makes no difference in this third-party/first-party analysis. Mrs. Shores correctly points out that Liberty Mutual only agreed to pay \$25,000 in bodily injury coverage because of the household exclusion. This fact, however, does not in any way alter Mrs. Shores's third-party status. Liberty Mutual's attempts to enforce the provision does not transform Mrs. Shores's standing from third-party to first-party.

Mrs. Shores cites to *Black v. Allstate Insurance Company*, 100 P.3d 1163 (Utah 2004), in support of her argument that she is entitled to pursue her case against the insurer as a first party. Brief of Appellant Burdene Shores at 21 and 22. Mrs. Shores, however, misreads the facts and holding in *Black*.

In *Black v. Allstate*, Chris Black was involved in an automobile collision with Shirl Gallagher. *Black*, 100 P.3d at 1165. Both parties alleged the other was at fault and both were insured by Allstate Insurance Company. In addition, both Black and Gallagher submitted claims to Allstate for their respective damages. Black subsequently filed a lawsuit against Gallagher and Allstate. Black's claim against Gallagher was that Gallagher was fully responsible for the accident and should therefore pay his property damage for the loss. On the other hand, "Black's claim against Allstate was that Allstate breached its fiduciary duty to fairly and in good faith represent Black's interests with respect to Gallagher's claim" against Black. *Id.*

In defending the lawsuit, Allstate argued that Black had no standing because Black was not a party to the Gallagher insurance contract and therefore the insurer owed no fiduciary duties to Black. In declining this argument, the Utah Supreme Court determined that Allstate mischaracterized Black's cause of action against the insurer. *Id.* at 1167. In reviewing Black's Complaint, the Supreme Court found that "Black does not take issue with Allstate's conduct in processing his claim against Gallagher. Rather, Black argues that Allstate breached the duties it owed to him in handling Gallagher's claim against him." *Id.* The Court therefore concluded that "[w]hen handling the Gallagher claim, Allstate acted in its capacity as Black's liability insurer Hence, Black properly asserted a cause of action against Allstate based on his own contractual relationship with Allstate" *Id.*

Mrs. Shores claim is not analogous to *Black*. Unlike *Black*, Unior Shores is not asserting a claim for damages against Mrs. Shores for the automobile accident. Mrs. Shores is therefore not claiming that Liberty Mutual improperly handled a third-party claim against her under the policy. As a result, there is no privity of contract between Mrs. Shores and Liberty Mutual.

In arriving at its holding, the Supreme Court in *Black* reaffirmed its holding in *Sperry* "that the plaintiff could not be considered a party to the insurance contract for purposes of her bad faith action against the insurer since the insurer, in this capacity as the liability insurer for the husband, owed her no contractual good faith duties to settle her claim." *Id.* The Supreme Court further concluded that Allstate's reasoning would be "correct with regard to its handling of the Black claim against Gallagher." *Id.*

As in *Sperry v. Sperry* and *Rumley v. Allstate*, 924 S.W.2d 448, a case relied on by *Sperry*, Mrs. Shores's claim is not based on the "benefits payable to her under the policy, but upon her husband's tort liability to her for his negligence." *Rumley*, 924 S.W.2d at 450. As a result, Mrs. Shores occupies the position of a third-party claimant in tort, and not as a first-party claimant asserting contractual rights. This is not a first-party claim or even a mixed claim as Mrs. Shores asserts. The undisputed facts show that it is a third-party claim that is directly on point with *Sperry*, and any attempts to distinguish her claim, or liken it to *Black*, are misguided. Consequently, Mrs. Shores's counterclaim for bad faith refusal to settle was correctly dismissed by the trial court.

II.

LIBERTY MUTUAL'S HOUSEHOLD EXCLUSION DOES NOT VIOLATE SECTION 31A-21-308 OF THE UTAH CODE.

Mrs. Shores argues in her Appellate Brief that the trial court erred in granting summary judgment in favor of Liberty Mutual because Liberty Mutual's policy violates Utah Code section 31A-21-308. Brief of Appellant Burdene Shores at 23-32. Section 31A-21-308(1) states in relevant part, "[i]f the policy covers various risks, different limitations may be provided separately for each risk, if the policy clearly states that." Utah Code Ann. § 31A-21-308(1) (2004). Specifically, Mrs. Shores argues that Liberty Mutual was required to include a statement in the policy to the effect that "an insured, by being an insured" is a risk under the policy, and then list the household exclusion as a limitation for that risk. Brief of Appellant Burdene Shores at 25.

This argument is unpersuasive for several reasons. First, Mrs. Shores misconstrues the meaning of section 308(1). By various risks, the statute is referring to bodily injury, uninsured motor vehicle, personal injury protection, and other such risks. The household exclusion is not a differing risk, but is an exclusion to the liability coverage of the policy. This exclusion is the same as multiple other exclusions and limitations for liability coverage. These exclusions and limitations do not constitute other varying risks, and, as a result, Section 31A-21-308(1) does not apply as Mrs. Shores contends.

Furthermore, even if the household exclusion did constitute another risk, the policy is clear in setting forth that limitation, which is all that is required of section 31A-21-308(1). This section does not provide that the separate risk has to be in the declarations as Mrs. Shores would have the Court believe. Because the limitation is clear, the household exclusion would be valid even if 31A-21-308(1) applied.²

III.

LIBERTY MUTUAL’S HOUSEHOLD EXCLUSION DOES NOT VIOLATE PUBLIC POLICY.

Burdene Shores argues that public policy, as found in case law and statutory law, prohibits the enforcement of the household exclusion in the Liberty Mutual insurance policy.

² In arguing for the statement’s inclusion, Mrs. Shores is asking this Court to read a new provision into the statute. The law clearly states, however, that a court is not permitted to write a new requirement into a statute. *In re General Determination of Rights to the Use of Water*, 110 P.3d 666, 673 (Utah 2004) (stating that a statute should be interpreted as written and therefore the court “decline[s] the invitation to write [a new] . . . requirement into the statute.”).

