

2012 IL App (2d) 120433-U
No. 2-12-0433
Order filed December 24, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

UESCO INDUSTRIES, INC.,)	Appeal from the Circuit Court
)	of Lake County.
Plaintiff-Appellant,)	
)	
v.)	No. 11-MR-2036
)	
CONTINENTAL CASUALTY COMPANY)	
and TRANSPORTATION INSURANCE)	
COMPANY,)	
)	
Defendants-Appellees)	Honorable
)	Jorge L. Ortiz,
(Poolman of Wisconsin, Inc.-Defendant).)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶1 *Held:* The trial court abused its discretion in granting defendant’s motion to dismiss the suit pursuant to section 2-619(a)(3) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(3) (West 2010)); although another action was pending in federal court, the tort claimant did not have substantially similar interests to the insured such that they could be considered the “same parties” under the statute. Therefore, we reversed and remanded.

¶ 2 Plaintiff, Uesco Industries, Inc. (Uesco), appeals from the trial court’s order granting the motion to dismiss filed by defendants, Continental Casualty Company and Transportation Insurance Company (collectively Insurers), pursuant to section 2-619(a)(3) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(3) (West 2010)). The trial court found that a federal court action between Insurers and their insured, defendant Poolman of Wisconsin, Inc. (Poolman), involved the “same cause” and the “same parties,” and that consideration of additional factors also warranted the dismissal. Uesco argues that the trial court abused its discretion in granting the motion, because Uesco was not a party to the federal action and did not have sufficiently similar interests to Poolman’s. We agree and therefore reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 In 2009, Uesco filed a class action against Poolman in the circuit court of Cook County. Uesco alleged that Poolman violated the Telephone Consumer Protection Act (47 U.S.C. § 227 (2006)) by sending it an unsolicited junk fax advertisement on March 16, 2006, and also sending the advertisement to over 39 others. Uesco additionally asserted a cause of action for common law conversion, similarly based on unsolicited faxes.

¶ 5 Insurers had issued Poolman three commercial general liability insurance policies covering various policy periods. Insurers agreed to defend Poolman in the Cook County suit subject to a reservation of rights. On November 14, 2011, Insurers filed a declaratory judgment action against Poolman in Wisconsin federal court. They sought a declaration that they did not have a duty to defend or indemnify Poolman in the underlying suit.

¶ 6 Three days later, on November 17, 2011, Uesco filed the instant action in Lake County against Insurers and Poolman. It sought a declaration that pursuant to the insurance policies, Insurers

had a duty to defend and indemnify Poolman in the underlying suit. Poolman did not file an appearance or answer in the Lake County action.

¶ 7 On December 16, 2011, Insurers filed a motion to dismiss or stay the Lake County suit. They argued that the case should be dismissed pursuant to section 2-619(a)(3) because they had previously filed another action in federal court involving the “same parties” and seeking a determination of the “same cause.” Insurers argued that dismissal was also warranted under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)) on the grounds that Uesco did not have standing to seek a declaration of coverage under the policies because its claim against them was not ripe. Insurers claimed that there was no justiciable case or controversy between them and Uesco because Insurers had not denied Poolman coverage but rather had agreed to defend it under a reservation of rights, and because no judgment or settlement had been entered against Poolman in the underlying suit. As an alternative to dismissal, Insurers sought a stay of the case pending resolution of the federal suit.

¶ 8 Uesco filed a response to Insurers’ motion to dismiss on February 2, 2012. It argued that a section 2-619(a)(3) dismissal was not warranted because there was no other action pending against the same parties for the same cause, as Uesco was not a party to the federal suit. Uesco argued that dismissal was also not warranted under section 2-619(a)(9) because it had a ripe, justiciable claim for declaratory relief. Uesco argued that although Insurers were defending Poolman pursuant to two of its policies, they had also disclaimed coverage entirely and refused to defend Poolman under a third policy. According to Uesco, the federal district court action showed that there was an actual controversy between Insurers and Poolman, and Uesco asserted that it had a substantial interest in the determination of available insurance coverage.

