SIXTH DIVISION
June 30, 2016

No. 1-14-3073

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GERARDO CURIAS, Plaintiff-Appellee, v. AMERICAN ACCESS CASUALTY COMPANY, Defendant-Appellant,	)	Appeal from the Circuit Court of Cook County.
	)	No. 13 CH 1361
AMERICAN ACCESS CASUALTY COMPANY, Counterplaintiff-appellant, v. GERARDO CURIAS, SAUL HERNANDEZ, SUBHAN VAHORA and TRANSPORT SERVICE CO., Counterdefendants-Appellees.	)	Honorable Mary Mikva, Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

HELD: Saul Hernandez was not a "regular operator" of the subject vehicle at the time of the accident at issue.

¶ 1 This appeal involves an auto insurance coverage dispute between American Access Casualty Company (American Access) and its insured Gerardo Curias arising out of a two-car collision. At the time of the accident, Saul Hernandez was driving the Curias vehicle, which collided with a vehicle driven by Subhan Vahora and owned by Transport Service Co. Hernandez was not a resident of the Curias household and was not named as a driver on his automobile insurance policy.

¶ 2 The primary issue on appeal is whether the evidence established that Hernandez's use of the Curias vehicle was frequent or regular enough that he became a "regular operator" of the vehicle within the meaning of the policy provisions which hold that coverage may be voided if a regular operator is driving the vehicle and is not named as a driver on the insurance application. The circuit court determined that Hernandez was not a "regular operator" of the Curias vehicle at the time of the accident. We agree and therefore affirm.

¶ 3 BACKGROUND

¶ 4 The circuit court decided this case on the basis of stipulated facts and exhibits. At all relevant times herein, Curias was a named insured under an automobile insurance policy written and issued by American Access under policy number 12AU000925377, insuring his 2009 Honda Accord. On November 18, 2012, Hernandez was operating the subject motor vehicle with Curias riding as a passenger when the vehicle collided with the vehicle driven by Subhan Vahora.

¶ 5 Curias sought coverage under the policy for property damage to his vehicle. American Access denied coverage, taking the position that Curias' failure to list Hernandez as an operator on the application for automobile insurance constituted a material misrepresentation allowing it to rescind the policy and declare it null and void from its inception. There was a provision in the application which required Curias to "List All Household Residents Age 14 and Over and Any Other operators." Curias listed only himself and his wife.

¶ 6 American Access relied on the following language found in condition 2 of the policy to rescind the policy:

> "If, at any time, the Company becomes aware of any operator residing in the insured's household, 'resident operator' or any 'regular operator' of an insured automobile, other than an excluded operator who is not named on the declaration page as a named insured or operator * * * the policy will at the Company's option be declared null and void * * * For purposes of Condition 2, * * * 'regular operator' means any person who operates an insured automobile and to whom such automobile is made available for his/her regular use."

¶ 7 American Access refused to pay the claim, arguing that Curias fraudulently failed to disclose Hernandez as a regular operator on the insurance application form. American Access canceled the policy and purportedly returned the premiums Curias had paid.

¶ 8 In response, Curias brought an action in the circuit court against American Access, seeking a declaration that he was entitled to coverage on the basis that Hernandez was only a permissive operator of the vehicle at the time of the accident. American Access filed a counterclaim against Curias, Hernandez, Vahora and Transport Service Co. seeking a declaration that the policy was null and void *ab initio* due to a material misrepresentation on Curias'

application for automobile insurance for his failure to disclose Hernandez as a regular operator of the insured vehicle and therefore the policy was properly rescinded.

¶ 9 American Access voluntarily dismissed Transport Service Co. without prejudice because the company did not make a claim against the policy and agreed to be bound by the circuit court's judgment. Subhan Vahora was also voluntarily dismissed by agreement and agreed to be bound by the court's judgment. Hernandez was defaulted for failing to file an appearance or responsive pleading.

¶ 10 Curias filed an answer to the counterclaim. American Access moved for summary judgment on its counterclaim, which was denied.

¶ 11 Prior to trial, the parties submitted an agreed statement of facts and exhibits to the court. In the agreed statement, the parties stipulated that Hernandez drives the Curias vehicle three or four times per week with Curias' permission. In a sworn statement, Curias described his relationship with Hernandez and the nature of Hernandez's use of his vehicle. Curias stated that he and Hernandez are friends and that they work together. Hernandez does not own a car. About three or four days per week, after work, Curias permits Hernandez to drive both of them from their workplace to Hernandez's house. After Hernandez is dropped off at his house, Curias then drives the rest of the way to his own home. At the time of the accident, Hernandez was driving himself and Curias from their workplace.

