2016 IL App (1st) 151410-U

THIRD DIVISION
February 24, 2016

No. 1-15-1410



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| SAFECO INSURANCE COMPANY OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>SCOTT KREIMAN and BRIGETTE KREIMAN<br><br>Defendants-Appellants,<br><br>(ALEXANDRA LUVISI, ERIN McRAITH, and PROGRESSIVE INSURANCE CO.,<br><br>Defendants.) | ) | Appeal from the Circuit Court of Cook County, Illinois.<br><br>No. 14 CH 02683<br><br>Honorable Mary Lane Mikva, Judge Presiding. |

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PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

**ORDER**

¶ 1 *Held*: Trial court properly entered summary judgment in favor of insurer where insured's automobile and umbrella policies excluded coverage for his daughter's use of her mother's car.

¶ 2 In this declaratory judgment action, defendants-appellants Scott and Brigette Kreiman appeal from the trial court's order granting summary judgment in favor of plaintiff-appellee,

Safeco Insurance Company. Safeco issued automobile and umbrella insurance policies to William Luvisi, whose daughter, Alexandra Luvisi, was insured under the policies. Alexandra was driving her mother Erin McRaith's car when she was involved in a car accident with Scott Kreiman, who, along with his wife, filed suit against her. Safeco sought a declaration that it was not obligated to defend or indemnify Alexandra based on policy exclusions, and the trial court agreed, granting summary judgment in Safeco's favor. Finding no error, we affirm.

¶ 3 BACKGROUND

¶ 4 Alexandra is the minor daughter of William Luvisi and Erin McRaith, who are divorced. On the date of Alexandra's accident with Scott in November 2012, she was driving a Hyundai Sonata owned by McRaith, who insured it with Progressive Insurance Company. The liability limit of McRaith's Progressive policy was $100,000.

¶ 5 William insured his own vehicles with Safeco under both an automobile and umbrella policy. The automobile policy had a liability limit of $500,000 and excluded liability coverage for, among other things, "[a]ny vehicle, other than your covered auto, which is: * * * (2) furnished or available for the regular use of any family member or other person who resides with you."

¶ 6 The umbrella policy has its own list of exclusions, which, as relevant here, provides that the policy does not apply to bodily injury, personal injury, or property damage,

> "c. arising out of the maintenance or use, including loading or unloading, of any non-owned vehicle regularly used or available for use by you or any family member, if the vehicle is not covered by underlying insurance."

"Underlying insurance" is defined as "insurance policies providing the insured with primary liability coverage meeting or exceeding the required minimum limits. The types of policies and

the required minimum liability limits are listed in the policy Declarations." The Declarations, in turn, prescribe a minimum liability limit for an automobile/motor vehicle of $500,000 per occurrence. Prior to Alexandra's accident, William maintained in force his underlying automobile policy with Safeco.

¶ 7 Following the Kreimans' suit against Alexandra, Safeco filed this action seeking a declaration that it was not obligated to defend or indemnify Alexandra under either the automobile or umbrella policies it issued to William based on the exclusions set forth above. Specifically, Safeco alleged that the Hyundai was a "non-owned vehicle" available for Alexandra's regular use, and was not covered by the requisite amount of underlying insurance.

¶ 8 The Kreimans filed a motion for judgment on the pleadings, arguing that Alexandra was covered under William's umbrella policy, even if coverage was not available under the underlying automobile policy. The Kreimans cited Condition 18, which provides:

> "Maintenance of Underlying Insurance.
>
> Each policy, when applicable, as specified in the Schedule of Underlying Insurance of the Declarations, shall be maintained in full effect, without alteration, during the policy period except for any reduction of the aggregate limit or limits due to payment of claims with respect to occurrences that take place during the policy period.
>
> If you fail to do so, this policy will not be invalid, but we shall only be liable to the extent that we would have been had you complied with this condition."

The Kreimans maintained that this Condition operated to provide coverage despite the umbrella policy's exclusion for non-owned vehicles available for an insured's regular use.

¶ 9 Initially, the trial court agreed and granted the Kreimans' motion, but then reconsidered and reversed its order, holding that "Condition 18 has absolutely no relationship to Exclusion 5(c) [the regular use exclusion], and if Exclusion 5(c) applies, there is no coverage under the umbrella policy." The court went on to note that the parties had not addressed the applicability of Exclusion 5(c) given that discovery had not yet been conducted on the issue of whether the Hyundai was "regularly used or available for use" by Alexandra within the meaning of the exclusion.