¶ 9 The trial court issued its ruling on April 11, 2012. The trial court granted in part and denied in part Insurers' motion to dismiss under section 2-619(a)(9). It found that Uesco had standing to pursue a declaratory judgment action against Insurers on matters pertaining to the duty to defend Poolman in the underlying action, and that such action was ripe for judicial determination. In contrast, it found that the issue of Insurers' duty to indemnify Poolman in the underlying action was not ripe because there had been no adjudication of liability against Poolman in that action.

¶ 10 The trial court further granted Insurers' motion to dismiss under section 2-619(a)(3), which was brought on the basis that there was "another action pending between the same parties for the same cause." We summarize the trial court's findings. The "same parties" requirement did not mean that the parties had to be identical, and it was enough if the litigants' interests were sufficiently similar. While Uesco and Poolman were not identical parties, they were the same parties for the purpose of section 2-619(a)(3) because their interests were sufficiently similar, in that they both had an interest in the validity of the insurance policies in question and in having Insurers provide a defense and coverage for Poolman in the underlying action. The "same cause" requirement was satisfied where both causes were based on substantially the same facts or issues. Here, both cases were unquestionably based on the same issues, those being whether Insurers had a duty to defend and indemnify Poolman in the underlying action pursuant to the three insurance policies in question.

¶ 11 The trial court stated that a court must consider four factors in deciding whether a stay or dismissal of an action is appropriate under section 2-619(a)(3): comity; the prevention of multiplicity, vexation, and harassment; the likelihood of obtaining complete relief in the foreign jurisdiction; and the *res judicata* effect of a foreign judgment in the local forum. Poolman was a Wisconsin corporation, the insurance policies in question were issued and delivered in Wisconsin,

and Wisconsin law applied to the coverage issues in the case. The Wisconsin federal court had a substantial interest in the litigation based on Poolman being a Wisconsin resident. The prevention of multiplicity of actions also weighed in favor of granting a stay or dismissal of the action because otherwise there was a danger of inconsistent results. Complete relief regarding all issues could be resolved in the federal action, and Uesco was not a necessary party in that action under the Federal Rules of Civil Procedure.

¶ 12 The trial court additionally stated that Insurers claimed that Uesco brought the instant action for a vexatious or harassing purpose, as none of the parties resided in Lake County and the action was filed three days after the federal action. This claim was not established to the court's satisfaction, but maintaining the action would cause undo inconvenience and expense to Insurers where the very relief all parties sought in the instant action could be afforded in Wisconsin, which had a more significant interest in the litigation, as opposed to Lake County, Illinois, where no party had a connection. The interests of judicial economy would also be served by a stay or dismissal of the action. The court had considered the *res judicata* effect of a federal judgment, and it was mindful that under Illinois public policy, underlying claimants had a substantial interest in how insurance questions were resolved. Still, under the facts of the case, where the underlying claimants' interest and the insured's interest were the same, and where the coverage action had a more legitimate and substantial relation to Wisconsin and the Wisconsin federal court forum, and in the exercise of the court's discretion, it found that the dismissal of the instant action was warranted under section 2-619(a)(3).

¶ 13 Uesco timely appealed.

¶ 14

II. ANALYSIS

¶ 15 On appeal, Uesco challenges the trial court's grant of Insurers' motion to dismiss under section 2-619(a)(3). We start by addressing the applicable standard of review, which the parties dispute. A section 2-619 motion to dismiss admits a complaint's legal sufficiency but asserts an affirmative matter outside the complaint that defeats the claim. *Patrick Engineering, Inc., v. City of Naperville*, 2012 IL 113148, ¶ 31. Uesco cites to numerous supreme court cases stating that we review dismissals under section 2-619 *de novo*. See, e.g., *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55; *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003). However, when a party brings a motion under section 2-619(a)(3) specifically, the trial court has the discretion to determine whether a dismissal is warranted. *Workforce Solutions v. Urban Services of America, Inc.*, 2012 IL App (1st) 111410, ¶ 74. Section 2-619(a)(3) allows a dismissal if there is "another action pending between the same parties for the same cause" (735 ILCS 5/2-619(a)(3) (West 2010)), so its purpose is to avoid duplicative litigation (*Performance Network Solutions, Inc. v. Cyberklix US, Inc.*, 2012 IL App (1st) 110137, ¶ 27). "A section 2-619(a)(3) motion to dismiss is inherently procedural and urges the trial court to weigh several factors when deciding whether it is appropriate for the action to proceed." *Id.* Accordingly, a trial court's decision to dismiss under section 2-619(a)(3) will not be disturbed absent an abuse of discretion. *Id.* An abuse of discretion occurs when a ruling is arbitrary, fanciful, or unreasonable. *Id.*

