NOTICE
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2012 IL App (5th) 110186-U

NO. 5-11-0186

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

GOVERNMENT EMPLOYEES INSURANCE COMPANY (GEICO), Plaintiff-Appellee, v. JAMES ERWIN, Defendant-Appellant, and CHARLES BOYD, STAR CONKLIN, ROBERT CONKLIN, and PAULA CONKLIN, Defendants.	Appeal from the Circuit Court of St. Clair County. No. 08-MR-35 Honorable Stephen P. McGlynn, Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Donovan and Justice Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting declaratory judgment in favor of plaintiff because the insurance policy in issue did not cover the automobile involved in the accident that injured James Erwin.

¶ 2 Defendant, James Erwin (Erwin), appeals from a declaratory judgment entered in the circuit court of St. Clair County in favor of plaintiff, Government Employees Insurance Company, which actually was improperly named and formally substituted by order of the trial court to the correct name, GEICO. The other defendants, Charles Boyd (Boyd), the driver of the vehicle allegedly covered by plaintiff's policy, Star Conklin (Star), the owner of the

vehicle involved in the accident, and Robert Conklin (Robert) and Paula Conklin (Paula), Star's parents, with whom Star resided and who owned the insurance policy in issue, take no part in this appeal. The issues raised on appeal are (1) whether the complaint for declaratory judgment should be dismissed as untimely and (2) whether the trial court erred in entering summary judgment in favor of plaintiff. We affirm.

¶ 3 BACKGROUND

¶ 4 On April 19, 2006, Erwin was seriously injured when a car driven by Boyd struck Erwin's motorcycle. As a result of the accident, Erwin broke his neck and sustained other injuries. Boyd was driving a 1996 Chevy Cavalier. The Cavalier was owned by his girlfriend, Star, who was a passenger in the car at the time of the accident. Boyd and Star were both living with Robert and Paula at the time of the accident. Star produced an insurance card from GEICO at the scene of the accident, identifying GEICO as the insurer.

¶ 5 Robert and Paula insured vehicles with GEICO beginning in 2004. The first policy insured a 1978 Ford truck and a 1987 Dodge van. The policy was cancelled on November 19, 2004, for nonpayment. Robert and Paula's account shows that the policy was reissued or reinstated on April 19, 2005, but this time only the 1978 Ford truck was insured. After another cancellation, the 1978 Ford and the 1987 Dodge were both insured effective October 18, 2005. Over the next several years, Robert and Paula were not always current with payments to GEICO, and they let their policy lapse on more than one occasion. At times only one car was insured, and at other times two cars were insured under the policy. For example, on December 10, 2005, the 1987 Dodge van was deleted, and only the 1978 Ford truck was insured, and on January 19, 2006, the policy was again cancelled for nonpayment.

¶ 6 On January 23, 2006, the policy was reissued, with the 1978 Ford truck being the only insured vehicle. The premium amount was $242.20, and the policy was effective from January 19, 2006, through July 19, 2006. Robert made a partial payment. On January 24,

2006, Star's Chevy Cavalier was substituted for the Ford truck, and no change in premium occurred. On January 25, 2006, the 1987 Dodge van was added to the policy as an insured vehicle, and the premium increased by $119.81.

¶ 7 On February 6, 2006, the policy was again cancelled for nonpayment, and $366.01 was credited to the insureds. The automobile liability insurance policy at issue, 4023865209 (the policy), was reissued by GEICO on April 17, 2006, and had policy limits of $20,000 per person and $40,000 per accident. The premium for the reissued policy was $366.01. The two vehicles insured and identified under the policy are (1) a 1978 Ford, vehicle identification number (VIN) F15BUCA2074, and (2) a 1987 Dodge, VIN 2B4K4133HR374041. The 1996 Chevy Cavalier, VIN 1G1JC5242T7243449, is not listed on the policy.

¶ 8 On April 20, 2006, Robert contacted GEICO, requesting that Star's Cavalier, the car involved in the accident on the previous day, be added to the policy. At that time, Robert advised GEICO that Star was the sole owner of the Cavalier.

¶ 9 On April 25, 2006, GEICO responded to an inquiry from Erwin's attorney about coverage. GEICO informed the attorney that its investigation revealed that Boyd did not qualify as an insured under the policy and that the 1996 Cavalier was not an owned automobile on the date of loss. As a result, GEICO stated that it would be withdrawing from the matter.

¶ 10 On May 15, 2006, GEICO's employee, Trina Mosely, conducted a telephone interview with Robert during which Robert expressed his belief that the Cavalier was insured by GEICO at the time of the accident. On May 25, 2006, GEICO notified Robert, Paula, Boyd, and Star via letter that GEICO was denying coverage for the accident as follows:

> "The GEICO Indemnity Insurance Company will take no further action with respect to any claim which you might have against us or with respect to any claim or suit

against you, which has arisen, or may arise, out of said accident and hereby withdraws from the matter entirely. Geico Indemnity Insurance Company will not be able to defend you nor indemnify you if a suit is filed against you in this matter."