¶ 10 The discovery depositions revealed that both McRaith and Alexandra considered the Hyundai to be Alexandra's car, although McRaith was the titular owner. Alexandra described the car as a birthday present, and testified that she was the only driver of the car, although her mother also had a set of keys to the vehicle. Alexandra drove the car to school, to visit friends, to run errands, and back and forth between her parents' houses, where she divided her time. Alexandra did not have to ask permission to drive the car, but she did have to inform McRaith where she was going. McRaith, in turn, did not restrict Alexandra's use of the car to certain times of day; however, she did require Alexandra to obey Illinois law while driving.

¶ 11 Following the depositions of Alexandra and McRaith, Safeco moved for summary judgment on the grounds that Alexandra was a regular user of the Hyundai, and the non-owned vehicle exclusions in the automobile policy and the umbrella policy operated to deny coverage. In opposition, the Kreimans' disputed that Alexandra had regular use of the vehicle and reiterated their earlier argument that Condition 18 operated to require coverage under the umbrella policy. The trial court found in favor of Safeco, and the Kreimans appeal.

¶ 12 ANALYSIS

¶ 13 Summary judgment is proper when the pleadings, depositions, and affidavits demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014); *State Farm Mutual Automobile Insurance Co. v. Coe*, 367 Ill. App. 3d 604, 607 (2006). In making this determination, the record materials must be viewed in the light most favorable to the non-movant. *Federal Insurance Co. v. Lexington Insurance Co.*, 406 Ill. App. 3d 895, 897 (2011). We review *de novo* an order granting summary judgment. *Hall v. Henn*, 208 Ill. 2d 325, 328 (2003).

¶ 14 Safeco contends it owes no coverage to Alexandra under either William's automobile or umbrella policy due to certain exclusions. It is the insurer's burden to demonstrate the applicability of an exclusion. *Skolnik v. Allied Property and Casualty Insurance Co.*, 2015 IL App (1st) 142438, ¶ 26. Moreover, where an insurer relies on an exclusionary clause to deny coverage, its applicability must be free and clear from doubt. *Country Mutual Insurance Co. v. Bible Pork, Inc.*, 2015 IL App (5th) 140211, ¶ 38. This is in keeping with the general proposition that any doubts as to coverage must be resolved in the insured's favor. *Maryland Casualty Company v. Dough Management Co.*, 2015 IL App (1st) 141520, ¶ 51 (quoting *International Minerals & Chemical Corp. v. Liberty Mutual Insurance Co.*, 168 Ill. App. 3d 361, 367 (1998)).

¶ 15 Turning first to the automobile policy, Safeco relies on the exclusion denying liability coverage for any vehicle, other than the insured's "covered auto" that is "furnished or available for the regular use of any family member." Safeco contends that as a regular user of her mother's Hyundai (not a "covered auto" under William's policy) Alexandra was not entitled to coverage.

¶ 16 "Regular use" is not subject to absolute definition and is dependent on the facts and circumstances of each case. *State Farm Mutual Automobile Insurance Co. v. Differding*, 69 Ill

.2d 103, 107 (1977). But where the facts are undisputed, the issue of whether a regular use exclusion applies may be determined on a motion for summary judgment. See, *e.g.*, *Ryan v. State Farm Mutual Automobile Insurance Co.*, 397 Ill. App. 3d 48, 52 (2009), *State Farm Mutual Automobile Insurance Co. v. Bundy*, 165 Ill. App. 3d 260, 266-67 (1988); contra *American Access Casualty Co. v. Griffin*, 2014 IL App (1st) 130665, ¶¶ 22-23 (reversing summary judgment in favor of insurer on regular use exclusion where affidavits left unanswered questions of whether minor daughter was required to ask permission to use mother's vehicle and scope of that permission). Our supreme court has explained that the purpose of "regular use" provisions is to exclude coverage for "frequent, habitual, or principal use" of non-owned vehicles and provide coverage only for isolated or casual use. *Auto Owners Insurance Co. v. Miller*, 138 Ill. 2d 124, 129 (1990). "This is to prevent the insurance company from being subjected to additional risk without receiving an appropriate premium." *Id.*