¶ 16 Uesco argues that we may not rely on appellate court decisions to disregard our supreme court's pronouncements that are on point. See *People v. Artis*, 232 Ill. 2d 156, 164 (2009) (supreme court decisions are binding on all lower courts, and the appellate court lacks the authority to overrule them). Uesco maintains that we therefore must apply *de novo* review to all dismissals under section 2-619. We disagree with Uesco that the cases it cites are directly on point, as they deal with section

2-619 motions in general, which are largely reviewed *de novo*. As explained, however, motions to dismiss brought specifically under section 2-619(a)(3) are unique in that they require the trial court to exercise discretion in determining whether to dismiss a claim, correspondingly implicating a deferential standard of review. See also *Hastings Mutual Insurance Co. v. Ultimate Backyard, LLC*, 2012 IL App (1st) 101751, ¶ 22 (while we generally review motions to dismiss *de novo* because they usually do not require the trial court to determine credibility or weigh facts, section 2-619(a)(3) motions are different because they require the trial court to weigh several factors in making its determination, so we review such motions for an abuse of discretion). Our supreme court itself has consistently applied an abuse-of-discretion standard when reviewing section 2-619(a)(3) dismissals, clearly justifying the application of this standard here. See *Zurich Insurance Co. v. Baxter International, Inc.*, 173 Ill. 2d 235, 244 (1996); *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 447-48 (1986).

¶ 17 Turning to the merits, as mentioned, a section 2-619(a)(3) motion allows a defendant to move for a dismissal or stay where there is “another action pending between the same parties for the same cause.” 735 ILCS 5/2-619(a)(3) (West 2010). The movant has the burden of providing clear and convincing evidence that the action is between the same parties and involves the same cause. *Performance Network Solutions*, 2012 IL App (1st) 110137, ¶ 29.

¶ 18 “Although the purpose of the law is to avoid duplicative litigation, a circuit court is not automatically required to dismiss or stay a proceeding under section 2-619(a)(3) even when the ‘same cause’ and ‘same parties’ requirements are met.” *Zurich*, 173 Ill.2d at 243. Instead, in its discretion, the trial court should consider the following four additional factors: (1) comity; (2) the prevention of multiplicity, vexation, and harassment; (3) the likelihood of obtaining complete relief

in the foreign jurisdiction; and (4) the *res judicata* effect of a foreign judgment in the local forum. *Performance Network Solutions*, 2012 IL App (1st) 110137, ¶ 33. Not all of these factors apply to each case, and the trial court may also, in its discretion, consider other factors. *Van Der Hoening v. Board of Trustees*, 2012 IL App (1st) 111531, ¶ 25. The trial court should also weigh the policy of avoiding duplicative litigation against the possible prejudice to the plaintiff if it grants the motion. *Id.*

¶ 19 Returning to section 2-619(a)(3)'s "same cause" and "same parties" requirements, actions involve the "same cause" where "the relief requested is based on substantially the same set of facts." *Combined Insurance Company of America v. Certain Underwriters at Lloyd's London*, 356 Ill. App. 3d 749, 753 (2005). Uesco does not directly contest the trial court's finding that the two cases involve the same cause, in that both seek to determine whether Insurers have a duty to defend and indemnify Poolman in the underlying Cook County suit. Rather, Uesco challenges the trial court's finding that the cases involve the "same parties." It is undisputed that the parties to the two actions are not identical, as Uesco is not a party to the federal suit. However, parties need not be identical to satisfy the "same parties" requirement, as the requirement is satisfied if the parties have sufficiently similar interests, regardless of whether the litigants differ in name or number. *Id.* at 754.

