

No. 1-16-0538

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

DIRECT AUTO INSURANCE COMPANY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 14 CH 16992
)	
YASER ZAIDAN, DANNY RADOJEVICH, and)	
LIBERTY MUTUAL INSURANCE COMPANY,)	
a/s/o DANNY RADOJEVICH,)	Honorable
)	Mary L. Mikva,
Defendants-Appellees.)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

Held: We affirm the trial court's decision to grant summary judgment in favor of defendant Liberty Mutual Insurance Company and deny Direct Auto Insurance Company's motion for summary judgment and motion for reconsideration.

¶ 1 Plaintiff Direct Auto Insurance Company appeals the trial court's grant of summary judgment in favor of defendant Liberty Mutual Insurance Company and denial of Direct Auto's

cross-motion for summary judgment, in addition to the trial court's denial of Direct Auto's motion for reconsideration. On appeal, Direct Auto argues that the trial court erred in finding that (1) Direct Auto received adequate notice of an automobile accident to invoke coverage under its policy with the insured, defendant Yaser Zaidan, and (2) Direct Auto did not exercise reasonable diligence in obtaining the cooperation of its insured.

¶ 2

I. BACKGROUND

¶ 3

Direct Auto filed a declaratory judgment action on October 20, 2014, against defendants Yaser Zaidan, Danny Radojevich, and Liberty Mutual as subrogee of Radojevich. Direct Auto alleged that on August 24, 2013, an unknown person driving Yaser Zaidan's vehicle came into contact with a vehicle driven by Radojevich near 7400 W. Archer, Summit, in Cook County. Radojevich and his insurer Liberty Mutual made a claim for damages. Direct Auto alleged that it was first notified of the accident through a telephone call from Radojevich on August 26, 2013, and it heard nothing further until three months later, when it received a notice of attorney's lien from Radojevich's counsel on December 11, 2013. Direct Auto sought a judicial declaration that it owed no duty to defend or indemnify Yaser Zaidan because he breached his automobile insurance policy by failing to provide proper written notice of the loss and failing to cooperate with Direct Auto.

¶ 4

The Direct Auto insurance policy issued to Yaser Zaidan contained the following provisions at issue on appeal:

"PART VI-CONDITIONS

3. Notice.

A. Notice of Loss under Part I, II, III, IV, and V. As a condition precedent to coverage, within 30 days of any accident, occurrence or loss, regardless of fault, the Company must receive **written notice** containing **at least** the following information: a) The time, place and location of the loss; and b) The full name and address of each known person who occupied any

vehicle involved in the loss and/or who was present at the scene at the time of the loss; and c) The purpose of the use of the vehicle at the time of the loss; and d) The facts surrounding the loss; and e) Any other information the Company requests in order to conclude its investigation of the loss. *** Failure to provide timely, written notice of a loss will result in denial of any claim under this policy for that loss.

6. Assistance and Cooperation of the Insured. The insured shall cooperate with the Company and, upon the Company's request or through attorneys selected by the Company, provide recorded statement(s); an examination under oath; attend hearings and trials; assist in making settlements, securing and giving evidence, obtaining the attendance of the witnesses and in the conduct of any legal proceedings in connection with the subject matter of this insurance. ****"

¶ 5 Liberty Mutual and Radojevich answered the complaint. Direct Auto filed a motion for default against Yaser Zaidan for failure to appear or plead.¹ On March 5, 2015, the trial court entered an order of default against Yaser Zaidan.

¶ 6 Liberty Mutual and Direct Auto filed cross-motions for summary judgment. Direct Auto's motion was based on Yaser Zaidan's failure to notify it of the accident or cooperate with its investigation. Direct Auto asserted that the notice it received from Radojevich failed to comply with the policy's notice provision because Radojevich's telephone call on August 26, 2013, was not in writing, it received the attorney's lien from Radojevich's counsel three months after the accident, well outside the 30-day requirement, and these attempts to notify it of the claim also failed to provide all the information required under the notice provision.

