2017 IL App (2d) 170214-U
No. 2-17-0214
Order filed November 20, 2017



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| ED NAPLETON ELMHURST IMPORTS, INC., d/b/a ED NAPLETON ACURA and NAPLETON'S KIA OF ELMHURST, | ) | Appeal from the Circuit Court of Du Page County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 15-MR-1166 |
| SAFEWAY INSURANCE COMPANY and JAMES JOHNSTON, III, | ) | |
| Defendants | ) | Honorable Bonnie M. Wheaton, |
| (Safeway Insurance Company, Appellant). | ) | Judge, Presiding. |

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

**ORDER**

¶ 1 *Held*: Safeway's insurance policy did not name Napleton as a loss payee when Johnston's car accident occurred, and there was no evidence that Johnston or anyone else had notified Safeway of Napleton's interest in the vehicle by that time, so Napleton was not entitled to recover under the policy. Even if Napleton had been properly named as a loss payee, the policy contained a simple loss payable clause making Napleton's rights as a loss payee dependent on Johnston's rights as the insured. Because Johnston waived his right to any claim against Safeway arising from the car accident, Napleton likewise could not collect as the loss payee. Therefore, we reversed the trial court's grant of summary judgment in Napleton's favor and entered summary judgment in favor of Safeway.

¶ 2 Defendant, Safeway Insurance Company (Safeway), appeals from the trial court's grant of summary judgment in favor of Ed Napleton Elmhurst Imports, Inc. (Napleton), and the trial court's denial of its cross-motion for summary judgment. Under the trial court's ruling, Safeway must pay insurance proceeds to Napleton as a loss payee under an automobile insurance policy issued to James Johnston, III. We reverse and enter summary judgment for Safeway.

¶ 3 I. BACKGROUND

¶ 4 Napleton filed a complaint against Safeway and Johnston on August 14, 2015, alleging as follows. On August 7, 2014, Johnston purchased a 2014 Kia Soul automobile from Napleton for $21,999.44. As part of the transaction, he entered into a purchase agreement and retail installment contract. He also signed an insurance coverage acknowledgment naming Safeway as his insurer and Napleton as a loss payee. On August 15, 2014,[1] the Kia was involved in an accident and declared a total loss. At that time, Napleton was the lienholder on the vehicle's title. Napleton requested insurance coverage for the automobile from Safeway but was denied. Napleton sought a declaratory judgment against Safeway and also alleged bad faith in Safeway's refusal to pay its claim (see 215 ILCS 5/155 (West 2014)). Napleton alleged breach of contract against Johnston.

¶ 5 A copy of the insurance coverage acknowledgement attached to the complaint shows that Napleton is handwritten as the loss payee, whereas the rest of the document is typed. Also, a copy of the retail installment contract shows that "Santander Consumer USA" was typewritten as the assignee of interest, but this was crossed out and changed to a handwritten "Ed Napleton

[1] Subsequent documents show that the accident took place on August 13, 2014, but this distinction is not relevant to the issues on appeal.

Elmhurst Imports." Napleton later admitted that it changed the retail installment contract after Johnston signed the contract, outside of his presence, because financing with Santander Consumer USA fell through.

¶ 6 In Safeway's response to the complaint, it filed a document showing that Johnston had withdrawn all of his claims against Safeway resulting from the collision and released Safeway from any liability arising from the loss. Safeway also produced a copy of the insurance policy. The policy was effective from February 28, 2014, to February 28, 2015. Under the heading "*LOSS PAYEE AGREEMENT*," it states:

> "*The Company shall pay the Loss Payee identified on the declarations as its interest shall appear. The right of the Loss Payee herein is subject to any defense the Company has as to the insured. The Loss Payee shall tender to the Company properly executed title to the insured vehicle as a condition of payment hereunder. The Company will give legally required notice of renewal, intent not to renew or cancellation to the Loss Payee identified on the declarations.*"

An endorsement page shows that on August 7, 2014, a 2014 Kia Soul was added to the policy, and a 2012 Volkswagen Passat was removed. Napleton is not listed anywhere on the policy.