¶ 20 Insurers argue that Uesco and Poolman have the same interests, as they both have an interest in the validity of Poolman's insurance policies and in having Insurers provide a defense and coverage for Poolman in the underlying action.

¶ 21 Uesco argues that the mere fact that it and Poolman "could have" an interest in the availability of insurance coverage under the policies is not sufficient. Uesco points out that it is not an alter ego, an assignee, or otherwise in privity with Poolman. Uesco argues that it is engaged in

an adversarial litigation posture with Poolman, so Poolman does not and cannot represent Uesco's interests in connection with a coverage action.

¶ 22 Uesco cites *Zurich Insurance Co.*, 173 Ill. 2d 235, and *Hapag-Lloyd (America), Inc. v. Home Insurance Co.*, 312 Ill. App. 3d 1087 (2000). In the first case, Zurich issued comprehensive general liability insurance policies to Baxter. Baxter was sued by hemophiliacs alleging that Baxter supplied them with blood factor concentrates contaminated by HIV. *Id.* at 238. Zurich sought a declaration in Illinois that it had no duty to defend or indemnify Baxter for the hemophiliacs' claims under the insurance policies. Baxter subsequently filed an action in California for a declaration to the contrary. *Id.* at 239. In the Illinois case, the trial court raised the issue of the joinder of the underlying tort claimants, and Zurich filed an amended complaint naming Illinois claimants and seeking a declaratory judgment as to those claimants. *Id.* at 240-41. Baxter moved to dismiss the claim under section 2-619(a)(3), arguing that the Illinois action was less comprehensive than the California action, and the trial court granted a stay. *Id.* at 241.

¶ 23 The supreme court stated as follows. The case was, "in every way, an Illinois dispute," as both companies were headquartered in Illinois, Baxter's risk management department was in Illinois, the policies were negotiated and signed in Illinois, and the policies were governed by Illinois law. *Id.* at 244. Circumstances indicated that Baxter filed the California case based on a retaliatory motive. *Id.* at 244-45. Moreover, under California law, underlying tort claimants were not necessary parties when an insurance company brought a declaratory judgment action against its insured to determine the company's obligations under an insurance policy. Baxter argued that, in contrast, Illinois law required that the underlying tort claimants be joined for the declaratory judgment action to proceed. *Id.* at 245. Zurich had waived the issue of compulsory joinder, but even if the court

agreed that such claimants must be joined, it did not agree that this factor would favor the California action. *Id.* The court stated:

“If Baxter’s interpretation is correct, Illinois law evinces a recognition that the underlying claimants have a substantial interest in how insurance coverage questions are resolved. It also reflects a belief that this interest is best protected by having the claimants participate directly in the litigation between the insurance carrier and the insured, rather than by allowing the claimants to sue the carrier independently, as is apparently the practice in California. Accordingly, if Baxter’s construction of the law is correct, the fact that the claimants will be excluded from the coverage litigation in California is not reason to defer to the California courts. It is a reason to insist that the Illinois action be allowed to proceed in the courts of Illinois. Litigants such as Baxter should not be permitted to invoke section 2-619(a)(3) of the Code as a means for evading this state’s public policy.” *Id.* at 246.