¶ 7 In support of its motion, Direct Auto provided an affidavit from claims manager Mike Torello. According to Torello, Direct Auto requested a report of accident from Radojevich on August 26, 2013, when he called, and made a second request in writing on August 27, 2013, but it never received a response. Torello averred that Direct Auto also requested Yaser Zaidan's

¹ The record reflects that Direct Auto effectuated service on Yaser Zaidan at an address on 84th Place in Justice, Illinois, by special process server and filed an affidavit of special process server on December 19, 2014, which indicates that the summons and a copy of the complaint was left with Zaidan's brother "Omar" at that location.

cooperation, but he never responded. Torello testified that Direct Auto mailed Yaser Zaidan three letters: a report of accident on August 26, 2013, for his completion; a request for information on August 27, 2013; and a final letter on October 4, 2013. Torello averred that Direct Auto was unable to ascertain who was driving the insured vehicle at the time of the accident and whether this person had permission to drive the vehicle.

¶ 8 Direct Auto attached to its motion the letters to Yaser Zaidan and Radojevich. The August 26, 2013, report of accident was addressed to Yaser Zaidan at an address on West 84th Place in Justice, Illinois. It listed the date of accident and claim and policy numbers, and requested that he return the report to Direct Auto "as soon as possible." The August 27, 2013, letter to Yaser Zaidan advised that his policy required him to properly notify Direct Auto of the loss in order to receive coverage and set forth the notice provision from the policy; it requested that he provide this information within 26 days, or Direct Auto would deny the claim. Lastly, the October 4, 2013, letter from Direct Auto to Yaser Zaidan informed him that he "failed to notify us of this loss pursuant to the provisions in the policy" and it denied coverage.

¶ 9 The August 27, 2013, letter from Direct Auto to Radojevich stated that Yaser Zaidan's policy "requires that when a loss occurs he/she notifies the Company of the loss and provides written notice containing, at a minimum, certain information ***." The letter explained that "[a]s a condition precedent to coverage," Direct Auto "must receive written notice containing at least the following information within the time frame set forth in the policy." The letter set forth the notice provision requirements. The letter requested that Radojevich provide the information within 26 days or it would deny coverage.

¶ 10 Direct Auto also attached the December 11, 2013, letter and accompanying notice of attorney's lien from Radojevich's counsel, which were addressed to Yaser Zaidan and Omar

Zeidan with their addresses both listed at the West 84th Place address in Justice, Illinois. The letter indicated Radojevich had retained the law firm to pursue an action for personal injuries and property damage arising out of the August 24, 2013, accident. The enclosed notice of attorney's lien also listed both Yaser Zaidan and Omar Zeidan at the same address.

¶ 11 In Liberty Mutual's motion for summary judgment, it alleged that Yaser Zaidan's vehicle rear-ended Radojevich's vehicle on August 24, 2013, while Radojevich's vehicle was stopped at a traffic light. Liberty Mutual argued that Direct Auto took insufficient action to contact Yaser Zaidan as it merely sent him two letters and performed a LexisNexis search for his vehicle and address before sending him the denial of coverage letter on October 4, 2013. Liberty Mutual argued that anyone could give notice under Direct Auto's policy, including Radojevich, and that Direct Auto did not strictly adhere to the writing requirement. Liberty Mutual asserted that Direct Auto also failed to show that it was substantially prejudiced by Zaidan's failure to cooperate.

¶ 12 In support of its motion, Liberty Mutual attached a September 24, 2014, letter from Radojevich's counsel to Direct Auto, which included an itemized statement of the claimed damages incurred by Radojevich and supporting documentation. This supporting documentation included a copy of documents allegedly faxed by Liberty to a Direct Auto representative one year prior on September 24, 2013. The cover letter for the faxed documents noted the date of the loss, Direct Auto's claim number, and the amount requested in damages, and also attached proofs. The attached proofs included an auto appraisal report from Liberty Mutual dated September 5, 2013, and photographs of the damage to Radojevich's vehicle. The attached proofs also included an "Internal Claim Report" from Direct Auto which listed Yaser Zaidan's name as

the policy holder, the policy number, the date, time, and location of the accident, the date of report, and the following loss description:

"CLAIMANT STATES: CV WAS STOPPED AT TRAFFIC LIGHT WHEN IV FOR UNKNOWN REASONS REAR ENDED CLAIMANT. POLICE REPORT MADE, INJURIES REPORTED, & NO FURTHER DETAILS GIVEN."