¶ 7 On February 3, 2016, Napleton obtained a default judgment against Johnston.

¶ 8 Laura Devine, assistant claim manager with Safeway, testified as follows in her deposition. A Napleton employee reported the accident to Safeway on August 15, 2014, and Napleton later provided a copy of the title to Safeway. A claim note from an adjuster dated August 21, 2014, stated:

> "Spoke to Ken McTeho at Napleton Acura – they will be listed as loss Payee on A's [Johnston's] policy-advised him that A [Johnston] will not cooperate with SIC and

> wants to drop his claim. However, as loss payee, they have the right to pursue the claim but they will have to repossess the vehicle and cooperate."

Devine assumed that the adjuster was writing down what McTeho was stating in the conversation. Johnston had requested to drop his claim in a voicemail on August 19, 2014. Safeway left a voicemail for him, but it never was able to speak to him directly. Safeway sent him a claim withdrawal form, and Safeway received the completed form back on September 3, 2014. Safeway did not make an offers or promises to Johnston in exchange for him signing the form. Safeway sent a letter to Napleton on September 17, 2014, denying its claim on the bases that Johnston was the only named insured, there was no loss payee listed on the policy, and Johnston had withdrawn his claim.

¶ 9 Mirjana Condos, an underwriting supervisor with Safeway, testified as follows in her deposition. Johnston's producer, United Auto Insurance, requested that his insurance policy be changed to cover the 2014 Kia Soul, and Safeway made the change on August 7, 2014. In order to add a loss payee on the policy, Johnston would have needed to inform his producer, and the producer would have then submitted the request in writing to Safeway. If Johnston had contacted Safeway directly, he would have been directed to speak to the producer. There would have been no additional charge to name a loss payee. If the loss payee were added at a later date, it would qualify from the date the request was received. Safeway's claim department received the insurance coverage acknowledgement from Napleton on August 18, 2014. Condos did not consider it to be a request by Johnston to have Napleton added as a loss payee because the document was not submitted by the producer to the underwriting department. If a loss payee were added when the policy was changed to add the 2014 Kia Soul, it would have appeared on the same endorsement page. If the change was made later, Safeway would have generated

another endorsement page. The only policy language informing the insured what steps to take to add a loss payee was:

> "**NOTICE** –This policy has been issued based upon the reliance on the statements on the application. **Read it Carefully** and notify the Company (through your agent) of any misinformation or changes that may occur immediately."

¶ 10 Napleton moved for summary judgment on October 11, 2016. We summarize its argument with regards to its claim for a declaratory judgment. The proceeds of an insurance contract are indemnity for actual losses sustained by the insured or a loss payee. The vehicle was declared a total loss before Johnston even made his first payment, and the party who suffered an actual loss was Napleton. As the lienholder, it was permitted to step into Johnston's shoes and bring a claim for the loss. This was even acknowledged by Safeway in its claim adjuster's notes. There were multiple "issues" with Safeway's position that the claim denial was warranted because Napleton was never added to the declarations page as a loss payee. First, it was self-serving of Safeway not to make this change when the vehicle was totaled within a week after purchase. Safeway was aware at the time that Johnston was withdrawing any claim he had, so now Safeway was seeking to avoid paying any insurance proceeds for its own failure to change the declarations page. Second, Safeway told Napleton that it was a loss payee and could pursue the claim with proof of ownership of the vehicle, which Napleton provided. Third, the policy was ambiguous as to how an insured was supposed to add a party as a loss payee. The intentions of Johnston and Napleton were clearly to have Napleton added as a loss payee on the Safeway policy, and the only condition for payment to be made to the loss payee was executed title to the vehicle. Additionally, on August 16, 2014, Safeway was still in the process of switching over Johnston's insurance to his new vehicle, as it sent a letter to his broker that day with the

endorsement to be filled out and signed. At that point, Safeway already knew that the vehicle was a total loss and that Napleton was making a claim.

¶ 11 Napleton attached numerous documents to its motion, including a letter from Safeway to United Auto Insurance, Johnston's producer, dated August 16, 2014. The letter requested that Johnston and the agent sign the document to confirm that the information for the endorsement change to add the 2014 Kia Soul was correct.