The supreme court further stated that while the California action had only three parties, namely Zurich, Baxter, and another of Baxter’s insurers, the Illinois action included in addition to those parties over 100 excess insurers and dozens of underlying claimants. *Id.* at 246. In this manner, the Illinois action was more comprehensive than the California action, and it would be just as conclusive. *Id.* at 247. For all of these reasons, the supreme court held that the trial court’s entry of a stay constituted an abuse of discretion. *Id.*

¶ 24 In *Hapag-Lloyd*, the other case cited by Uesco, plaintiff Hapag Lloyd was found jointly and severally liable with another party, Three I Truck Line (Three I), in an underlying tort action. *Hapag-Lloyd*, 312 Ill. App. 3d at 1089-90. Hapag Lloyd and Three I were covered by insurance policies issued by three companies, one of which was Home Insurance Company (Home). *Id.* at

1089. Home filed a suit against Three I in federal district court in Illinois seeking a declaration that it was not required to indemnify Three I because Three I failed to provide timely notice of the claim. *Id.* at 1090. Hapag Lloyd subsequently filed suit in state court, seeking a declaration that the policies issued by all of the insurers provided coverage for the adverse judgment against it and Three I. *Id.* at 1089-90. Home and Three I moved to stay or dismiss Hapag-Lloyd's complaint under section 2-619(a)(3) based on the federal suit, and the trial court granted the motion. *Id.* at 1090.

¶ 25 The appellate court stated as follows. The trial court correctly found that the "same cause" requirement had been met, because both suits arose out of the same transaction or occurrence, regardless of whether Hapag-Lloyd made additional claims in the state suit. *Id.* at 1095-96. However, on the issue of whether the actions involved the same parties, "[i]t is Illinois public policy that underlying claimants have a substantial interest in how insurance questions are resolved." *Id.* at 1094. Our supreme court found in *Zurich* that the interest is best protected by allowing claimants to participate directly in the suit between the insurer and the insured. Thus, if Hapag-Lloyd was not a necessary party to the federal suit regarding insurance coverage, it was not a reason to defer to the federal court, but rather reason to allow the Illinois action to proceed. "Home and Three I [were] not allowed to use section 2-619(a)(3) relief as a means to sidestep Illinois public policy." *Id.* Under Illinois case law, the insured party could not adequately represent a judgment creditor's interests. *Id.* Hapag-Lloyd was a necessary and independent party to the Illinois action, a status which could not be represented by Three I. Accordingly, the trial court abused its discretion when it found that Hapag-Lloyd to be the "same party" as Three I with "sufficiently similar" interests. *Id.* at 1095.

¶ 26 Uesco additionally cites two circuit court cases which we do not discuss, as circuit court decisions are not precedential. *Delgado v. Board of Election Commissioners*, 224 Ill. 2d 481, 488 (2007).

¶ 27 Insurers argue that the cases relied on by Uesco do not address whether an insured can adequately represent the injured party's interest under the type of situation here, where the coverage dispute is essentially a Wisconsin dispute governed by Wisconsin law, where the insured is a named defendant in both actions but only appeared as a party in the first-filed action, and where a judgment has not been rendered against the insured in the underlying suit.

¶ 28 Insurers maintain that *Hapag-Lloyd* is distinguishable because there the court found that the first-filed suit was less comprehensive, since it was brought by only one insurer against one of the adversarial defendants, and because the two suits did not involve parties with substantially similar interests. Insurers argue that the court did not dismiss the first-filed suit on the grounds that the insured tortfeasor cannot adequately represent the claimant's interest, as Uesco contends, but instead because the same parties criterion was not satisfied where both adversarial defendants were not named in both actions, and both defendants and their insurers were named only in the second-filed suit. Insurers argue that here, in contrast, there is only one adversarial defendant-Poolman-who has only appeared in the federal action. According to Insurers, its federal suit is the more appropriate one under *Hapag-Lloyd* because it is the only suit involving the adversarial defendant.

¶ 29 Insurers argue that *Zurich*, the other case relied on by Uesco, actually compels the dismissal of the Lake County action. Insurers maintain that just as that court found that the case was, "in every way, an Illinois dispute" (*Zurich*, 173 Ill. 2d at 244), this case is a Wisconsin dispute in that Poolman

is a Wisconsin company, the insurance policies were negotiated and issued in Wisconsin, and the coverage issues will be decided under Wisconsin law.