Brief of Appellant Burdene Shores at 15-16, 23-50. A review of the law in this area shows that Mrs. Shores's public policy arguments are unfounded.

The Utah Supreme Court held that “[a]n insurer may include in a policy any number or kind of exceptions and limitations to which an insured will agree unless contrary to statute or public policy.” *Utah Farm Bureau Ins. Co. v. Crook*, 980 P.2d 685, 688 (Utah 1999) (quoting *Gee v. Utah State Ret. Bd.*, 842 P.2d 919, 921 (Utah Ct. App. 1992)); *See also Calhoun v. State Farm Mut. Auto. Ins. Co.*, 96 P.3d 916 (Utah 2004). “[T]he general judicial attitude toward insurance policies is to sustain them on grounds of public policy wherever possible.” *Id.* (quoting *Ross v. Producers Mut. Ins. Co.*, 295 P.2d 339, 343 (Utah 1956)).

Because “[t]he nature and scope of what constitutes a ‘clear and substantial’ public policy . . . is not always easily discernible,” the Supreme Court has provided a guide to assist in discerning what constitutes clear public policy. *Rackley v. Fairview Care Ctrs., Inc.*, 23 P.3d 1022, 1026 (Utah 2001). The Utah Supreme Court in *Rackley* stated that “public policy is ‘clear’ if it is plainly defined by one of three sources: (1) legislative enactments; (2) constitutional standards; or (3) judicial decisions.” *Id.* at 1027. The household exclusion in the Liberty Mutual insurance contract is supported by all three.

A. The Household Exclusion is Supported by Judicial Decisions from Utah and other States.

One of the three criteria set forth in *Rackley* for the determination of public policy is the support of judicial decisions. Case law in Utah and in other jurisdictions support Liberty Mutual's household exclusion as valid and enforceable.

A review of judicial history in Utah demonstrates that the Appellate Courts will uphold exclusions in automobile policies so long as the statutory minimum coverages are satisfied. For example, the Utah Supreme Court held as follows in a 1980 opinion:

[C]ontracting parties are free to limit coverage in excess of the minimum required limits, and the exclusion found in the contract is valid in relation to any coverage exceeding the minimum amounts. Thus, a balance is struck between the necessity of securing minimum automobile liability coverage and the availability of lower premiums because of the exclusion of high insurance risks.

Allstate Ins. Co. v. U.S. Fidelity & Guar. Co., 619 P.2d 329, 333 (Utah 1980) (footnotes omitted).

In 1985, the Utah Supreme Court decided *Farmers Insurance Exchange v. Call*, 712 P.2d 231 (Utah 1985), where the court held that household exclusion clauses in automobile insurance policies are contrary to public policy and the no-fault statutes as to any amount at or below the minimum benefits established under the No-Fault Insurance Act. The Court declined to address the validity of the exclusion in excess of the statutory mandated minimums.

In 1987, the Utah Supreme Court decided *State Farm Automobile Insurance Company v. Mastbaum*, 748 P.2d 1042 (Utah 1987). In *Mastbaum*, Thomas and Kathleen Mastbaum were both insured under an automobile policy with State Farm Insurance. Mrs. Mastbaum was seated in the front passenger seat of her vehicle when she was severely injured in an accident while Mr. Mastbaum was driving. She subsequently filed a civil suit against Mr. Mastbaum alleging that he was intoxicated and negligent in operating the vehicle. Mr. Mastbaum tendered the case to State

Farm, who subsequently brought a declaratory action on the basis that the family exclusion relieved it from paying any judgment to Mrs. Mastbaum.

The majority opinion in *Mastbaum* affirmed the validity of the State Farm household exclusion and held “that the household or family exclusion is valid in this state as to insurance provided by an automobile policy in excess of the statutorily mandated amounts and benefits.” *Mastbaum*, 748 P.2d at 1044. Mrs. Shores, however, relies upon Justice Zimmerman’s concurrence and Justice Durham’s dissent in *Mastbaum* to argue that household exclusions written after 1986 are invalid under Utah Code section 31A-22-309.

Contrary to Mrs. Shores’s arguments, the concurring and dissenting opinions are not controlling. The *Mastbaum* decision is actually a plurality opinion. As such, it is not binding and does not establish any precedent for future cases. *State v. Mohi*, 901 P.2d 991, 996 (Utah 1995). In a later decision, this Court commented that the plurality decision in *Mastbaum* was dicta. *Nat’l Farmers Union Prop. & Cas. Co. v. Moore*, 882 P.2d 1168, 1170 (Utah Ct. App. 1994).

Although not binding precedent, the majority opinion in *Mastbaum* recognized that the vast majority of cases throughout the country hold that household exclusions are enforceable with regard to policy amounts exceeding the statutory minimums. *Id.* at 1043-44 (and cases cited therein). The Court then concluded as follows:

We adhere to . . . the majority view and hold that the household or family exclusion is valid in this state as to insurance provided by an automobile policy in excess of the statutory mandated amounts and benefits. While the minority view is attractive from the standpoint of an injured victim, the policy must be enforced

as written when its provisions do not conflict with our mandatory automobile insurance statutes.

Id. at 1044.

As mentioned in *Mastbaum*, the majority of courts, both before and after *Mastbaum*, have held that household exclusions in automobile policies are enforceable so long as the coverage is not reduced below the minimum financial responsibility insurance limits required by state law. A sampling of these decisions include the following: *Coffman v. State Farm Mut. Auto. Ins. Co.*, 884 P.2d 275 (Colo. 1994); *Smalls v. State Farm Mut. Auto. Ins. Co.*, 678 A.2d 32 (D.C. 1996) (“[H]ousehold exclusion clauses have been upheld by the courts of many states when they have not been in conflict with statutory requirements. . . . [T]here is no bar to enforcement of the clause with respect to amounts greater than the minimum statutory requirements.”); *Georgia Farm Bureau Mut. Ins. Co. v. Burch*, 476 S.E.2d 62 (Ga. Ct. App. 1996); *Krause v. Krause*, 589 N.W.2d 721 (Iowa 1999); *Halpin v. Am. Family Mut. Ins. Co.*, 823 S.W.2d 479 (Mo. 1992); *Farmers Ins. Exch. v. Young*, 832 P.2d 376 (Nev. 1992); *Hartline v. Hartline*, 39 P.3d 765 (Okla. 2001); *Hansen v. United Serv. Auto. Ass’n*, 565 S.E.2d 114 (S.C. Ct. App. 2002); *Cimarron Ins. v. Croyle*, 479 N.W.2d 881 (S.D. 1992); *Stearman v. State Farm Mut. Auto. Ins. Co.*, 849 A.2d 539 (Md. 2004); *Pribble v. State Farm Mut. Auto. Ins. Co.*, 933 P.2d 1108, 1111 (Wyo. 1997) (“The vast majority of cases . . . have held that household exclusions or analogous exclusions are enforceable with respect to policy amounts in excess of the statutory minimum”) (citation omitted).