¶ 13 The internal claim report noted that Radojevich contacted Direct Auto by telephone on August 26, 2013, at 9:30 a.m. The internal claim report listed the driver of the insured vehicle as "unknown" and noted "UNSURE OF WHO DRIVER WAS. PERSON DIDNT HAVE AN ID WITH THEM AND DIDNT SPEAK ENGLISH VERY WELL. PERSON CLAIM TO BE THE PERSON ON THE INSURANCE CARD. IV LEFT SCENE OF ACCIDENT BEFORE POLICE ARRIVE." The report indicated the insured vehicle sustained front end damage and that there was only one occupant. Under the claimant section, the report listed Radojevich's driver's license number, his birthday, address, telephone number, vehicle information and license plate number, the Liberty Mutual insurance policy number, and noted that his vehicle sustained rear-end damage and that Radojevich complained of neck and back pain. The internal claim report noted that the weather was clear and the roads were dry. In addition, the internal claim report indicated that a police report was made to the Summit-Argo police department and the police report number was 1358898. On another Direct Auto form entitled "Activity Sheet," it was noted that "Insured rear-ended Claimant" and also indicated that police report was made. Liberty Mutual also attached a letter dated August 26, 2013, from Direct Auto to the Summit-Argo police department requesting the police report.

¶ 14 In further support of its motion, Liberty Mutual relied on the deposition testimony of Torello. He testified that Direct Auto's claim file indicated that when Radojevich called on August 26, 2013, he stated that he was stopped at a traffic light when the insured vehicle rear

ended him, the person driving the insured car claimed to be the person on the insurance card and did not speak English, and that a police report was made. Yaser Zaidan was the only driver on the policy. Torello testified that based on the information from the initial telephone call reporting the claim, Direct Auto's computer system automatically generated accident report letters that were sent to the insured and the claimant and a letter requesting the police report. However, Torello testified that there was no police report in the claim file. Torello testified that when a claim is made by someone other than the insured, Direct Auto typically calls the insured and a note is made in the file, but he did not examine the file to see if a telephone call was made to Yaser Zaidan. Torello testified that the insured and the claimant are also sent letters regarding the insured's obligations under the policy. Torello testified that there was no indication that the insured's vehicle was being used for business purposes at the time of the accident, and Direct Auto did not know whether Yaser Zaidan was driving, or if someone else was driving with his permission. The LexisNexis search of the vehicle showed Yaser Zaidan as the owner, and the LexisNexis search for the insured's address did not reveal any other drivers at the household. The search listed his telephone and Social Security numbers. There was no indication that the insured vehicle had been stolen.

¶ 15 On December 7, 2015, the trial court entered an order granting summary judgment in favor of Liberty Mutual and against Direct Auto. The court found that "there was adequate notice pursuant to Direct Auto's policy" and that Direct Auto had not shown reasonable diligence in securing its insured's cooperation.

¶ 16 Direct Auto filed a motion for reconsideration on December 14, 2015, reiterating that the notice did not comply with the policy's requirement of written notice within 30 days of the loss containing particular information and that it exercised reasonable diligence in securing Yaser

Zaidan's cooperation. Direct Auto later supplemented its motion with a copy of the complaint that Radojevich filed against "Yasir Zeidan" and Omar Zeidan on January 5, 2015, in which Radojevich brought a claim for damages sustained in the accident and alleged that Omar Zeidan was operating the insured vehicle at the time of the accident, with "Yasir Zeidan's" permission. Direct Auto asserted that Radojevich failed to previously disclose the identity of the driver.

¶ 17 In response, Liberty Mutual argued that Direct Auto had actual notice of the claim two days after the accident when Radojevich called Direct Auto, that Direct Auto could not hold Radojevich to the specific requirements of the notice provision in the insured's policy, that the information provided was sufficient to satisfy the policy and allow Direct Auto to investigate, that the writing requirement was satisfied because Direct Auto personnel recorded the information provided during Radojevich's telephone call, and that Direct Auto did not show reasonable diligence in obtaining the participation of its insured. Further, Liberty Mutual argued that the identity of the driver, Omar Zeidan, was not new information which Radojevich had failed to disclose. Liberty Mutual pointed out that the letter and notice of attorney's lien sent in December 2013 were addressed to both Yaser Zaidan and Omar Zeidan, and the police report clearly listed Omar Zeidan as the driver. Liberty Mutual attached a copy of the police report, no. 1358898. The police report listed "ZEIDAN ZEIDAN, OMAR" as the driver. In the narrative section, the officer wrote:

"R/O responded to Summit P.D. for accident report. Upon arrival, R/O spoke with Unit # 2 [Radojevich] who stated 'I was stopped in traffic, when I was hit from behind.' Unit #1 stated that 'I did not stop in time, and hit him from behind.' No injuries report at time of report."