¶ 12 Safeway moved for summary judgment on October 18, 2016. It argued that there was no genuine issue of material fact that Napleton did not have an insurance policy with Safeway and was not a loss payee under Johnston's policy. Safeway additionally argued that since Johnston had voluntarily withdrawn any claims relating to the accident, Safeway was not required to provide any insurance coverage to either him or Napleton.

¶ 13 On February 17, 2017, the trial court granted summary judgment for Napleton on the count seeking a declaratory judgment, ruling that it was entitled to coverage from Safeway. The trial court denied Napleton's claim for bad faith. The trial court stated that the claim adjuster's notes were controlling, and that:

> "because of the timing of this that *** Safeway had been advised of Napleton's interest in the vehicle and that the failure was on the part of Safeway.
>
> There's nothing in the policy that requires the broker to be the one who advises Safeway. It says the agent, but it doesn't define who the agent is or what the agent is."

¶ 14 Safeway timely appealed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, Safeway contests the trial court's grant of summary judgment for Napleton. Summary judgment is appropriate only where the pleadings, depositions, admissions, and

affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016); *Hertz Corp. v. City of Chicago*, 2017 IL 119945, ¶ 12. We review *de novo* an order granting summary judgment. *Id.* The construction of an insurance policy presents a question of law, which we also review *de novo*. *St. Paul Fire & Marine Insurance Co. v. Waukegan*, 2017 IL App (2d) 160381, ¶ 24.

¶ 17 Safeway argues that the "Loss Payee Agreement" section of the policy requires that a loss payee "be identified on the Declarations page," but Napleton was never added to the policy. Safeway maintains that the only change Johnston requested was to add the 2014 Kia Soul to the policy and remove the 2012 Volkswagen Passat. Safeway argues that no one took any steps to notify it of Napleton's interest in the car before the accident. Safeway argues that its underwriting procedures do not permit adding a loss payee to a policy retroactively, so Napleton could be afforded coverage for the accident only if it had been added as a loss payee before August 13, 2014.

¶ 18 Safeway next cites *Chrysler First Commercial Corp. v. State Farm Insurance Co.*, 269 Ill. App. 3d 318, 322 (1995), for the proposition that a title holder or lienholder is not automatically a loss payee. Safeway argues that, therefore, it is not bound to offer coverage to anyone who produced title to the vehicle. Safeway additionally argues that in regards to being a lienholder, Napleton did not provide its filing with the Secretary of State as proof of its lien because the filing shows Santander as the lienholder of record at the time of the August 13, 2014, accident.

¶ 19 Safeway argues that even if we determine that Napleton was added as a loss payee, Napleton is subject to the same defenses that could be raised against the named insured, as stated

in its policy. Safeway contends that because Johnston voluntarily withdrew his claim for coverage related to the accident, Napleton is bound by the withdrawal and not entitled to coverage.

¶ 20 Last, Safeway argues that Napleton is not an insured or party to Johnston's insurance policy; that Napleton cannot sue the tortfeasor's insurer directly; and that because Safeway was not a party to the retail purchase contract, retail installment contract, or insurance coverage acknowledgement, it is not bound by those documents' terms. Safeway argues that Napleton should have checked Johnston's insurance policy to make sure it was added as a loss payee before allowing Johnston to leave the dealership with the Kia Soul.

¶ 21 Napleton counters that it is a loss payee under the policy because it suffered an actual loss from the accident as the lienholder. Napleton argues that although it is not listed on the policy's declarations page, it was self-serving for Safeway to not add it when the vehicle was totaled within one week after purchase. Napleton argues that the policy is ambiguous in that it does not inform an insured how to make someone a loss payee, and it therefore should be construed against Safeway. Napleton argues that Safeway also advances an inconsistent argument, in that it argues that only the insured, his agent, or policy producer could make a request to add a loss payee, yet Safeway later states that Napleton could have taken steps to notify it of its interest in the vehicle.