The judicial history in Utah also includes two Utah Supreme Court decisions which have upheld household exclusions on at least two occasions in insurance policies other than automobile policies. These decisions include *National Farmers Union Property & Casualty Company v. Moore*, 882 P.2d 1168 (Utah 1994), which affirmed a household exclusion in a farmowner's policy as valid and enforceable and not contrary to public policy, and *Allen v. Prudential Property & Casualty Company*, 839 P.2d 798 (Utah 1992), which upheld a household exclusion in a homeowner's policy on grounds that it was unambiguous.

Most recently, the Utah Supreme Court decided *Calhoun v. State Farm Mutual Automobile Insurance Company* in July of 2004. *Calhoun*, 96 P.3d 916. In that opinion the Supreme Court held as follows:

[C]ontrary to the Calhoun's assertions, exclusionary endorsements such as the "owned vehicle" exception at issue are not necessarily invalid. "Rather, contracting parties are free to limit coverage in excess of the minimum required limits, and [an] exclusion found in [a] contract [is] valid in relation to any coverage exceeding minimum amounts."³ As long as any exclusions are phrased in "language which clearly and unmistakably communicates to the insured the specific circumstances under which the expected coverage will not be provided," exclusions in insurance policies beyond the minimum coverage limits are allowed.⁴

Id. 923-24 (citations omitted). Approximately one month later, the Utah Supreme Court also decided *Speros v. Fricke*, 98 P.3d 28, 44 n.8 (Utah 2004), where the Court likewise held that

³Citing *Allstate Ins. Co. v. United States Fidelity & Guar. Co.*, 619 P.2d 329, 333 (Utah 1980).

⁴Citing *Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272, 1275 (Utah 1993).

“[c]ontracting parties are free to limit coverage in excess of the statutory minimum requirements.”⁵

The trial court here correctly concluded that *Calhoun* sets forth the general rule of law governing exclusions in automobile policies, and that it was bound to follow that rule of law. Order and Final Judgment at 6-7 (R. 438-39). Based on this rule of law, the trial court correctly held that the household exclusion in the Liberty Mutual policy of insurance was a valid and enforceable provision limiting liability coverage under the policy. *Id.* at 7 (R.437).

The underlying policy concerns behind household exclusions also support their enforcement. One of those policy objectives is to keep premiums lower by excluding an area of high risk. *Allstate*, 619 P.2d 329; *Farmers Ins. Exch. v. Cocking*, 173 Cal. Rptr. 846 (Cal. 1981); *Allstate Ins. Co. v. Feghali*, 814 P.2d 863 (Colo. 1991). The courts have also held that household and family exclusions protect insurers from collusion among family members who pursue insurance claims and lawsuits. *Cocking*, 173 Cal. Rptr. at 846; *Feghali*, 814 P.2d at 863; *Prudential Prop. & Cas. Ins. Co. v. Scott*, 514 N.E.2d 595 (Ill. Ct. App. 1987); *State Farm Mut. Auto. Ins. v. Butler*, 904 S.W.2d 350 (Mo. Ct. App. 1995); *Orange v. State Farm Mut. Auto. Ins. Co.*, 443 S.W.2d 650, 651-52 (Ky. Ct. App. 1969). In addition, household exclusions protect families from the disrupting influence of litigation between spouses and other family members.

⁵ The *Speros* Court concluded that an intentional acts exclusion is valid in excess of the minimum liability limits mandated by statute.

Feghali, 814 P.2d at 863. These same policy concerns apply to the household exclusion at issue here.

A review of the judicial history in Utah shows that the Utah Appellate Courts enforce exclusions in automobile policies so long as the statutory minimum amounts are preserved. In addition, the validation of family exclusions above the statutory minimums is consistent with the trend of authority from around the country. Accordingly, public policy as defined by judicial authority supports the enforcement of the household exclusion in the Liberty Mutual policy of insurance.

B. The Household Exclusion is Supported by Legislative Enactments.

The Utah Insurance Code establishes the requirements insurance carriers must meet when providing motor vehicle coverage to an insured. Relevant to this appeal is section 31A-22-304 of the Code, which provides the statutory minimums for insurance coverage. Utah Code Ann. § 31A-22-304(1)(a) (2002). Specifically, this section states that an insurance policy may not limit the amount of motor vehicle liability coverage below “\$25,000 because of liability for bodily injury to or death of one person, arising out of the use of a motor vehicle in any one accident.” The language in the Liberty Mutual policy endorsement meets this minimum requirement. LibertyGuard Auto Policy (R.245).

Mrs. Shores argues that there is no statutory approval for the household exclusion. Brief of Appellant Burdene Shores at 43. The clear inference from section 304(1)(a), however, is that insurance policies may limit liability coverage to greater than or equal to \$25,000. Furthermore,

Section 31A-1-102(7) of the insurance code states that the purpose of the code is to “maintain freedom of contract and enterprise.” Utah Code Ann. § 31A-1-102(7) (2002). Along these same lines, the Utah Supreme Court has repeatedly held that “[a]s long as any exclusions are phrased in ‘language which clearly and unmistakably communicates to the insured the specific circumstances under which the expected coverage will not be provided,’ exclusions in insurance policies beyond the minimum coverage limits are allowed.” *Calhoun*, 96 P.3d at 923-24 (quoting *Alf*, 850 P.2d at 1275).