¶ 18 At the hearing on the motion for reconsideration, Direct Auto argued that its policy required a specific type of notice and the trial court should enforce this provision. The trial court debated whether the notice provision could be enforced against a third party or whether the

notice as provided should be assessed for reasonableness. The trial court ultimately determined that Radojevich was not bound by the policy's notice provision and held that Radojevich provided reasonable notice under the law based on his telephone call to Direct Auto two days after the accident and the notice of attorney's lien provided three months after the accident. It found that to the extent a writing was required, Direct Auto made a writing when Radojevich called to report the claim. The trial court entered an order denying the motion to reconsider on February 19, 2016. This appeal followed.

¶ 19

II. ANALYSIS

¶ 20

A. Standard of Review

¶ 21

"[S]ummary judgment is proper only where 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." *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49 (citing 735 ILCS 5/2-1005(c) (West 2000)). We review the circuit court's decision *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). Where both parties filed cross-motions for summary judgment, "they concede the absence of a genuine issue of material fact and invite the court to decide the questions presented as a matter of law." *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill. App. 3d 749, 755 (2005). In addition, when reviewing a circuit court's decision on a motion for reconsideration, we employ an abuse of discretion standard, unless the motion only asked the circuit court to reexamine its application of the law to the particular case as it existed at the time of judgment, in which case the standard of review is *de novo*. *Belluomini v. Zaryczny*, 2014 IL App (1st) 122664, ¶ 20.

¶ 22 We follow the rules of contract construction in interpreting insurance policy language. *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010). "The interpretation of a contract presents a question of law subject to *de novo* review on appeal in accordance with the general rules applicable to contract interpretation." *Storino, Ramello & Durkin v. Rackow*, 2015 IL App (1st) 142961, ¶ 18. Our primary aim is to give effect to the intent of the parties. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 362 (2006). If language in a provision is unambiguous, we give this language its "plain and ordinary meaning." *Indiana Insurance Co. v. Liaskos*, 297 Ill. App. 3d 569, 573 (1998). We must view the policy "as a whole and take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract." *AMCO Insurance Co. v. Erie Insurance Exchange*, 2016 IL App (1st) 142660, ¶ 20. Any ambiguities in an insurance contract "will be construed in favor of the insured and against the insurer who drafted the policy." *Outboard Marine*, 154 Ill. 2d at 109.

¶ 23 B. Notice Provision

¶ 24 On appeal, Direct Auto asserts that the notice provision required notice to be provided in a specific manner, rendering the "reasonable notice" test generally followed by Illinois courts inapplicable here. It asserts that third parties such as Radojevich had to comply with this provision, and Radojevich's notice failed to comply because he did not identify the driver or the purpose of the use of the vehicle at the time of the accident and it was not in writing. Direct Auto asserts that its particular notice provision was approved by the Illinois Department of Insurance and is therefore entitled to great weight that it is not against public policy.

¶ 25 Liberty Mutual argues that the purpose of the notice requirement was fulfilled here because Radojevich's telephone call provided actual and reasonable notice of the occurrence and sufficient information to enable Direct Auto to investigate the claim, and any lack of information

was due to Direct Auto's failure to utilize information it possessed, such as following up on its request for the police report. Liberty Mutual asserts that Direct Auto knew of Omar Zeidan because his name was listed in the notice of attorney's lien and also listed on the police report as the driver of the insured vehicle.

¶ 26 Our supreme court has determined that insurance policy notice provisions "impose valid prerequisites to insurance coverage." *Country Mutual Insurance Co. v. Livorsi Marine, Inc.*, 222 Ill. 2d 303, 311 (2006). "It is well established that notice provisions are not merely technical requirements but, rather, conditions precedent to the triggering of the insurer's contractual duties." *Berglind v. Paintball Business Ass'n*, 402 Ill. App. 3d 76, 85 (2010) (citing *Zurich Insurance Co. v. Walsh Construction Company of Illinois Inc.*, 352 Ill. App. 3d 504, 508 (2004); *Northbrook Property & Casualty Insurance Co. v. Applied Systems, Inc.*, 313 Ill. App. 3d 457, 464 (2000), *Barrington Consolidated High School v. American Insurance Co.*, 58 Ill. 2d 278, 281 (1974); *Country Mutual*, 222 Ill. 2d at 311). Notice provisions provide the insurer with "an opportunity to make a timely and thorough investigation and to gather and preserve possible evidence." *Barrington Consolidated High School*, 58 Ill. 2d at 281.