¶ 22 Napleton also argues that Safeway's August 16, 2014, letter to the broker shows that it was still in the process of switching over Johnston's insurance to his new vehicle at a time when Safeway knew that Napleton owned the vehicle and was making a claim. Napleton argues that there is no policy language stating that a loss payee cannot be added retroactively. Napleton

argues that Johnson would have had to turn over his insurance proceeds to Napleton, so there is no reason that Napleton could not be added as a loss payee retroactively.

¶ 23 Napleton argues that its intentions and those of Johnston were clear, as the purchase of the vehicle required proof of insurance and having Napleton added as a loss payee; Johnston signed the insurance acknowledgement agreement on August 7, 2014, which listed Napleton as a loss payee; and the Safeway policy was changed on the same day to include the new vehicle.[2] Napleton argues that from that date forward, the car was covered by Safeway. According to Napleton, when Johnston totaled the vehicle about one week later, he had not paid for it, and Napleton was the titleholder and proper owner of the vehicle. Napleton argues that the policy's only condition for payment was providing the executed title to the vehicle. Napleton maintains that, correspondingly, the claim adjuster's notes from August 21, 2014, indicated that Safeway was advising it that it would be a loss payee on the policy.

¶ 24 Napleton additionally argues that Johnston's withdrawal of his claim is not a defense for Safeway. Napleton cites *Chrysler First Commercial Corp.*, 269 Ill. App. 3d 318, for the proposition that a loss payee can bring a separate suit for insurance but is subject to the same defenses that could be raised against the named insured. Napleton maintains that, as the lienholder of the vehicle, it is permitted to step into Johnston's shoes and bring a claim for the loss of the vehicle, and its rights to do so are not dependent on whether Johnston wanted to pursue a claim for his own damages. Napleton asserts that it is logical that Johnston would

[2] Napleton states that the change was made based on a telephone call from Johnston, but in the page of the record it cites, Condos testified that the change was made based on a request from Johnston's producer.

withdraw his claim under the policy, as the vehicle was declared a total loss before he had even made his first payment.

¶ 25 Last, Napleton maintains that Safeway's argument, that Napleton should have checked that it was a loss payee before allowing Johnston to drive off with the car, was simply impractical. Napleton argues that under Safeway's policy language, the changes would have to be done in writing, so no dealership would be able to let a customer have a car for days, until after brokers sent letters to the insurance companies to make formal policy changes. Napleton argues that Safeway itself was still finalizing the paperwork for changes to the policy after the accident. Napleton argues that the outcome that Safeway advocates would be a miscarriage of justice, as Safeway collected insurance premiums from Johnston; Napleton sold the vehicle to Johnston on the condition Napleton would be covered by his insurance policy; Safeway acknowledged that Napleton was a loss payee; and then because Johnston allegedly did not have his broker send a letter to Safeway asking for Napleton to be added as a loss payee on the declarations page, despite no clear instructions on the policy to do so, Safeway can escape paying out on the policy.

¶ 26 In response, Safeway maintains that nothing in the record supports Napleton's assertion that Johnston agreed to make it a loss payee, as Napleton's name is handwritten on the otherwise typed insurance coverage agreement. Safeway argues that because Napleton admits that it unilaterally altered the retail installment contract outside of Johnston's presence, Safeway may have also altered the insurance coverage agreement. According to Safeway, nothing in the record suggests that Johnston intended for Napleton to be covered by his Safeway insurance policy or that Safeway acknowledged Napleton as a loss payee. Safeway argues that the claim adjuster's notes show that McTeho had advised Safeway that Napleton would be added as a loss

payee, not the reverse. Safeway argues that this is especially true given that the documents must be viewed in the light most favorable to it when considering summary judgment for Napleton. Safeway further maintains that McTeho had no authority to request a change to Johnston's policy, and the adjuster had no authority to add Napleton as a loss payee. Safeway argues that, similarly, Napleton has no standing to argue that the insurance policy is ambiguous.