Contrary to the Shoreses’ arguments, the above demonstrates that there is statutory authority supporting the household exclusion. On the other hand, the Shores have not identified any statutory provision which would prevent insurers from including household exclusions in their automobile policies.⁶

As mentioned before in this Brief, Mrs. Shores relies on Justice Zimmerman’s concurrence and Justice Durham’s dissent in *Mastbaum*, 748 P.2d 1042, to argue that household exclusions written after 1986 are invalid under Utah Code section 31A-22-309. Brief of Appellant Burdene Shores at 42-45. As mentioned previously, the opinion in *Mastbaum* is a plurality opinion and does not establish any precedent for future cases. *Mohi*, 901 P.2d 991; *Moore*, 882 P.2d 1168.

In addition to the plurality not being binding law, a later amendment to the insurance code shows that Justice Durham’s analysis would no longer be valid. In support of her opinion that

⁶ Liberty Mutual demonstrated in section II of this Brief that the household exclusion does not violate Utah Code Ann. § 31A-21-308(1).

the legislature intended to invalidate all household exclusions, Judge Durham cited to the personal injury protection statute of the Utah Insurance Code, which only permits certain exclusions. *Mastbaum*, 748 P.2d at 1045-47. Because the accident occurred in 1981, Judge Durham relied on the personal injury protection statute before July 1, 1986. *Id.* (citing Utah Code Ann. § 31A-22-309 (1985 Insurance Code Recodification pamphlet edition)). The only three permissible exclusions in this section included intentional acts, nonpermissive use, and injury sustained while occupying an owned, but not insured, motor vehicle.

In 1986, the legislature added a significant subsection. The newly added paragraph (2)(b) states that the “provisions of this subsection do not limit the exclusions which may be contained in other types of coverage.” Utah Code Ann. § 31A-22-309(2)(b) (1986). The addition of subsection (2)(b) makes clear that 31A-22-309 only applies to personal injury protection coverage. The coverage at issue in this appeal is liability coverage. By enacting subsection (2)(b), the legislature demonstrated that it had no intention of imposing the same limitations on exclusions for liability coverage. Accordingly, the plurality in *Mastbaum* would have come to a different result with the addition of paragraph (2)(b).

In summary, there are no statutory grounds to invalidate the household exclusion. Adopting the Shoreses’ arguments would require insurers to offer more than the minimum amounts under section 31A-22-304, a position rejected by *Mastbaum*. *Mastbaum*, 748 P.2d at 1044 (“[A] statute has no effect upon insurance which it does not require.”); *Meyer v. State Farm Mut. Auto. Ins. Co.*, 689 P.2d 585, 594 (Colo. 1984) (Rovira, J., dissenting) (“[A]lthough

an insurance policy must comply with statutory requirements . . . a statute has no effect upon insurance which it does not require.”). The above arguments demonstrate that the household exclusion in the Liberty Mutual policy is supported by legislative enactments, is not contrary to public policy, and should be enforced.

C. The Household Exclusions is Consistent with the Constitutional Right to Contract.

The Utah Constitution states that “[n]o bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.” Utah Const. art. I, §18. The Utah Supreme Court has further emphasized the importance of freedom of contract and the deference courts will give to this freedom. *Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395 (Utah 1998); *Bakowski v. Mountain States Steel, Inc.*, 52 P.3d 1179 (Utah 2002). In *Bakowski*, the Utah Supreme Court held that a court cannot make a better contract for the parties than the one they made for themselves. *Bakowski*, 52 P.3d at 1185.⁷ In addition, a court will also not “avoid the contract’s plain language to achieve an ‘equitable’ result.” *Id.*⁸ Along these same lines, Utah courts have repeatedly held that an insurer is entitled to freely contract with their insureds as long as statutory requirements are met. *Allstate*, 619 P.2d at 329; *Crook*, 908 P.2d 685; *Calhoun*, 96 P.3d 916; *Speros*, 98 P.3d 28.

⁷ See also *Ryan*, 972 P.2d 395 (finding that the law enables parties to freely contract; establishing terms and allocating risks between them, and the law even permits parties to enter into unreasonable contracts or contracts leading to hardship on one party.).

⁸ See also *Utah Coal & Lumber Rest., Inc. v. Outdoor Endeavors Unlimited*, 40 P.3d 581, 584 (Utah 2001) (stating that “equitable relief should not be used to assist one in extricating himself from circumstances which he has created.”).

Consistent with the law in Utah, Liberty Mutual's household exclusion is a valid attempt to limit coverage beyond the statutory minimum limits. Both Liberty Mutual and the Shores freely contracted for the insurance services provided. The Court cannot avoid the plain language of the exclusion to fashion what it views to be a more equitable result. The household exclusion in the Liberty Mutual policy should be affirmed as a valid and enforceable provision.

D. The Household Exclusion Does Not Otherwise Contravene Public Policy.

In arguing that the household exclusion violates public policy, Mrs Shores further relies on *Farmers v. Call*, 712 P.2d 231, and *Meyer v. State Farm*, 689 P.2d 585. Brief of Appellant Burdene Shores at 40-41. These cases, however, do not support Mrs. Shores's position.

As mentioned above, the *Farmers v. Call* court invalidated a household exclusion to the extent that it did not provide the statutorily required minimum coverages set forth in the law. The *Call* court, however, "decline[d] to address . . . the validity of the household exclusion clause *in excess of the statutory minimums*." *Call*, 712 P.2d at 236 (emphasis added). Because the present case addresses coverage in excess of the statutory minimums, the holding in *Call* is irrelevant to whether Liberty Mutual's household exclusion violates public policy.