¶ 30 Insurers additionally cite an unpublished appellate decision from New Jersey, but this decision is not precedential, and we do not consider it. See *Napleton v. Great Lakes Bank, N.A.*, 408 Ill. App. 3d 448, 453 (2011); *Guido v. Duane Morris LLP*, 995 A.2d 844, 851 n.4 (N.J. 2010) (New Jersey court rules reject the use of unpublished decisions as precedent).

¶ 31 We conclude that the trial court abused its discretion in granting Insurer's section 2-619(a)(3) motion to dismiss. As we explain below, Illinois public policy requires that underlying tort claimants be joined as necessary parties when an insurance company brings a declaratory judgment action against its insured to determine the company's obligations under an insurance policy. Therefore, Uesco cannot be said to have substantially similar interests to Poolman such that it can be considered the same party in the federal action.

¶ 32 We recognize that in *Zurich*, our supreme court relied on waiver when accepting Baxter's position that underlying tort claimants must be joined in declaratory judgment actions to determine insurance coverage. *Zurich*, 173 Ill. 2d at 245. Still, our supreme court had held just as much in a prior case, *M.F.A. Mutual Insurance Co. v. Cheek*, 66 Ill. 2d 492, 502 (1977), and it has been restated in many appellate court decisions. See, e.g., *American Country Insurance Co.*, 339 Ill. App. 3d 835, 841 (2003); *Hapag-Lloyd*, 312 Ill. App. 3d at 1094; *Western States Insurance Co. v. Weller*, 299 Ill. App. 3d 317, 320 (1998). Essentially, "Illinois courts have consistently determined that the tort claimant in an underlying action is a necessary party to a declaratory judgment action brought to determine coverage for that claim." *Society of Mt. Carmel v. National Ben Franklin Insurance Co.*, 268 Ill. App. 3d 655, 661 (1994).

¶ 33 The injured party is a necessary party in such declaratory judgment suits because liability insurance is intertwined with public policy considerations, including that such policies should give the public the maximum protection possible when taking into account fairness to the insurer. *Reagor v. Travelers Insurance Co.*, 92 Ill. App. 3d 99, 102 (1980). Injured victims are the beneficiaries of liability insurance policies, giving them rights under the policies that vest at the time of the incident causing the injuries. *Id.* at 103. Thus, the victim has a substantial right in the insurance policy's viability (*Continental Casualty Co. v. Howard Hoffman & Associates*, 2011 IL App (1st) 100957, ¶ 23), as a declaration of noncoverage would eliminate a source of funds for him or her (*Skidmore v. Throgmorton*, 323 Ill. App. 3d 417, 421-22 (2001)). Accordingly, "Illinois law evinces a recognition that the underlying claimants have a substantial interest in how insurance coverage questions are resolved *** [and] that this interest is best protected by having the claimants participate directly in the litigation between the insurance carrier and the insured ***." *Zurich*, 173 Ill. 2d at 246.

¶ 34 To be sure, Uesco and Poolman have overlapping interests in a determination of coverage under the insurance policies. However, under the case law discussed above, such similarities do not exclude underlying tort claimants as necessary parties in Illinois when an insurer files suit against its insured for a declaration of coverage. See also *Chandler v. Doherty*, 299 Ill. App. 3d 797, 805 (1998) (victims may have greater motivation than insured to obtain policy coverage); *Flashner Medical Partnership v. Marketing Management, Inc.*, 189 Ill. App. 3d 45, 53-54 (1989) (tort claimants are necessary parties whose interests are not adequately represented by the insured). The trial court in the instant case acknowledged that under Illinois public policy, the underlying claimants had a substantial interest in how insurance questions were resolved. However, the trial court failed