¶ 27 We conclude that the trial court erred in granting Napleton summary judgment and denying Safeway summary judgment. We begin by observing that in Illinois, parties to an insurance contract can assign the insurance proceeds to a third party. *In re Rose Investments, Inc.*, 1996 WL 596328, *9 (Bankr. N.D. Ill. Sept. 16, 1996). Loss payable clauses govern the rights of third parties with an interest in the insured property who are assigned the policy's proceeds. *Id.* In this case, the loss payee clause states, in relevant part:

> "*The Company shall pay the Loss Payee identified on the declarations as its interest shall appear. The right of the Loss Payee herein is subject to any defense the Company has as to the insured. The Loss Payee shall tender to the Company properly executed title to the insured vehicle as a condition of payment hereunder.*"

¶ 28 When a defendant moves for summary judgment, it must satisfy its initial burden of production by affirmatively establishing that some element of the case must be resolved in its favor or that there is an absence of evidence to support the plaintiff's case. *Performance Food Group Co. v. ARBA Care Center of Bloomington*, LLC, 2017 IL App (3d) 160348, ¶ 18. Safeway met this burden by pointing out that Napleton is not identified anywhere on the policy as the loss payee, as required by the loss payee clause. The burden then shifted to the nonmoving party, Napleton, to establish that there were genuine issues of fact and/or that Safeway was not entitled to a judgment as a matter of law. See *id.* "While the nonmoving party

in a summary judgment motion is not required to prove his or her case, the nonmovant must present a factual basis arguably entitling that party to the judgment." *Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 8 (2004). Quite simply, Napleton failed to do so.

¶ 29 Both in opposition to Safeway's motion and in support of its own summary judgment motion, Napleton argued that Johnston's intentions were clearly to add Napleton as a loss payee, as Johnston signed the insurance acknowledgement agreement on August 7, 2014, listing Napleton as a loss payee, and the Safeway policy was changed the same day to include the Kia. However, Napleton cites no authority for the proposition that a contract between it and Johnston could bind Safeway, which was a third party. Moreover, just because Johnston promised to add Napleton as a loss payee does not mean that he actually followed through on this promise. Indeed, there is no evidence that Johnston took any action in this regard. There is also no indication, contrary to Napleton's argument, that Johnston was misled by any policy language. Rather, the evidence shows only that he requested that Safeway change the coverage on the policy from his prior car to the Kia. Neither Johnston nor anyone else notified Safeway of Napleton's interest in the car until after the accident had occurred, when Napleton contacted Safeway, and there is no policy language or caselaw that would require Safeway to add Napleton as a loss payee retroactively.

¶ 30 Napleton repeatedly states that Safeway itself acknowledged Napleton's status as a loss payee in its claim adjuster's notes, but Napleton does not directly argue that Safeway is bound by the notes, nor does Napleton cite any relevant legal authority for this proposition. Therefore, Napleton has forfeited reliance on such an argument. See *CE Design, Ltd. v. Speedway Crane, LLC*, 2015 IL App (1st) 132572, ¶ 18 (the failure to clearly define issues and support them with authority results in forfeiture of the argument).

¶ 31 Moreover, even if, *arguendo*, Napleton had been added as a loss payee, it would not be entitled to recover based on the loss payable clause present here because, as Safeway argues, Napleton is subject to the same defenses that could be asserted against Johnston, and Johnston voluntarily withdrew his claim. See *supra* ¶ 19.

¶ 32 There are two types of loss payable clauses, also called mortgage clauses, in insurance policies which protect lienholders: a simple/ordinary loss payable clause and a standard loss payable clause. *Chrysler First Commercial Corp.*, 269 Ill. App. 3d at 321. Under the simple loss payable clause, an insurer pays the policy's proceeds to the lienholder, as its interest may appear, before the insured receives payment. *Id.* The lienholder is just an appointee to receive the proceeds to the extent of its interest, and its right of recovery does not exceed that of the insured. *Id.* That is, a loss payee's rights are of a derivative nature and entirely dependent on the rights of the named insured. *Posner v. Firemen's Fund Insurance Co.*, 49 Ill. App. 2d 209, 216 (1964). "If for some reason the named insured could not collect under the policy, then the loss payee would likewise be unable to collect." *Id*; see also 4 Couch on Ins. § 65:23 ("there is no privity of contract between the insurer and the mortgagee that would permit the latter to recover regardless of acts of the mortgagor, not participated in by him or her, which cause a forfeiture"). Therefore, a simple loss payable clause alone cannot support a claim by a loss payee directly against an insurer. *Suburban, Inc. v. Cincinnati Insurance Co.*, 323 Ill. App. 3d 278, 279 (2001); see also *Posner*, 49 Ill. App. 2d at 216 (quoting *Barwick*, 266 Ill. App. at 577) (" 'The payee has no direct rights against the insurer, but recovers, if at all, solely in the right of the insured, and only when the latter has a valid and enforceable demand under the policy.' ")