In addition, Mrs. Shores relies on *Call* to argue that Liberty Mutual's agent was required to give them substantive notice of the household exclusion liability limits for insureds. Brief of Appellant Burdene Shores at 41. This argument has specifically been rejected by the Utah appellate courts. *Allen*, 839 P.2d 798; *Moore*, 882 P.2d 1168. In *Allen v. Prudential*, the insured's child was injured when a pot of boiling water spilled on him. After the accident, the

child's father made a claim against his homeowner's insurance seeking recovery for the accidental injury of the child. The insurer denied the claim based on a household exclusion in an endorsement to the policy which excluded coverage for any insured. *Allen*, 839 P.2d at 807.

In a subsequent declaratory judgment action, the insured in *Allen* argued that the agent did not mention the household exclusion at the time the policy was sold. *Id.* at 799. The facts further showed that the policy was delivered two months after the meeting between the insured and the agent. Similar to the arguments by Mrs. Shores here, the insured in *Allen* argued that the court should invalidate the household exclusion on the grounds that the insurance policy was an adhesion contract which violated the insured's reasonable expectations of coverage.

In ruling against the insured, the Utah Supreme Court rejected all variations of the reasonable expectations doctrine under Utah law. *Id.* at 807; *Moore*, 882 P.2d at 1169; *Alf*, 850 P.2d at 1275. The Court explained that the insured's theory would essentially

allow a court to invalidate a clear provision of an insurance contract, even if the insured had not read it, if the finder of fact is convinced that the insurer's agent knew or should have known that the insured had expectations that contradicted the policy's language and that the agent created or helped to create those expectations. . . . [W]e decline to make such a change in Utah law.

Allen, 839 P.2d at 804.⁹

As in *Allen*, Mrs. Shores's argument that her reasonable expectations have not been met are unsupported by the law in Utah. The fact that Mr. Farnsworth did not mention the household

⁹The Supreme Court further rejected the insured's argument that the household exclusion was ambiguous. *Allen*, 839 P.2d at 807. The Court held that the household exclusion clearly applied to the insured's son who was injured by the spill.

exclusion at the time of the sale has no bearing on the enforcement of the provision. The Utah Supreme Court has made clear that the language of the policy takes precedent over any expectation the agent helped to create. In addition, the fact that the household exclusion is included in an endorsement does not make it invalid or ambiguous.

Next, Mrs. Shores relies upon the majority's discussion of public policy underlying the household exclusion in *Meyer v. State Farm*, 689 P.2d 585. Brief of Appellant Burdene Shores at 40-41. The *Meyer* case is a 1984 Colorado Supreme Court decision. The holding in *Meyer* that a household exclusion ran contrary to public policy was later rejected by Colorado's General Assembly. In fact, the General Assembly "legislatively repealed" *Meyer* by enacting a new section of the Colorado Revised Statutes. *Allstate Ins. Co. v. Feghali*, 814 P.2d 863, 865 (Colo. 1991) (explaining subsequent repeal of the *Meyer* decision). Colorado's General Assembly made clear that *Meyer*'s interpretation of legislative intent regarding household exclusions was flawed. *Id.*

The Supreme Court decision in *Feghali* further held that exclusions in insurance policies for "coverage of claims made by a member of a household against another member of the same household . . . are in conformity with the public policy of this state." *Id.* Moreover, the Colorado Supreme Court concluded that the inclusion of household exclusions may "serve to benefit the public." *Id.* at 866. In reaching this conclusion, the Colorado Court looked to the California courts and noted the following:

"The [California] Legislature reasonably may have concluded that the benefits *to the public* from automatically including 'family member' coverage in all automobile liability

policies were outweighed by the probable adverse consequences of such a rule. It is not unreasonable to suppose that substantial increases in premiums would be forthcoming if such coverage were declared mandatory. It may well have been a legislative concern that an increase in the costs of liability insurance might result in an appreciable increase in the number of uninsured drivers to the ultimate detriment of the general public.”

Id. (quoting *Farmers Ins. Exch. v. Cocking*, 628 P.2d 1, 4 (Cal. 1981)).

IV.

LIBERTY MUTUAL’S HOUSEHOLD EXCLUSION IS UNAMBIGUOUS AND SHOULD BE ENFORCED.

A. The Household Exclusion is Clear and Unambiguous.

The Shores also argue that Liberty Mutual’s household exclusion is ambiguous for a number of reasons. Brief of Appellant Unior Shores at 14; Brief of Appellant Burdene Shores at 32. “Whether an ambiguity exists in a contract is a question of law” for the courts to decide. *Alf*, 850 P.2d at 1274; *Cannon v. Travelers Indem. Co.*, 994 P.2d 824, 827 (Utah Ct. App. 2000). Contrary to the Shoreses’ arguments, a reading of the entire Liberty Mutual policy, including the household exclusion, reveals that it is straightforward and unambiguous.

The Utah Supreme Court has offered guidelines for determining whether an insurance provision is valid. The law holds that insurance policies are interpreted according to the rules governing ordinary contracts. *Crook*, 980 P.2d 685; *Alf*, 850 P.2d 1272. The Utah Supreme Court stated that “[c]ourts interpret words in insurance policies according to their usually accepted meanings and in light of the insurance policy as a whole. Policy terms are harmonized with the policy as a whole, and all provisions should be given effect if possible.” *Crook*, 980 P.2d at 686 (citing *Nielsen v. O’Reilly*, 848 P.2d 664 (Utah 1992)).

Insurance policies are not ambiguous “simply because one party seeks to endow them with a different interpretation according to his or her own interests.” *Alf*, 850 P.2d at 1274-75; *Saunders v. Sharp*, 840 P.2d 796 (Utah Ct. App. 1992). Ambiguity is found “‘if the terms used to express the intention of the parties may be understood to have two or more plausible meanings.’” *Alf*, 850 P.2d at 1274 (quoting *Village Inn Apartments v. State Farm Fire & Cas. Co.*, 790 P.2d 581, 583 (Utah Ct. App. 1990)). Contract terms may also be considered ambiguous if they contain “‘uncertain meanings of terms, missing terms, or other facial deficiencies.’” *Bakowski*, 52 P.3d at 1184 (quoting *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991) (quotations and other citations omitted)).