¶ 27 Generally, the notice provisions construed by our courts have required that the insured notify the insurer of an occurrence or a lawsuit "as soon as practicable." See *Berglind*, 402 Ill. App. 3d at 86; *Country Mutual*, 222 Ill. 2d at 311; *Barrington Consolidated High School*, 58 Ill. 2d at 281; *Simmon v. Iowa Mutual Casualty Co.*, 3 Ill. 2d 318, 320-21 (1954). Our supreme court has interpreted the phrase "as soon as practicable" to mean "within a reasonable time." (Internal quotation marks omitted.) *Berglind*, 402 Ill. App. 3d at 86 (quoting *Country Mutual*, 222 Ill. 2d at 311). In determining whether notice was provided in a reasonable time, our courts consider the specific language of the policy; the insured's sophistication, awareness of an occurrence and

diligence in determining whether it falls under the policy; and any prejudice to the insurer. *Id.* (citing *Country Mutual*, 222 Ill. 2d at 312-13 (citing *Simmon*, 3 Ill. 2d at 322)). Whether notice was reasonably provided depends on the facts of each case. *Country Mutual*, 222 Ill. 2d at 311-12. It can be determined as a matter of law where the facts are not disputed. *Zurich Insurance Co. v. Walsh Construction Company of Illinois*, 352 Ill. App. 3d 504, 509 (2004). Generally, Illinois courts have "applied the *Simmon* analysis regardless of the type of notice that is at issue," whether it is notice of an occurrence or notice of a lawsuit stemming from an occurrence. *Country Mutual*, 222 Ill. 2d at 313-14. "In sum, the *Simmon* rule has been widely accepted as the proper analysis for review of all notice requirements contained in insurance policies." *Id.* at 314.

¶ 28 As previously set forth, Direct Auto's notice provision required, as a condition precedent to coverage, written notice within 30 days of an accident, and required that the notice contain specific information. This notice provision is distinguishable from the notice provisions construed in such cases as *Country Mutual* and *Simmon*, which called for notice "as soon as practicable" instead of notice within a specific time. Direct Auto argues that the *Simmon* analysis therefore does not apply and the court should not examine whether the notice was reasonable. Although these cases involved the interpretation of different policy language, the *Simmon* analysis nevertheless takes into consideration "the specific language of the policy's notice provisions" and therefore allows for consideration of the particular language and requirements set forth in any policy's notice provision, whatever that language may be.

¶ 29 Moreover, *Simmon* and cases from our appellate courts which construed "as soon as practicable" notice provisions are also instructive here because they similarly involved the interpretation of automobile insurance policies, which entail unique public policy concerns compared to other types of insurance policies. The *Simmon* court observed that automobile

insurance occupies an important position in the modern world and that our legislature has enacted several laws to protect third parties injured in motor vehicle accidents. *Simmon*, 3 Ill. 2d at 322. It is a well-established principle that “a contract of automobile insurance is more than a simple agreement between two parties ***. It is a contract which protects both the insured and the public from the hazards of financial distress to which they may become victims as a result of engaging in traffic upon our streets and highways.” (Internal quotation marks omitted.) *Rivota v. Kaplan*, 49 Ill. App. 3d 910, 919 (1977).

¶ 30 In addition, in *Simmon*, 3 Ill. 2d at 318, our supreme court held that notice of an accident need not be given by the insured named in the policy; it can be given by the injured party, or any person, so long as the notice is reasonable. In *Simon*, the policy required the insured to provide notice, but the supreme court held that “[i]t does not matter who gives the notice, as long as a notice is given.” *Id.* at 323. Accordingly, a third party such as Radojevich was entitled to provide notice to Direct Auto of the accident and his claim.

¶ 31 Direct Auto relies on *West American Insurance Co. v. Yorkville National Bank*, 238 Ill. 2d 177 (2010), in support of its argument that a notice provision in an insurance policy is important and should be enforced. However, *West American* actually supports the trial court's determination in the present case.