¶ 17 A car that is available for someone's use "at any time in his complete discretion" is certainly regularly used. *Economy Fire & Casualty Co. v. Gorman*, 84 Ill. App. 3d 1127, 1129 (1980); see also *State Farm Mutual Automobile Insurance Co. v. Dreher*, 190 Ill. App. 3d 182 (1989). But something less than wholly unfettered use may also amount to regular use. For example, courts have found regular use where the insured is required to ask permission to use the vehicle, but that permission is routinely granted, *Bundy*, 165 Ill. App. 3d at 262-63, 265, or where the car is obtained from the owner for a limited purpose, but the owner makes the car available for use at any time (*Continental National American Group v. Vaicunas*, 26 Ill. App. 3d 835, 839-40 (1975)). On the other hand, courts have found only casual use where the owner of the vehicle strictly limits when and for what purpose it can be driven and enforces those limits (*Knack v. Philips*, 134 Ill. App. 3d 117, 122 (1985)), or where the owner retains the only set of

keys to the vehicle (*Sheary v. State Farm Mutual Automobile Insurance Co.*, 207 Ill. App. 3d 1067, 1071 (1991)).

¶ 18 Here, the facts, viewed in the light most favorable to the Kreimans, support the conclusion that the Hyundai was available for Alexandra's regular use. Not only did both McRaith and Alexandra consider the Hyundai to be Alexandra's car, but Alexandra was also the only driver of the vehicle (McRaith had her own vehicle), had a set of keys, was not restricted in distance or time of driving, and did not need to ask permission to drive the car. To be sure, McRaith sometimes forbade Alexandra from going out, but this was not a restriction on the use of the Hyundai *per se*, as she was also prohibited at those times from leaving the house in a friend's car. Likewise, the requirement that Alexandra inform McRaith of her whereabouts when she left the house applied irrespective of whether or not she was taking the Hyundai. While McRaith, as Alexandra's mother, certainly had the right to impose restrictions on Alexandra's use of the car, there is no evidence in the record that she exercised this right in such a way as to deprive Alexandra of regular use of the Hyundai. Indeed, the only restrictions on use the Kreimans point to are restrictions imposed not by McRaith, but by the state of Illinois: for example, Alexandra was required to obey the speed limit and refrain from drinking or texting when driving. Under these circumstances, there is no genuine issue of material fact as to whether Alexandra had regular use of the Hyundai.

¶ 19 Turning then to the umbrella policy, this, too has an exclusion for regular use. However, the regular use exclusion in the umbrella policy applies only "if the vehicle is not covered by underlying insurance." Initially, the Kreimans argue that this exclusion is ambiguous on its face, and as such, should be construed in favor of the insured. See *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108-09 (1992). The construction of an insurance policy is

a question of law and is appropriate for resolution by way of a motion for summary judgment. *Founders Insurance Co. v. Walker,* 2015 IL App (1st) 141301, ¶ 22.

¶ 20 Our primary goal in interpreting an insurance policy is to give effect to the intentions of the parties. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993). To that end, we consider the policy as a whole and assume that every provision was intended to serve a purpose. *Founders Insurance Co. v. Munoz,* 237 Ill. 2d 424, 433 (2010). Where a policy provision is ambiguous, it will be construed liberally in favor of coverage, but the mere fact that parties disagree as to the meaning of a provision does not render it ambiguous. *Id.* Rather, an ambiguity exists only if the policy language is subject to more than one reasonable interpretation. *Hobbs v. Hartford Insurance Co. of the Midwest,* 214 Ill. 2d 11, 17 (2005). "We will not * * * 'torture ordinary words until they confess to ambiguity.'" *Id.* at 30 (quoting *Western States Insurance Co. v. Wisconsin Wholesale Tire, Inc.*, 184 F.3d 699, 702 (7th Cir. 1999)).

¶ 21 Here, the exclusion at issue reads, in its entirety:

> "The policy does not apply to any:
>
> * * *
>
> 5. Bodily injury, personal injury or property damage:
>
> * * *
>
> c. arising out of the maintenance or use, including loading or unloading, of any non-owned vehicle regularly used or available for use by you or any family member, if the vehicle is not covered by underlying insurance."

The policy defines underlying insurance as liability coverage that meets or exceeds the minimum limit, which is $500,000. We cannot discern any ambiguity in this exclusion:

it applies to a non-owned, regularly used vehicle, that is insured for less than $500,000. (Safeco implicitly concedes that injury or damage arising from the regular use of a non-owned vehicle insured for the required limit would not be excluded from coverage.)

¶ 22 Nevertheless, the Kreimans maintain that the requirement of underlying insurance reads the "regularly used" clause out of the exclusion. But this argument is premised on a misapprehension of an exchange between the trial court and counsel for Safeco, in which the trial court asked counsel whether William's umbrella policy would have provided coverage if the accident had occurred during Alexandra's one-time use of a friend's car that had less than $500,000 in liability coverage. Safeco's counsel originally responded in the negative, but could not point to a policy provision that supported this conclusion. Indeed, Exclusion 5(c) makes coverage dependent on carrying the requisite amount of underlying insurance on a *regularly used* non-owned vehicle; it says nothing about requiring underlying insurance on a vehicle that is used causally. Thus, the exclusion gives effect to both the "regularly used" and "underlying insurance" clauses, and no facial ambiguity exists.