The terms found in the Liberty Mutual insurance contract contain none of these deficiencies. The policy provides liability coverage of \$100,000 each person and \$300,000 per accident. LibertyGuard Auto Policy (R.256). This coverage is modified, however, by an exclusion in an endorsement to the insurance policy which clearly states as follows: “[w]e do not provide Liability Coverage for any ‘insured’ for ‘bodily injury’ to you to the extent that the limits of liability for this coverage exceed the applicable minimum limits for liability specified by Utah Code Ann. Section 31A-22-304.” LibertyGuard Auto Policy (R.245).

This section is clear in limiting the amount of motor vehicle liability coverage to \$25,000 when an insured spouse brings a personal injury claim against his or her insured spouse for

negligence.¹⁰ The provision is clear, does not omit terms, and is not subject to multiple meanings. *Crook*, 980 P.2d 685; *Alf*, 850 P.2d 1272. Contrary to the Shoreses' arguments, the language of the policy is not obtuse and confusing. Brief of Appellant Burdene Shores at 33; Brief of Appellant Unior Shores at 28.

Mrs. Shores argues that the provision is particularly confusing to older, retired military personnel who are the target of Liberty Mutual's advertising campaign. Brief of Appellant Burdene Shores at 33. In making this argument, Mrs. Shores fails to explain why retired military people would be at a disadvantage from the rest of the population in understanding policy provisions. Logic indicates that the opposite is true: a person who has the intelligence and determination to achieve an honorable military career would likely be better equipped to read and understand technical documents.

The Shores provide no legal authority to support their position that the household exclusion is ambiguous. The Shores either make arguments that have been rejected by the courts, or they argue that the language is obtuse. Liberty Mutual has, however, cited to several opinions throughout this Brief which have enforced household exclusions with language similar to that included in the Liberty Mutual policy of insurance.¹¹ These opinions and the household

¹⁰ The Supreme Court of Tennessee recently upheld a household exclusion in an automobile policy which read, "[w]e do not provide liability Coverage for any 'insured' for 'bodily injury' to you." *Purkey v. Am. Home Assurance Co.*, 2005 WL 2402216 (Tenn. 2005)

¹¹ *Purkey*, 2005 WL 2402216; *Pribble*, 933 P.2d 1108; *State Farm Mut. Auto. Ins. Co. v. Nationwide Mut. Ins. Co.*, 516 A.2d 586 (Md. 1986); *Croyle*, 479 N.W.2d 881; *Halpin*, 823 S.W.2d; *Young*, 832 P.2d 376; *Coffman*, 884 P.2d 275; *Smalls*, 678 A.2d 32; *Burch*, 476 S.E.2d

exclusion itself demonstrate that the provision is not ambiguous, and that a person of “ordinary intelligence and understanding” could “fairly and reasonably” understand the meaning of the exclusion. *Farmers Ins. Exch. v. Versaw*, 99 P.3d 796, 797 (Utah 2004). The trial court here was correct in determining that the provision “clearly and unmistakably communicates to the insureds the circumstances under which coverage will be limited under the policy.” Order and Final Judgment at 6 (R. 438).

B. The Household Exclusion is not Ambiguous because it reduces the Stated Coverage.

The Shores argue that the household exclusion is ambiguous because it conflicts with the coverage set forth in the declarations of the Liberty Mutual policy. Brief of Appellant Burdene Shores at 32; Brief of Appellant Unior Shores at 23. This is the same argument that the insured made before the Utah Supreme Court in *Alf v. State Farm*, 850 P.2d 1272. In *Alf*, the Utah Supreme Court held that an exclusion is not ambiguous because it conflicts with the stated coverage in some way. *Id.* at 1275. The reasoning in *Alf* applies with equal force to the Shoreses’ arguments:

[T]he Alfs claim that the exclusion is inconsistent with the expected coverage and that the inconsistency creates an ambiguity in the policy. However, this logic would prevent application of any exclusion since exclusions are necessarily inconsistent with coverage. We decline to adopt a new definition of “ambiguous” that would render an exclusion invalid simply because it conflicts with the stated coverage in some way.

Id.

62; *Krause*, 589 N.W.2d 721; *Hartline*, 39 P.3d 765; *Hansen*, 565 S.E.2d 114; *Stearman*, 849 A.2d 539.

If the Shoreses' arguments on this point were adopted, every exclusion and limitation in an insurance policy would be ambiguous because they conflict with the stated coverage. The household exclusion here is a common and accepted provision applied to modify the stated coverage in the policy. The provision does not give rise to different or inconsistent meanings any more than any other policy exclusion or limitation. The law does not support the Shoreses' argument that the exclusion is ambiguous because it reduces the stated coverage.

C. The Household Exclusion is not Invalid because it Appears in an Endorsement and not in the Policy Declarations.

The Shores further argue that the household exclusion is unenforceable because it is not included in the declarations of the Liberty Mutual policy of insurance. Brief of Appellant Burdene Shores at 33-34; Brief of Appellant Unior Shores at 15. The Shores therefore contend that the household exclusion is hidden in an endorsement, and that they had no meaningful notice of the provision. *Id.*

The Wyoming Supreme Court responded to this same argument in *Pribble v. State Farm*, 933 P.2d at 1112-13. In *Pribble*, the court "approved an exclusion which did not appear on the declarations page, and found that all parts of the insurance contract require each other for complete meaning." *Id.* at 112 (citing *Martin v. Farmers Ins. Exch.*, 894 P.2d 618, 621 (Wyo. 1995)). The court further reasoned that the "Declarations Page obviously does not include the terms and conditions of the policy booklet," and that the "location of the 'household exclusion' in the policy booklet does not create any potential double meaning or ambiguity." *Id.*

The opinion of *Cotton States Mutual Insurance Co. v. Coleman*, 530 S.E.2d 229 (Ga. Ct. App. 2000), is also instructive. In that decision, the claimant argued, and the trial court agreed, that the “exclusion was ‘camouflaged’ and ‘unclear’ because it was contained in an endorsement instead of in the body of the policy.” *Id.* at 230. The Georgia appellate court held that the trial court decision was without merit, and that every insurance contract is to be “‘construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any rider, endorsement, or application made a part of the policy.’” *Id.* at 231 (citation omitted). The court further stated that these “forms constitute the entire policy, including the declarations portion which is also identified.” *Id.*¹²

The alternative would place every insurer writing an insurance contract under a duty to predict what terms an insured arbitrarily deems so essential that they must appear on page one rather than page twenty-two. A review of the Liberty Mutual policy shows that there are many exclusions and limitations included in the policy that are not part of the declarations. It is not practical to mention each of these in the policy declarations, and it would diminish the significance of the declarations pages.