¶ 32 In *West American*, the court determined that the insured was entitled to coverage for a defamation claim under its commercial general liability policy despite a 27-month delay in providing written notice to the insurer of the lawsuit. *Id.* at 186. Our supreme court held that “where the insurance company has actual notice of the loss or receives the necessary information from some other source, there is no prejudice to the insurer from the failure of the insured to give notice of the claim.” (Internal quotation marks omitted.) *West American*, 238 Ill. 2d at 189. “An

insurance company is deemed to have 'actual notice' of a lawsuit where it has sufficient information to locate and defend the suit." *Id.* at 190 (citing *Cincinnati Companies v. West American Insurance Co.*, 183 Ill. 2d 317, 329 (1998)). " '[I]n order to have actual notice sufficient to locate and defend a suit, the insurer must know both that a cause of action has been filed and that the complaint falls within or potentially within the scope of the coverage of one of its policies.' " *Id.* (quoting *Cincinnati Companies*, 183 Ill. 2d at 329–30). The court followed the *Simmon* analysis and found no evidence that the insurer was prejudiced as a result of the late notice, as the insurer received actual notice of the lawsuit within a few months of it being filed and two years before the scheduled trial. *Id.* at 186-89. The court held that "actual notice to an insurer is relevant to whether the insurer has been prejudiced by a delay in receiving written notice as specified by the policy." *Id.* Accordingly, the court held that the insurer received reasonable and sufficient notice based on a conversation between the insured and the insurance agent and board meetings at which the agent was present wherein the lawsuit was discussed. *Id.*

¶ 33 Along similar lines, the court in *Illinois Founders Insurance Co. v. Co. v. Barnett*, 304 Ill. App. 3d 602, 607 (1999), held that "actual notice can arise from a letter or phone call to the insurer from an injured party or an attorney asserting a claim under the insurance policy." The court observed that there is a "strong public policy in favor of coverage" and held that the actual notice standard is not unduly burdensome. *Id.* It reasoned that an insurer receives consideration for covering the insured and it " 'should not be allowed to evade its responsibilities under the policy as a result of the insured's ignorance, particularly where the insurer has actual notice of a claim against its insured.' " *Id.* (quoting *Cincinnati Companies*, 183 Ill. 2d at 329). In *Barnett*, the court found that the insurer received actual notice of the lawsuit where the insurer received notice of the accident within eight days of occurrence, the insurer was in communication with the

injured party and the insured and sent the insured claim forms shortly after the accident, the insurer assigned a claim number and hired investigators and began preparing to defend the claim, the injured party and her attorney were in communication with the investigator, and the investigator and insurance broker received a copy of the complaint within two weeks of it being filed. *Id.* at 611.

¶ 34 Here, the undisputed facts showed that Direct Auto had actual notice of the accident within two days of its occurrence. Radojevich provided Direct Auto sufficient information to inform it of the particulars of the claim, including his name and contact information, the insured vehicle information, the date, time and location of the accident, the basic facts surrounding the accident, and the police report number. Even if Radojevich's telephone call did not provide the identity of the driver or indicate the use of the insured vehicle, the telephone call nevertheless apprised Direct Auto of the pertinent information regarding the accident to enable further investigation. In fact, Direct Auto assigned a number to the claim and sent several letters to its insured, Radojevich, and the police department requesting further information. Apparently, Direct Auto failed to follow up on its police report request. Moreover, Omar Zeidan's name was listed not only on the police report, but also on the notice of attorney's lien, which Direct Auto received approximately three months after the accident.

¶ 35 Although the notice provision specified that notice must be in writing, this does not defeat the fact that Direct Auto was provided with timely actual notice. To the extent a writing was required, the information Radojevich provided was recorded by Direct Auto onto its claim information forms. Additionally, the police report also contained written information regarding the accident. Moreover, although it fell outside the 30-day window, the attorney's lien also contained the pertinent information regarding the claim. As argued by Liberty Mutual, Direct

Auto does not necessarily strictly adhere to the written notice requirement and accepts notice via various forms, such as faxes, mail, and email. Our courts have not required insureds to "jump through meaningless hoops towards an absurd end: telling the insurer something it already knows." *Cincinnati Companies*, 183 Ill. 2d at 329. Yaser Zaidan's failure to respond to Direct Auto's letters was due to no fault or lack of diligence by Radojevich in reporting his claim. Having called Direct Auto and provided the pertinent information regarding the accident, he should not be required to then put this same information into a writing and again give it to Direct Auto.