to recognize the extent of this interest; the *Hapag-Lloyd* court held that Hapag-Lloyd's status as a necessary and independent party to the Illinois action would be jeopardized if it were represented by Three I in a federal action, "such that a violation of Illinois public policy and substantial prejudice would result." *Hapag-Lloyd*, 312 Ill. App. 3d at 1095. The appellate court therefore concluded that the trial court abused its discretion when it found Three I to be the " 'same party' " as Hapag-Lloyd based on " 'sufficiently similar' " interests. *Id.* As mentioned, Insurers attempt to distinguish *Hapag-Lloyd* on the basis that there, both adversarial defendants and all insurers were named only in the second-filed suit, whereas here, only the federal suit involves the adversarial defendant, Poolman. However, Uesco named Poolman as a defendant in this action, and it was Poolman's choice whether or not to appear. Insurers cannot escape the fact that *Hapag-Lloyd's* logic applies equally here, *i.e.*, that a party's status as a necessary and independent party to the Illinois action would be jeopardized if it were represented by another party in a different action, violating Illinois public policy and causing substantial prejudice. Thus, as in *Hapag-Lloyd*, the trial court erred in finding that Uesco could be labeled as the "same party" as Poolman based on "sufficiently similar" interests.

¶ 35 Insurers argue that Uesco was not a necessary or indispensable party to the federal action, citing *CFI of Wisconsin, Inc. v. Hartford Fire Insurance Co.*, 230 F.R.D. 552 (W.D. Wis. 2005). In *CFI*, the Wisconsin federal district court held that "when the insured institutes an action against its insurer for declaratory judgment arguing that the insurer is obligated to it them [*sic*] the insured's position protects the interests of the absent party because both parties want the policy to be viable." *Id.* at 554. However, the *CFI* court also held where an insurance company files a declaratory judgment action seeking to determine its liability for an occurrence between its insured and the

injured party (which is the situation here), the injured third-party is a necessary party because it has a substantial right in the policy's validity. *Id.* at 554. In any event, taking as true for the purposes of this appeal Insurers' position that Uesco was not a necessary party to the federal suit, our supreme court stated in *Zurich* that the fact that an underlying claimant would be "excluded from the coverage litigation" in another forum was "not a reason to defer to" that form, but rather "reason to insist that the Illinois action be allowed to proceed in the courts of Illinois." *Zurich*, 173 Ill. 2d at 246. As such, Insurers' attempt to characterize *Zurich* as a case supporting the dismissal is unavailing. Indeed, our supreme court cautioned that section 2-619(a)(3) may not be used "as a means for evading this state's public policy." As Illinois public policy demands the joinder of underlying tort claimants in declaratory judgment suits brought by insurers against their insureds, allowing dismissal under section 2-619(a)(3) in favor of a suit where the claimant is not a necessary party would be contrary to such policy.¹ As such, the trial court abused its discretion in granting Insurers' section 2-619(a)(3) motion to dismiss.

¶ 36 We further note that the trial court seemed to balance Uesco's public policy interest in participation among other factors, such as comity, the prevention of multiplicity of suits and harassment, the likelihood of obtaining complete relief in the foreign jurisdiction, and *res judicata* considerations. However, section 2-619(a)(3) on its face allows a dismissal if there is "another action pending between the *same parties* for the same cause" (emphasis added) (735 ILCS 5/2-619(a)(3) (West 2010)), and, as discussed, it is precisely because of the public policy interest that we have determined that the trial court abused its discretion in determining that Uesco could be considered the same party as Poolman. As the facts of this case failed to satisfy the "same parties"

¹We express no opinion on whether the outcome of this case would be different if Uesco was in fact a necessary party to the federal suit.

requirement, which is one of the threshold requirements of section 2-619(a)(3), we do not discuss the additional discretionary factors recited above. We also do not discuss Uesco's arguments that the trial court correctly determined that it had standing to pursue a declaratory judgment action against Insurers on the issue of their duty to defend Poolman in the underlying action, and that such action was ripe for judicial determination.²

¶ 37

III. CONCLUSION

¶ 38 For the reasons stated, we reverse the judgment of the circuit court of Lake County and remand the cause for further proceedings consistent with this order.

¶ 39 Reversed and remanded.

²Uesco states that it included this argument based on the recognition that we may affirm on any basis in the record, regardless of the trial court's reasoning. See *In re Marriage of Petrik*, 2012 IL App (2d) 110495, ¶ 33.