¶ 23 Alternatively, the Kreimans contend that if Exclusion 5(c) is not ambiguous on its face, it becomes ambiguous when read with Condition 18, quoted above, which provides that if the policyholder fails to maintain the underlying insurance as reflected in the declarations, the umbrella policy will be available, but only to the extent it would have been had the underlying insurance been maintained. In other words, if instead of maintaining an underlying policy with a liability limit of $500,000, the policyholder reduced the liability limit to $250,000, the policyholder would be required to make up the difference before calling on Safeco to pay under the umbrella policy. But we fail to see how Condition 18 is relevant here given that William did maintain his underlying policy in the required amount. Because of that undisputed fact, resort to

Condition 18 is unnecessary. See *Aurelius v. State Farm Fire & Casualty Co.*, 384 Ill. App. 3d 969, 978 (2008) (rejecting insured's attempt to point to language in unrelated policy section to create ambiguity in policy section at issue).

¶ 24 Finally, the Kreimans maintain that if there is no patent ambiguity in the umbrella policy, a latent ambiguity exists so as to provide coverage. A latent ambiguity may exist where the language is clear and suggests a single meaning, "but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings." *Hoglund v. State Farm Mutual Automobile Insurance Co.*, 148 Ill. 2d 272, 279 (1992). The "extrinsic fact" the Kreimans point to here is William's reasonable expectation.

¶ 25 According to the Kreimans, William reasonably expected that his umbrella policy would cover Alexandra's regular use of her mother's car that was insured for less than $500,000 (despite the clear language in the policy to the contrary), and this gives rise to a latent ambiguity that is sufficient to trigger coverage. For this proposition, the Kreimans rely almost entirely on *Hoglund*, a case we find inapposite. *Hoglund* was a consolidated case in which the plaintiffs were passengers injured in motor vehicle accidents. *Id.* at 274. The drivers of the vehicles in which the plaintiffs were traveling were uninsured, while the drivers of the vehicles with which they collided were insured; both sets of drivers were at fault. *Id.* The plaintiffs recovered $100,000 from the insured drivers, but the defendant denied the plaintiffs uninsured motorist coverage under their policies due to a set-off provision. *Id.* at 274-76. The supreme court held that while the set-off provision, read literally, would bar coverage, the reasonable expectations of the insureds, together with the public policy behind the uninsured motorist statute and the coverage intended by the policies themselves, gave rise to a latent ambiguity. *Id.* at 278-79. Significantly, the *Hoglund* court did not confine its analysis to the expectations of the insured,

but considered those expectations in connection with other factors, such as public policy. *Id.*; see also *Obenland v. Economy Fire & Casualty Co.*, 234 Ill. App. 3d 99, 111 (1992) (distinguishing *Hoglund* on similar grounds).

¶ 26 Here, the Kreimans point to no public policy that would entitle Alexandra to coverage. Unlike the uninsured motorist statute at issue in *Hogland*, there is no comparable statute requiring Safeco to insure a non-owned car provided for the insured's regular use that is not covered by the requisite amount of underlying insurance. To the contrary, an insurer has long been permitted to exclude just such a risk. See, *e.g.*, *Miller*, 138 Ill. 2d at 129; *Vaicunas*, 26 Ill. App. 3d at 838 (absent regular use exclusion, insurer may lose premiums and "'the hazard under the insurance would be increased'") (quoting *Rodenkirk v. State Farm Mutual Automobile Insurance Co.*, 325 Ill. App. 421, 433 (1945)). Nor did the language of the policy reasonably suggest to William that this risk would be covered. As described above, the policy provisions unambiguously excluded coverage for a regularly used vehicle not covered by underlying insurance.

¶ 27 In sum, there is no ambiguity, either patent or latent, in Exclusion 5(c). Further, because we have concluded that Alexandra was a regular user of her mother's car as a matter of law, and it is undisputed that the liability limits of her mother's policy is less than $500,000, Exclusion 5(c) operates to deny Alexandra coverage under William's umbrella policy.

¶ 28 CONCLUSION

¶ 29 For the reasons stated, we affirm the trial court's order granting summary judgment in favor of Safeco.

¶ 30 Affirmed.