¶ 12 After taking the case under advisement, the circuit court entered a final order and opinion granting judgment in favor of Curias and the other counterdefendants. The court determined that Hernandez was not a "regular operator" of the Curias vehicle at the time of the accident, and therefore, there was no basis to rescind the policy. As a result, the court held that Curias was entitled to coverage under the policy.

¶ 13 American Access appeals from the circuit court's order. For the reasons that follow, we affirm.

¶ 14 ANALYSIS

¶ 15 At the outset, we note that Curias did not file an appellee's brief in this case. However, since the record is fairly simple and the issues can be decided without an appellee's brief, we will address the merits of the case. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). This appeal involves the correctness of the circuit court's construction of provisions of an automobile insurance policy.

¶ 16 The construction of the provisions of an insurance policy is a question of law subject to *de novo* review. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010). An insurance policy is a contract and therefore our primary objective is to ascertain and give effect to the intent of the parties as expressed in the language of the policy. *Hobbs v. Hartford Insurance Company if the Midwest*, 214 Ill. 2d 11, 17 (2005).

¶ 17 To ascertain the intent of the parties and the meaning of the words used in the insurance policy, the court must construe the policy as a whole, taking into account the type of insurance for which the parties have contracted, the risks undertaken and purchased, the subject matter that is insured and the purposes of the entire contract. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993). If the words in the policy are unambiguous, the court will afford them their plain, ordinary meaning, and will apply them as written. *Id*.

¶ 18 As a rule, insurance policies are liberally construed in favor of coverage. *Westfield National Insurance Co. v. Long*, 348 Ill. App. 3d 987, 990 (2004). Therefore, insurance provisions that limit or exclude coverage are liberally construed in favor of the insured and against the insurer. *National Union Fire Insurance Co. v. R. Olson Construction Contractors*,

Inc., 329 Ill. App. 3d 228, 233 (2002). An insurer has the burden of showing that a claim falls within an exclusionary provision. *American Alliance Insurance Company v. 1212 Restaurant Group*, 342 Ill. App. 3d 500, 505 (2003).

¶ 19 The dispute in this case centers on the interpretation and application of the policy's "regular operator" provision. As previously mentioned, the policy defines a "regular operator" as "any person who operates an insured automobile and to whom such automobile is made available for his/her regular use." The term "regular use" within the context of an insurance policy clause is not subject to an absolute definition and therefore we must consider its meaning based on the facts of each particular case. *American Freedom Insurance Co. v. Uriostegui*, 366 Il. App. 3d 1000, 1004 (2006). The regular use exclusion does not depend so much on actual use, but on availability. *Ryan v. State Farm Mutual Automobile Insurance Co.*, 397 Ill. App. 3d 48, 51 (2009). This exclusion denies coverage for vehicles made available for regular use by insureds. *Id*.

¶ 20 In this case, although Hernandez was driving the vehicle at the time of the accident, there is no evidence that the vehicle was regularly made available for his use. The agreed facts state that Hernandez drove himself and Curias from their workplace three or four times per week, with Curias' permission and while Curias was riding as a passenger in the vehicle. There is no evidence that Hernandez ever drove the vehicle at will or without permission or for his own purposes. Curias' unrebutted sworn statement shows that he gave Hernandez permission only to drive them part of the way from their workplace.

¶ 21 Thus, the scope of Hernandez's permission was strictly limited to driving with Curias from their workplace and there is no evidence expanding the scope of that permission, let alone furnishing the vehicle for Hernandez's sole, discretionary use. See *Knack v. Phillips*, 134 Ill.

App. 3d 117, 122 (1985) (vehicle was not available for regular use where duration of permission to use vehicle was never agreed upon, use of vehicle was for purpose of going to and from work and owner of vehicle did not regard permissive use of vehicle as anything other than temporary, casual use).

¶ 22 Accordingly, we agree with the circuit court that Hernandez was not a "regular operator" of the Curias vehicle at the time of the accident and therefore there was no basis to rescind the policy. As a result, Curias is entitled to coverage under the policy.

¶ 23 For the foregoing reasons, we affirm the order of the circuit court of Cook County.

¶ 24 Affirmed.