On July 28, 2006, Erwin filed suit against Star and Boyd in an underlying lawsuit, seeking damages resulting from the April 19, 2006, accident.

¶ 11 On December 17, 2007, the circuit court of St. Clair County entered a default judgment in the amount of $1,325,374 in favor of Erwin and against Star and Boyd. On January 28, 2008, Erwin's attorney obtained a garnishment summons to be issued to GEICO for collection of any property or moneys due for the indemnification of Boyd and/or Star under the policy. On February 14, 2008, GEICO filed the instant declaratory judgment action, seeking a declaration that there was no insurance coverage for the Cavalier, Boyd, or Star which were involved in the underlying action. At trial, Erwin was the only remaining defendant, as the other defendants were served, failed to appear, and defaulted in the matter. On September 8, 2009, default judgments were entered against Boyd and Star. On March 23, 2010, default judgments were entered against Robert and Paula. Erwin filed a motion to dismiss the declaratory judgment action, which motion was not ruled on.

¶ 12 The action went to trial on February 10, 2011. At trial, Vicki Mercer, a GEICO claims coverage underwriter, testified that the policy in question was "reissued," which means that there was a lapse in coverage and a new policy of insurance with new coverage dates was issued. Mercer testified that when a policy is reissued, the insureds must specify which vehicles they want insured under the reissued policy, the coverages they want, how the vehicles are used, and which drivers will be using them. A copy of the policy was introduced into evidence. Several other exhibits were also entered.

¶ 13 On March 30, 2011, the trial court entered an order in favor of GEICO, finding that the policy did not cover the April 19, 2006, accident, that neither Boyd nor Star was afforded

coverage by the policy, that GEICO had no duty to indemnify or defend pursuant to the policy, and that GEICO is not barred by equity or common law from denying coverage or indemnity based upon the manner in which the claim was handled. Erwin filed a timely notice of appeal.

¶ 14 ANALYSIS

¶ 15 I. TIMELINESS

¶ 16 The first issue we address is whether the complaint for declaratory judgment should have been dismissed as untimely. Erwin basically raises an estoppel argument, asserting that GEICO cannot raise a policy defense because it failed to timely seek a declaration of its rights and duties under the policy. We disagree.

¶ 17 An insurer that believes that there is no duty to defend or indemnify under its policy must either defend the suit under a reservation of rights or seek a declaratory judgment that there is no duty to defend. *Economy Fire & Casualty Co. v. Brumfield*, 384 Ill. App. 3d 726, 730-31, 894 N.E.2d 421, 425-26 (2008). Failing to do either results in the insurer being estopped from later raising its policy defenses to coverage. *Economy Fire & Casualty Co.*, 384 Ill. App. 3d at 730-31, 894 N.E.2d at 426. However, "[e]stoppel cannot be utilized in order to create coverage if none existed." *ISMIE Mutual Insurance Co. v. Michaelis Jackson & Associates, LLC*, 397 Ill. App. 3d 964, 974, 921 N.E.2d 1156, 1166 (2009). As we will discuss more fully below, the 1996 Cavalier was simply not covered by the policy in question.

¶ 18 Furthermore, even assuming, *arguendo*, that estoppel is a valid argument, we find that GEICO timely filed its declaratory judgment action. In *ISMIE Mutual*, we found that the insurance company's filing of a declaratory judgment action 13 months after its first notice of the underlying lawsuit was a reasonable time in which to file such an action. *ISMIE Mutual*, 397 Ill. App. 3d at 973-74, 921 N.E.2d at 1165-66. In that case, by letter dated

August 7, 2007, ISMIE informed its insured, Jackson, that its coverage pursuant to a Medicare investigation was exhausted, effectively notifying Jackson all future defense costs would be paid by Jackson. ISMIE then filed its declaratory judgment action approximately two months later on October 5, 2007. We found this delay acceptable. *ISMIE Mutual*, 397 Ill. App. 3d at 974, 921 N.E.2d at 1166.

¶ 19 In the instant case, the underlying lawsuit was filed by Erwin against Star and Boyd on July 28, 2006. On December 17, 2007, the circuit court entered a default judgment in favor of Erwin. On January 28, 2008, Erwin's attorney caused a garnishment summons to be issued to GEICO for collection of any property or moneys due for the indemnification of Boyd and/or Star. Approximately, two weeks later, on February 14, 2008, GEICO filed its declaratory judgment action. Relying on *ISMIE Mutual*, we find this two-week delay well within the reasonable time allowed for filing such actions. Accordingly, we find no merit in Erwin's argument that GEICO's complaint for declaratory judgment should have been dismissed as untimely.