¶ 36 Direct Auto relies on *Illinois Valley Minerals Corp. v. Royal-Glove Insurance Co.*, 70 Ill. App. 3d 296, 301 (1979), where the court stated that "[t]he notice given by the injured party is available for the purpose of fulfilling the obligation of the insured as to notice, if it is timely, and is measured by the same standards as if it had been transmitted by the insured." *Id.* In *Illinois Valley*, the insurance policy required the insured to provide notice of an occurrence "as soon as practicable." *Id.* at 298. The insurer did not receive notice until over six months after the accident, when the injured party sent a letter to the insurer informing it of the occurrence and the amounts it had incurred in repairing the damages to its property. *Id.* at 298. The court held that while the injured party may provide notice to the insurer, the notice was not reasonable because of the six-month delay, after all repairs had been completed, thereby depriving the insurer of "any opportunity to make a timely and thorough investigation of the claim, one of the central purposes of the notice provisions." *Id.* at 300.

¶ 37 Direct Auto's reliance on *Illinois Valley* is unavailing. It did not involve an automobile insurance policy, which implicates more than a simple agreement between two parties as it protects the general public and injured parties. *Simmon*, 3 Ill. 2d at 322. In *Illinois Valley*, the

six-month delay deprived the insurer of an opportunity to investigate the claim because the damage had been repaired and the costs to repair the damages had been incurred long before it knew of the occurrence or claim. In contrast, Direct Auto learned of the accident merely two days after its occurrence, giving it ample time for further investigation. It was not deprived of an opportunity to inspect any damage before repairs were made. Thus, unlike in *Illinois Valley*, the purpose of the notice provision was fulfilled here by Radojevich's prompt notice. Similarly, Direct Auto has not been prejudiced in that no default judgment was entered against the insured in favor of the injured party before Direct Auto was informed of any claim or lawsuit involving the insured. Direct Auto was not deprived of any opportunity to participate in litigation surrounding the accident, considering that it instituted its own declaratory judgment action against defendants before any action was instituted by Radojevich or Liberty Mutual against Yaser Zaidan or Direct Auto.

¶ 38

C. Cooperation Provision

¶ 39

Direct Auto also argues on appeal that Zaidan breached the cooperation provision of his insurance policy. Liberty Mutual contends that Direct Auto merely sent two letters to the insured before denying the claim and this did not constitute reasonable diligence in seeking cooperation from the insured.

¶ 40

"A cooperation clause prevents collusion between the insured and injured and enables an insurer to prepare its defense to a claim." *American Access Casualty Co. v. Alassouli*, 2015 IL App (1st) 141413, ¶ 17 (citing *M.F.A. Mutual Insurance Co. v. Cheek*, 66 Ill.2d 492, 496 (1977)). Cooperation clauses are important features of insurance policies whose purpose should be observed. *Id.* "To establish a breach of the cooperation clause, the insurance company must show that it exercised a reasonable degree of diligence in seeking the insured's participation and

the insured's failure to participate was due to a refusal to cooperate." *Id.* (citing *Mazzuca v. Eatmon*, 45 Ill. App. 3d 929, 932 (1977)). This inquiry depends on the particular facts of each case. *Id.*

¶ 41 As previously discussed, automobile insurance policies involve more than private agreements between two parties; rather, public policy considerations seek to protect the general public and innocent third parties. *Cheek*, 66 Ill. 2d at 500-01. Accordingly, to avoid a windfall to insurers at the expense of the public, "an insurer must show that the insured's refusal to cooperate in its investigation caused it substantial prejudice" in order for the insurer to be relieved of its contractual obligations under the policy. *Alassouli*, 2015 IL App (1st) 141413, ¶ 18 (citing *Cheek*, 66 Ill. 2d at 500-01). An insurer may establish substantial prejudice by showing that "the insured's violation of the cooperation clause hampered its investigation." *Id.*

¶ 42 Direct Auto relies on *American Country Insurance Co. v. Bruhn*, 289 Ill. App. 3d 241, 250 (1997), in asserting that it need not show prejudice because its insured failed to cooperate at all. However, this court and our supreme court have rejected the argument that an insurer need not show prejudice where an insured substantially or materially fails to cooperate. *Alassouli*, 2015 IL App (1st) 141413, ¶ 19; *Cheek*, 66 Ill. 2d at 499. The *Alassouli* court observed that our supreme court has directed that "an insurer must prove substantial prejudice, which will not be presumed." *Id.* The *Alassouli* court distinguished *Bruhn*, where the insurer was not required to show prejudice in order to deny coverage based on lack of cooperation. *Bruhn*, 289 Ill. App. 3d at 250. The court in *Alassouli* reasoned that the insured in *Bruhn* explicitly refused to give a statement to the insurer and his refusal was recorded, the insured concealed his involvement in the accident for several years, and the insured later entered into a stipulated judgment requiring indemnification by the insurer. *Alassouli*, 2015 IL App (1st) 141413, ¶ 22 (citing *Bruhn*, 289 Ill.