The above rulings from Wyoming and Georgia are consistent with the law in Utah. The Utah Supreme Court held that “[p]olicy terms are harmonized with the policy as a whole, and all provisions should be given effect.” *Crook*, 980 P.2d at 686. As mentioned before, the Utah

¹²“An insured who can read is required to read the policy and is presumed to have understood its contents.” *Coleman*, 530 S.E.2d at 231.

Supreme Court previously validated a household exclusion in a homeowner's policy even though the exclusion was in an endorsement attached to the policy. *Allen*, 839 P.2d 798. As in *Coleman* and *Pribble*, the fact that the household exclusion in the Liberty Mutual policy is in an endorsement as opposed to the declarations does not mean that it is camouflaged and unclear: All parts of the Liberty Mutual policy require each other for complete meaning. The policy should be considered as a whole rather than isolating select provisions.

To this end, the Liberty Mutual policy makes clear that it is to be read in its entirety. For example, the cover letter to the policy states as follows: "Please read your policy and each endorsement carefully." LibertyGuard Auto Policy (R.271). Page one of the policy under "agreement" also states that the agreement is "subject to all terms of this policy." *Id.* (R.269). In addition, the Endorsement in question states that "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY." *Id.* (R. 245). Finally, the declarations pages refer to the Endorsements to the policy, including the Endorsement containing the household exclusion. *Id.* (R.255).

For these reasons, the Court should decline to accept the Shoreses' argument that the household exclusion is unenforceable because it is not included in the declarations. The case law holds that the household exclusion is not invalid because it appears in an endorsement. The policy itself also shows that all provisions of the policy are to be read and considered. Accordingly, the household exclusion should be enforced in this case.

V.

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING
MRS. SHORES'S RULE 56(f) MOTION FOR A CONTINUANCE TO
CONDUCT ADDITIONAL DISCOVERY.**

The Shores finally argue that the trial court improperly refused to allow them to conduct discovery under Rule 56(f) of the Utah Rules of Civil Procedure before ruling on Liberty Mutual's motion for summary judgment on the declaratory judgment action. Brief of Appellant Burdene Shores at 46-47; Brief of Appellant Unior Shores at 30-31. Contrary to the Shoreses' arguments, the trial court was correct in denying Mrs. Shores's Rule 56(f) motion for several reasons.

First, the Shores failed to follow the proper procedure in bringing a Rule 56(f) motion and requesting a continuance. Mrs. Shores raised the motion for the first time at the hearing on Liberty Mutual's motion for summary judgment, even though Liberty Mutual filed its motion several months before the hearing. Order and Final Judgment at 2 (R.442); Transcript of Hearing dated 12/10/04 at 2-3.¹³ Rule 56(f) permits a party to request the continuance of a court's consideration of a motion for summary judgment to allow the party to conduct further discovery, if the party can demonstrate the need for an extension of time. Utah R. Civ. P. 56(f). To this end, Rule 56(f) requires the movant to "file an affidavit to preserve his or her contention that summary judgment should be delayed" and to "explain how the requested continuance will aid his or her opposition to summary judgment." *Sandy City v. Salt Lake County*, 794 P.2d 482, 488

¹³ The hearing transcript improperly identifies Mr. Rice, Counsel for Liberty Mutual, as making the Rule 56(f) motion where it should be Mr. Whitmer.

(Utah Ct. App. 1990) (citation omitted). The Shores failed to follow this procedure and provide an affidavit to preserve their contention, or one that contained an explanation as to why the Shores could not “present by affidavit facts essential to justify [their] opposition.” For this reason alone, the Rule 56(f) motion was properly denied.

Second, no amount of discovery would have enabled the Shores to defeat Liberty Mutual’s motion on the declaratory judgment claims. The central and material issue before the trial court was whether the household exclusion is a valid and enforceable provision under the law in Utah. The trial court correctly ruled that this was a legal issue to be decided by the court. Order and Final Judgment at 7 (R.437); *Speros*, 98 P.3d at 30 (“In reviewing coverage issues, we interpret the language of the . . . auto insurance policy in light of the requirements of Utah’s motor vehicle insurance statutes [T]his review turns on questions of law”); *Cannon*, 994 P.2d at 827.¹⁴ In fact, the trial court disregarded all affidavits in deciding the legal issue presented. Order and Final Judgment at 7 (R.437). In setting aside these affidavits, the trial court determined that the Shoreses’ allegations of misrepresentation and unfair marketing practices related to Mr. Shores’s bad faith counterclaim, and that a decision on the counterclaim was not before the Court. Transcript of Hearing dated 12/10/04 at 48-54.

The law provides that a motion for summary judgment can only be defeated by issues that are material to the case. Utah R. Civ. P. 56(c). The question of Liberty Mutual’s marketing

¹⁴ *Cannon* held that insurance policies are merely ordinary contracts. Whether a contract is ambiguous is a question of law. If a contract is determined to be unambiguous, its interpretation is also a question of law.

practices is immaterial to the legal question of whether the household exclusion is a valid and enforceable provision. Although the trial court did not consider it, the Affidavit of Liberty Mutual's insurance agent, Ryan Farnsworth, showed that Liberty Mutual teamed up with The Retired Enlistment Association to send direct mailers to its members. Affidavit of Ryan Farnsworth at 2 (R.387); Liberty Mutual Mailer (R.383). Mr. and Mrs. Shores received one of these direct mailers which explained that members of the Association could receive a savings on their automobile and homeowners insurance with Liberty Mutual. *Id.*

There is nothing wrong or illegal about this marketing practice. In this Appeal, the Shores have failed to show why members of The Retired Enlistment Association would be more trusting or confused than the rest of the population, or why retired military people would be at a disadvantage in understanding policy provisions. Furthermore, the Shores fail to provide any support for their contention that Liberty Mutual took advantage of any heightened trust or confusion by members of this organization. The Shoreses' arguments in this regard are nothing but conjecture unsupported by the evidence. *Webster v. Sill*, 675 P.2d 1170 (Utah 1983).