¶ 33 A simple loss payable clause was found in *Chrysler First Commercial Corp.*, 269 Ill. App. 3d at 321, where the policy stated:

> "If a loss payee is named in the **Declarations,** any loss payable under Section I shall be paid to you and the loss payee, as interests appear. Loss covered under Section I will be adjusted with you only." (Emphasis in original.)

Similarly, in *Suburban, Inc.*, 323 Ill. App. 3d at 280, 283, language stating that the insurance company would "adjust losses with you [the named insured]" and pay claims for loss or damage "jointly to you and the Loss Payee, as interest may appear," was found to constitute a simple loss payable clause. The same result was reached in *Posner*, 49 Ill. App. 2d at 211, 216, where the policy stated, "Loss, if any, to be adjusted only with the Insured named herein and payable to the Insured and [loss payee] ***, as their respective interests may appear."

¶ 34 Under the second kind of loss payable clause, being the standard loss payable clause, there is language creating a separate contractual relationship between the insurer and the lienholder. *Suburban, Inc.*, 323 Ill. App. 3d at 282; *Chrysler First Commercial Corp.*, 269 Ill. App. 3d at 321. Under a standard loss payable clause, the loss payee "is liable only for its own breaches and is protected from being denied coverage based on the acts or omissions of the named insured or the insured's noncompliance with the terms of the policy." *Stonegate Insurance Co. v. Hongsermeier*, 2017 IL App (1st) 151835, ¶ 17. One of the main purposes of a standard loss payable clause is to protect the loss payee from the debtor's "whims." *Old Second National Bank v. Indiana Insurance Co.*, 2015 IL App (1st) 140265, ¶ 20.

¶ 35 A standard loss payable clause was found in *West Bend Mutual Insurance Co.*, 158 Ill. App. 2d 241 (1987). In that case, a buyer purchased a motel pursuant to an installment contract. She also purchased insurance, naming herself as the insured and the seller as the loss payee. The buyer subsequently committed arson on the property, and the seller filed an insurance claim. *Id.* at 244. The insurance clause stated:

> " 'A contract for sale of the property described in this policy having been made between the Insured and [the buyer] 163 Hickory Hill, Port Richey, FL 33568 *the interest of said last named party is also insured hereunder*, but without any increase in the amount of insurance, and subject to all other terms, provisions and conditions of this policy, including any Mortgage Clause forming a part of this policy.' " (Emphasis added.) *Id.* at 246.

The appellate court stated that the clause indicated that the insurer recognized that the seller had an interest in the property distinct from the seller, and the insurer agreed that the interest was also insured under the policy. *Id.* at 247. The court stated that under the language, the seller acquired an interest in the policy with the insurer's consent, creating an independent contractual relationship between the seller and the insurance company. *Id.* Standard loss payable clauses were also found in *Hongsermeier*, 2017 IL App (1st) 151835, ¶ 24 (policy stated, "If we deny your claim, that denial will not apply to a valid claim of the mortgagee, if the mortgagee" fulfilled certain conditions), and *Old Second National Bank*, 2015 IL App (1st) 140265, ¶ 21 (policy stated, "if we deny your claim because of your acts or because you have failed to comply with the terms of this policy, the mortgageholder will still have the right to receive loss payment" (emphasis omitted) if it satisfied certain conditions).