App. 3d at 249). Thus, the insured in *Bruhn* "essentially colluded with the injured party by refusing to cooperate and then entered into a judgment whereby he admitted liability but provided that damages could only be collected from his insurance company." *Id.* (citing *Bruhn*, 289 Ill. App. 3d at 249).

¶ 43 The distinction drawn by the court in *Alassouli* is also applicable here. Unlike in *Bruhn*, there is no indication here that Yaser Zaidan explicitly refused to give a statement, concealed his involvement in the accident, entered into a stipulated judgment requiring Direct Auto to indemnify him, or colluded with Radojevich. Accordingly, Direct Auto must demonstrate that it exercised a reasonable degree of diligence in seeking Yaser Zaidan's cooperation and that it suffered substantial prejudice in its investigation due to his refusal to cooperate. *Alassouli*, 2015 IL App (1st) 141413, ¶ 23.

¶ 44 We find that Direct Auto failed to exercise reasonable diligence in securing the insured's cooperation and failed to show that it suffered any prejudice due to his failure to communicate with Direct Auto. The record reflects that Direct Auto sent only two letters to Yaser Zaidan following Radojevich's telephone call reporting the occurrence and performed two LexisNexis searches before it sent a third letter denying coverage just over one month after the accident. As Torello testified, there was no indication that a Direct Auto representative attempted to contact the insured via telephone or send a representative to his listed address. There is also no evidence that Direct Auto attempted to hire a private investigator or conduct a skip trace. There is no indication that any of the information gathered regarding the insured's address, telephone number, or other information was misleading or incorrect. It failed to follow up on the information it did have, such as the police report. Moreover, Direct Auto did not fail to locate

Yaser Zaidan with respect to its declaratory judgment as it hired a special process server to effectuate service upon him.

¶ 45 The steps taken by Direct Auto to procure the insured's cooperation stand in stark contrast to those taken in such cases as *Alassouli*, where the insurer called the insured numerous times and left messages on voicemail and with his roommate, conducted a skip trace, and hired a private investigator. *Alassouli*, 2015 IL App (1st) 141413, ¶ 22. The *Alassouli* court nevertheless found these measures failed to establish reasonable diligence. *Id.* ¶ 27. Additionally, the court held that the insured's lack of cooperation did not cause the insurer substantial prejudice as the insurer failed to conduct a proper investigation where the insurer had notice of the accident shortly after it occurred and had access to other sources of information regarding the accident, such as the police report. *Id.* ¶¶ 41-42. The court also observed that the injured party was the innocent party in the accident. *Id.* ¶ 43. Here, Direct Auto took far fewer measures to contact its insured. Moreover, is also has not shown that the lack of cooperation cause its substantial prejudice where it had access to other sources of information and had notice within two days of the accident.

¶ 46 Similarly, Direct Auto's efforts fall far short of those expended by the insurer in *Mazzuca v. Eatmon*, 45 Ill. App. 3d 929 (1977). In *Mazzuca*, the insurer received notice of the loss and suit from the plaintiff's attorney and hired an investigator to locate the insured. *Id.* at 930. The investigator when to his known address and place of employment and contacted the post office, but failed to follow up on new telephone numbers and addresses he obtained, and failed to examine driver's license, credit reports, or social security records. *Id.* at 930-31. The insurer sent the insured two letters and hired another investigator, who spoke to relatives and discovered a fraudulent credit card matter. *Id.* at 931. However, despite these efforts, the court found these

measures inadequate to show reasonable diligence or that the insured refused to cooperate. *Id.* at 934. Here, Direct Auto did not attempt to hire an investigator, go to Yaser Zaidan's address, or even call him, despite being in possession of his contact information.

¶ 47

III. CONCLUSION

¶ 48

Based on the foregoing analysis, we affirm the circuit court's order granting Liberty Mutual's motion for summary judgment and denying Direct Auto's motion for summary judgment and motion for reconsideration.

¶ 49

Affirmed.