¶ 20 II. MANIFEST WEIGHT

¶ 21 The second issue raised on appeal is whether the trial court's judgment in favor of GEICO was against the manifest weight of the evidence. Erwin contends that the 1996 Cavalier was an insured vehicle under the reinstated policy effective April 17, 2006. Erwin insists that when the policy was renewed or reinstated in the past, the prior terms and conditions in place at the time of cancellation were reinstated and because the Cavalier was insured at the time of the cancellation, Robert and Paula believed the Cavalier was insured on the date of reinstatement, two days prior to the accident. GEICO replies that Erwin misrepresents the evidence and that a review of the evidence shows that the trial court's determination of no coverage in this case is not against the manifest weight of the evidence. After careful consideration, we cannot say the trial court's finding of no coverage is against

the manifest weight of the evidence.

¶ 22 The parties agree that the applicable standard of review from the findings and decision of a trial court, after a bench trial, is whether such findings and decisions of the trial court are against the manifest weight of the evidence. A judgment is against the manifest weight of the evidence "only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *Best v. Best*, 223 Ill. 2d 342, 350, 860 N.E.2d 240, 245 (2006). The manifest weight standard requires us to give deference to the trial court as the finder of fact because it is in the best position to observe the demeanor of the witnesses and the parties, and we are not to substitute our judgment for that of the trial court regarding credibility issues, the weight to be given to the evidence, or the inferences drawn therefrom. *Best*, 223 Ill. 2d at 342, 860 N.E.2d at 245.

¶ 23 We agree with GEICO that Erwin's argument ignores the terms of the policy. Which vehicle or vehicles Robert and Paula believed to be insured under the reinstated policy is irrelevant. The unambiguous provisions in the policy control. Policy number 4023865209, issued on April 17, 2006, specifically states on the declarations page that the named insureds are Robert K. Conklin and Paula A. Conklin. It provides coverage for two vehicles: (1) a 1978 Ford truck and (2) a 1987 Dodge van. Star is not a named insured, and her 1996 Chevy Cavalier is not listed as a vehicle covered by the policy.

¶ 24 The policy states as follows:

> "Under Section I, we will pay damages which an **insured** becomes legally obligated to pay because of
>
> 1. **bodily injury**, sustained by a person, or
>
> 2. damage to or destruction of property,
>
> arising out of the ownership, maintenance or use of the **owned auto** or a **non-owned auto**. We will defend any suit for damages payable under the terms of this policy.

We may investigate and settle any claim or suit."

The policy then goes on to define "Persons Insured" under the policy as follows:

"**Who Is Covered**

Section I applies to the following as **insureds** with regard to an **owned auto**:

1. **you** and **your relatives**;

2. any other person using the auto with **your** permission ***."

"You and your" is defined in the definitions section as "the policyholder named in the declarations or his or her spouse if a resident of the same household." "Relative" is defined under the policy as "a person related to **you** who resides in **your** household." As previously set forth, Robert and Paula are the only two policyholders named on the declarations page. Boyd is not listed as a policyholder. Likewise, Boyd is not a relative in that he is not related to either Robert or Paula.

¶ 25 With regard to a "non-owned auto" the policy provides:

"Section I applies to the following with regard to a **non-owned auto**:

1. (a) **you**

2. (b) **your relatives** when using a **private passenger, farm** or **utility auto** or **trailer**."

Boyd does not qualify as an insured under this section of the policy because it has already been determined that he does not fall within the definition of either "you" or "your relatives" under the policy.

¶ 26 Boyd was driving a car not listed under the policy and he does not fit within any definition of an insured under the policy. Nevertheless, Erwin argues that because Robert and Paula believed the Cavalier was insured under the reissued policy, the Cavalier should be covered. As GEICO points out, Erwin fails to cite any legal authority for this proposition and fails to discuss why Robert called GEICO the day after the accident, seeking to *add* Star's

1996 Cavalier to the policy. Moreover, Robert's recorded statement in which he alleged that the Cavalier should have been on the policy is self-serving and in no way proves that GEICO made a mistake in issuing the policy, especially in light of the fact that he called GEICO requesting to add the vehicle after the accident.

¶ 27 While Erwin insists that the history of his nonpayment and reissued policies indicate that the policy was always renewed or reissued with the same vehicles being insured as the ones insured at the time of cancellation, the record does not support his assertion. First, Vicki Mercer, a GEICO claims coverage underwriter, testified at trial that when a policy is reissued, the insureds must specify which vehicles they want insured under the reissued policy. Second, Robert and Paula's account history belies Erwin's assertion. The account history, "Exhibit C", shows the original policy was issued in September 2004 and covered both a 1978 Ford truck and a 1987 Dodge Van. That policy was cancelled in November of 2004 for nonpayment. The policy was reissued on April 19, 2005; however, the reissued policy only covered the 1978 Ford truck. The 1987 Dodge van was not added until October 18, 2005. Thus, Erwin's argument is not supported by the record before us.

¶ 28 CONCLUSION

¶ 29 After careful consideration, we find that the trial court's judgment was not against the manifest weight of the evidence. The record before us supports the trial court's conclusion that neither the car nor its driver was covered by the policy. Based upon the record before us, the trial court's conclusion is neither unreasonable nor arbitrary, and Erwin has failed to convince us that the opposite conclusion was clearly evident.

¶ 30 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed.

¶ 31 Affirmed.