¶ 36 In this case, the loss payee clause (see *supra* ¶ 27) is similar to that *Chrysler First Commercial Corp.*, *Suburban, Inc.*, and *Posner*, in that the language simply allows the loss payee to receive the policy's proceeds, as its interest may appear, before the insured receives payment. That is, in contrast to *West Bend Mutual Insurance Co.*, *Hongsermeier*, and *Old Second National Bank*, the clause does not create a separate contractual relationship between the insurance company and the loss payee. Accordingly, the clause is a simple loss payee clause. There is

also no other language in the policy that could be construed as creating a distinct contractual relationship between the insurer and the loss payee. *Cf. Hongsermeire*, 2017 IL App (1st) 151835, ¶¶ 25-26.

¶ 37 As stated, under a simple loss payable clause, a loss payee's rights are derivative in nature and depend entirely on the named insured's rights. *Posner*, 49 Ill. App. 2d at 216. In *Posner*, the named insured did not timely file suit against the insurer, so the loss payee was similarly prohibited from recovery. *Id.* at 218. Here, the named insured, Johnston, waived any claim to the insurance proceeds, and the record does not indicate that he received anything from Safeway in exchange for doing so. *Cf. Perfect Investments, Inc. v. Underwriters at Lloyd's London*, 782 P.2d 932, 934 (Okla. 1989) (simple loss payee is not bound by insurance company's settlement with insured). A simple loss payable clause puts the loss payee "at the risk of every act and omission of the insured that would void, terminate, or adversely affect the insurance of the latter's interest under the policy." *Id.* at 216 (quoting *Barwick v. Westchester Fire Insurance Co.*, 266 Ill. App. 574, 577 (1932)). Accordingly, even assuming that Napleton was properly named as a loss payee, Napleton cannot recover from Safeway. This result is consistent with the principle that a loss payee under a simple loss payable clause cannot assert a claim directly against the insurer. *Suburban, Inc.*, 323 Ill. App. 3d at 279.

¶ 38 A similar result was reached in a case from another jurisdiction, *Northwestern National Casualty Co. v. Khosa, Inc.*, 520 N.W. 2d 771 (Minn. Ct. App. 1994). There, the owner of a commercial building was named as a loss payee on a tenant's insurance policy. *Id.* at 772. The owner later commenced an eviction proceeding, and the tenant decided to close shop and remove personal property and fixtures from the building. *Id.* In the process, the tenant allegedly damaged the building. *Id.* at 772-73. The owner sought coverage under the insurance policy as a

loss payee. *Id.* at 772. The Minnesota appellate court held that because the tenant had not made a claim for coverage under the policy, the owner could not assert an interest in the tenant's claim and thus had no right of recovery under the policy. *Id.* at 774-75. Here, Johnston affirmatively withdrew any claims that he had arising from the accident, so Napleton likewise has no claim from which it can assert an interest in the proceeds.

¶ 39 Napleton maintains that its rights are not dependent on whether Johnston wanted to pursue his own claim for damages, but Napleton relies on principles relevant to standard loss payable clauses, as opposed to the simple loss payable clause present here.

¶ 40 Napleton contends that an outcome in which Safeway does not have to pay out proceeds for an insured vehicle is unjust. However, the insurance contract was between Johnston and Safeway, and Johnston chose not to proceed with his claim. Any rights Napleton had to the insurance proceeds were derived from Johnston's rights and subject to his "whims" (*Old Second National Bank*, 2015 IL App (1st) 140265, ¶ 20). Although Napleton argues that it is not unexpected that Johnston would withdraw his claim because he had not begun his payments on the vehicle, Napleton ignores the fact that it has a default judgment against Johnston. Logically, most insureds in similar situations would proceed with their insurance claims in an effort to mitigate their financial liability for their vehicles, in which case the loss payees could recover. Regardless, Napleton chose contract terms which allowed Johnston to drive away with the vehicle based on financing that Napleton approved and a promise that he would add them as a loss payee. As discussed, loss payable clauses can have drastically different coverage depending on whether they are simple or standard. Had Napleton wanted more definite insurance coverage, it could have contracted for as much with either Johnston or an insurance company, but it chose not to do so. It is now stuck with the unusual turn of events that prohibit recovery here.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we reverse the judgment of the Du Page County circuit court. Pursuant to our authority under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we grant summary judgment for Safeway.

¶ 43 Reversed; judgment entered.