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2013 IL App (3d) 120646-U

Order filed June 19, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

ALLSTATE INSURANCE COMPANY,)	Appeal from the Circuit Court
)	of the 13th Judicial Circuit,
Plaintiff-Appellee,)	LaSalle County, Illinois,
)	
v.)	
)	
JOCELYN DAVIS,)	Appeal No. 3-12-0646
)	Circuit No. 11-MR-137
Defendant-Appellant)	
)	
(Paul D. Hougas and Lana Hougas,)	Honorable
)	R.J. Lannon, Jr.,
Defendants).)	Judge, Presiding.
)	

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* Summary judgment in favor of an insurer in a declaratory judgment action, finding that the insurer had no duty to defend nor indemnify its insureds under a homeowner's policy for a dog bite, was upheld on appeal. The undisputed facts indicated that coverage for the bite was excluded under the business activities exclusion in the policy.
- ¶ 2 The plaintiff, Allstate Insurance Company, filed a declaratory judgment action against the

defendants, Paul D. Hougas, Lana Hougas, and Jocelyn Davis, contending that it had no duty to defend nor indemnify Paul and Lana Hougas, its insureds under a homeowner's policy of insurance, in an action filed against them by Davis for a dog bite. The trial court granted Allstate's motion for summary judgment, and Davis appealed.

¶ 3

FACTS

¶ 4 Davis was bit by a dog owned by Paul Hougas, while visiting the Hougas home. Davis filed an action against Paul and Lana Hougas under the Illinois Animal Control Act, 510 ILCS 5/1 *et seq.* (West 2010). At the time of the injury, there was a homeowner's policy in effect, and there was no dispute that the injury occurred on the insured premises. However, Allstate contended that the loss was not covered, under the business activities exclusion in the policy. Thus, Allstate filed a declaratory judgment action, seeking a declaration that it had no duty to defend nor indemnify under the policy. Thereafter, Allstate filed a motion for summary judgment, arguing that there was no genuine issue of material fact that Davis's injury resulted from Paul Hougas's business activity, for which coverage was excluded under the policy.

¶ 5 In his deposition, Paul Hougas testified that he owned three adult Siberian Huskies, one male and two females. At the time of Davis's injury, both female dogs had puppies, 13 in total, that Paul had advertised for sale in the Chicago Sun Times for \$450 each. Both litters of puppies had been born on the insured premises, and the male dog had fathered both litters. Paul testified that he listed the puppies for sale at that price because the Sun Times charged more if there was no price listed in the advertisement.

¶ 6 Paul had engaged in a hobby called mushing for 10 years. Mushing is the term used for a person who drives dogs on a dog sled. Paul testified that he owned the thee adult dogs to pull his

sled. Both female dogs had puppies in the past. Paul testified that he had sold some of them and had given some of them away. He never claimed business losses on his tax return as a result of his mushing activities. He also never wrote off any business expenses or depreciated equipment in connection with his mushing.

¶ 7 On the day of the injury, Davis came to the Hougas home to potentially purchase a puppy. Davis looked at both litters, and was bitten by the adult male dog while doing so. Davis filed suit against Paul and Lana Hougas, under the Illinois Animal Control Act, to recover damages for the dog bite.

¶ 8 The homeowner's policy issued by Allstate had a business activities exclusion:

¶ 9 "We do not cover bodily injury or property damage arising out of the past or present business activities of an insured person" (emphasis omitted).

¶ 10 "Business" is defined as:

¶ 11 "any full or part-time activity of any kind engaged in for economic gain including the use of any part of any premises for such purposes."

¶ 12 The trial court granted summary judgment in favor of Allstate. It applied a two-factor test, and found that the injury arose out of a business activity of an insured person. Thus, it concluded that the business exclusion provision was applicable, and granted summary judgment in favor of Allstate. Davis appealed. Neither Hougas is a party to this appeal.

¶ 13 ANALYSIS

¶ 14 Davis argues that there is at least a question of material fact as to whether the injury arose from Paul Hougas's business activities, specifically, whether the sale of the puppies was intended to produce a profit or contribute to his livelihood. Allstate argues that the trial court was correct

because there was no genuine issue of material fact to preclude summary judgment.

¶ 15 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). In determining whether a genuine issue as to any material fact exists, pleadings, depositions, and admissions are construed against the party moving for summary judgment. *Williams v. Manchester*, 228 Ill. 2d 404 (2008). We review *de novo* the granting of summary judgment. *Williams*, 228 Ill. 2d at 417. The construction of insurance policy provisions is also a question of law that we review *de novo*. *State Farm Mutual Automobile Insurance Co. v. Illinois Farmers Insurance Co.*, 226 Ill. 2d 395 (2007).

¶ 16 When construing a policy, our primary function is to determine and apply the parties' intent as expressed in the written agreement. *Illinois Farmers Insurance Co. v. Keyser*, 2011 IL App (3d) 090484 (2011). If the words of the policy are unambiguous, we apply the policy language's plain and ordinary meaning. *Keyser*, 2011 IL App (3d) 090484. If the policy language is ambiguous, however, we must construe the language in favor of the insured and against the insurer, who drafted the policy. *Id.* The policy must be construed as a whole, taking into account the risk undertaken, the subject matter that is insured, and the purposes of the entire contract. *Id.*

¶ 17 In determining whether an insurance policy's business activities exclusion applies to a particular set of facts, courts in Illinois apply a two-part test: (1) was the activity regular and continuous, and (2) did the activity provide at least some portion of the insured's livelihood. *Allstate Insurance Co. v. Mathis*, 302 Ill. App. 3d 1027 (1999). Davis argues that there were

questions of fact precluding summary judgment as to both parts of the test.

¶ 18 Although Davis argued in her appellant's brief that it was far from clear that Paul Hougas's offer to sell the puppies was a part of a regular and continuous activity, the facts regarding the puppies were undisputed. Paul had been involved in mushing for at least 10 years. He kept the adult dogs in separate kennels, and had to put them together for the purpose of mating. Both female dogs had other litters previously, and the puppies had been advertised for sale in the Chicago Sun Times. He had sold or given away all of the puppies, and at least 10 puppies had been sold, for a maximum of \$400. Davis does not cite to any facts that would create a material issue as to this element.

¶ 19 Davis primarily attacks the second prong on the test, arguing that there was a material issue of fact whether Paul Hougas was motivated by a cost recovery motive rather than a profit motive with regard to the puppies. The trial court concluded that the facts only supported one conclusion: that Paul Hougas sold the puppies for profit. We agree that there was no evidence to support any other conclusion. The adult dogs, although kept in separate kennels, had a number of litters of puppies over a 10-year period. There was no evidence that Paul Hougas ever kept any of the puppies, or that the puppies were necessary for some purpose related to mushing. At the time of the incident, there were 13 puppies for sale on the premises. Since there is no genuine issue of material fact, we affirm the grant of summary judgment.

¶ 20 CONCLUSION

¶ 21 The judgment of the circuit court of LaSalle County is affirmed.

¶ 22 Affirmed.