The third reason that the Rule 56(f) motion was properly denied is that there were no misrepresentations made as the Shores contend. Mrs. Shores alleges that Liberty Mutual's agent falsely represented to them that their coverage under the Liberty Mutual policy would be similar to the coverage provided under their current insurance with MetLife. Brief of Appellant Burdene Shores at 44. Even assuming that these statements were made, the representation would have been accurate because the coverages were \$100,000 per person and \$300,000 per accident: the

same in both policies. LibertyGuard Auto Policy (R.256); Metlife Auto Insurance Policy (R.352).

More importantly, the MetLife policy also includes a family exclusion similar to the household exclusion in the Liberty Mutual policy. Metlife Auto Insurance Policy (R.343, 349). This family exclusion provides that there is no bodily injury coverage “to you or any person related to an insured by blood, marriage, or adoption who resides in the same household.” *Id.* Assuming this provision applied to the Shoreses’ accident, the result would be the same as with the Liberty Mutual household exclusion: the exclusion would not permit Mrs. Shores to recover \$100,000 in liability coverage due to her husband’s negligence in causing the accident. Consequently, there is no misrepresentation by Mr. Farnsworth because the coverages, including the household exclusion, would have been the same. As such, no genuine issue exists as to whether the agent misrepresented the terms of the Liberty Mutual policy. *Webster*, 675 P.2d at 1172 (“The mere assertion that an issue of fact exists without a proper evidentiary foundation to support that assertion is insufficient to preclude the granting of a summary judgment motion.”)

A fourth reason that the Rule 56(f) motion should have been denied is that the law in Utah does not impose upon an insurance agent the duties of disclosure that the Shores are arguing in this appeal. As mentioned previously in this Brief, any argument that the insurance agent had a duty to disclose the household provision has been declined by the Utah Appellate Courts. *Allen*, 839 P.2d 798; *Moore*, 882 P.2d 1168. In *Allen v. Prudential*, the insurer denied the claim based on a household exclusion in an endorsement to the policy. *Id.* at 807. In a

subsequent declaratory judgment action, the insured argued that the court should invalidate the household exclusion because the agent did not mention it at the time the policy was sold. *Id.* at 799. In ruling against the insured, the Utah Supreme Court explained that it would not “allow a court to invalidate a clear provision of an insurance contract.” *Allen*, 882 P.2d at 804.

The fact that Mr. Farnsworth did not mention the household exclusion at the time of the sale has no bearing on the enforcement of the provision. Such a finding would require an agent at the time of sale to review every exclusion in an insurance policy: an unreasonable and overly burdensome request.

Finally, the Shores allegations of non-disclosure and misrepresentation are further undermined by the fact that the Liberty Mutual policy of insurance was delivered to them shortly after it became effective on January 12, 2003. Affidavit of Ryan Farnsworth at 3 (R. 386). The Shores admit that they received the policy on or after January 16, 2003. Answer and Counterclaim at 3 (R.78). The insureds then had an obligation to review the insuring contract. *Coleman*, 530 S.E.2d at 231 (“An insured who can read is required to read the policy and is presumed to have understood its contents.”); *see also Allen*, 882 P.2d 798. If the insureds then believed that there were any misrepresentations or misunderstandings, that issue could have been addressed upon review of the policy. At no time after the policy was delivered did the Shores contact Liberty Mutual with any questions or concerns about any of its provisions. Affidavit of Ryan Farnsworth at 3-4 (R. 386-87). The accident giving rise to this case happened nearly eight months after the Shores received the policy. Amended Complaint at 2 (R.17).

Based on the above, the Shores cannot now contend that an exclusion is invalid because it wasn't disclosed by the insurance agent at the time of sale. The Shores had an obligation to review the Liberty Mutual policy and a court cannot invalidate a clear provision even where the insureds failed to read it. The record of this case demonstrates that the trial court properly exercised its discretion in denying Mrs. Shores's Rule 56(f) motion for a continuance to permit Mrs. Shores to conduct further discovery.

CONCLUSION

Based on the foregoing, Plaintiff and Appellee, Liberty Mutual Insurance Company, respectfully requests that the Utah Court of Appeals affirm the Order and Final Judgment of the trial court dismissing Defendant Burdene Shores's counterclaim of bad faith, affirm the Order and Final Judgment of the trial court granting Liberty Mutual's motion for summary judgment on its declaratory judgment action, and affirm the trial court's decision denying Defendant Burdene Shores's Rule 56(f) motion for a continuance to conduct further discovery. Liberty Mutual further requests that the appeal of Unior and Burdene Shores be dismissed.

DATED this 26 day of October, 2005.


MORGAN, MINNOCK, RICE & JAMES, L.C.

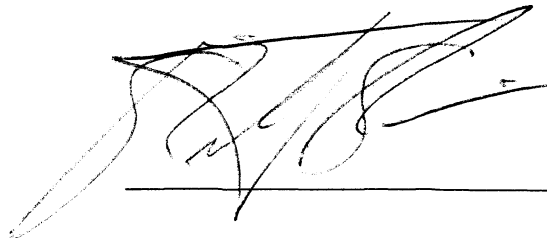
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CERTIFICATE OF MAILING

I hereby certify that on this 26 day of October, 2005, I caused two (2) true and correct copies of the foregoing **Brief of Appellee** to be mailed via first-class mail, postage prepaid, to the following:

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A handwritten signature in black ink, appearing to be "R. Ady", is written over a horizontal line.