2011 IL App (1st) 110759-U

FIRST DIVISION
November 14, 2011

No. 1-11-0759

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

ILLINOIS FARMERS INSURANCE COMPANY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 09 CH 19403
	)	
ESTATE OF SYLVIA JAMES, deceased,	)	Honorable Richard Billik,
	)	Judge Presiding.
Defendant-Appellant.	)	

JUSTICE KARNEZIS delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ *1* *HELD:* Summary judgment was proper in declaratory judgment suit where the insured's policy excluded coverage for a car "furnished or available" for the insured's "regular use." The insured's arrangement to trade cars with a friend several days a week for a period of about one to two months constituted "regular use."

¶ 2 Defendant, Estate of Sylvia James, deceased (Estate), appeals from the trial court's order granting summary judgment in favor of plaintiff Illinois Farmers Insurance Company (Farmers). On appeal, the Estate contends the trial court erred in denying coverage and granting summary judgment because: (1) the car involved in the accident was not "furnished or available" for the insured's "regular use;" and, (2) several inconsistencies in the insured's testimony created a question of fact, precluding summary judgment. For the following reasons, we affirm.

¶ 3 Background

¶ 4 This cause of action arose as a result of a car-pedestrian accident that resulted in the death of the victim, Sylvia James. The accident occurred on November 5, 2007, near the intersection of King Drive and 115th Street, in Chicago. Angelina Williams was driving a Dodge Charger, which belonged to her cousin Tiffany Dixon, when she struck the victim.

¶ 5 Subsequently, the Estate filed suit against Williams and Dixon. Williams is insured under the Farmers' insurance policy issued to her mother, Darlene Harvest. Farmers filed a complaint for declaratory relief alleging that the policy excluded coverage because Dixon's car was available for Williams' "regular use."

¶ 6 During discovery, Williams submitted to an examination under oath, which occurred on November 4, 2008. Williams stated that at the time of the accident, she owned an Oldsmobile Alero and Dixon owned the Dodge Charger. She explained that she had been driving Dixon's car when the accident occurred because she and Dixon

had been switching cars "on and off." Williams was thinking about buying a car like Dixon's car, so Dixon let Williams drive the car to see if Williams liked it. They would trade cars for about two to four days each week for a period of about two months prior to the accident. There were no restrictions placed on Williams' use of the car and Williams drove it as she "saw fit." When asked whether the car was available to Williams for her regular use during the two month period, Williams responded, "yes." The arrangement continued until several days after the accident when Williams left the country to play basketball in Greece.

¶ 7 Williams' discovery deposition was taken on February 1, 2010. Williams stated that prior to the accident, she and Dixon would trade cars for "a couple days out of a week," which lasted "for probably about a month." When questioned whether they switched cars on average "maybe one or two days a week for roughly a month," she agreed.

¶ 8 Farmers filed a motion for summary judgment. Finding that Williams' "regular use" of Dixon's car was excluded from the policy's coverage, the trial court granted the motion. The Estate now appeals.

¶ 9 Analysis

¶ 10 At issue is whether the Estate can recover from the insurance policy under which Williams is insured. General contract law governs the interpretation of insurance policies. *Hobbs v. Hartford Insurance Co.*, 214 Ill. 2d 11, 17 (2005). As such, courts seek to effectuate the intention of the parties, primarily as expressed through the policy

language itself. *Hobbs*, 214 Ill. 2d at 17. The policy is to be considered as a whole, wherein each provision is given effect. *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004). If the words used in the policy, given their plain and ordinary meaning, are unambiguous, they must be applied as written. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993).

¶ 11 The trial court may properly grant a motion for summary judgment where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Smith v. Armor Plus Co., Inc.*, 248 Ill. App. 3d 831, 839 (1993). The construction of an insurance policy is a question of law that this court determines *de novo*. *Vanek v. Illinois Farmers Insurance Co.*, 268 Ill. App. 3d 731, 735 (1994).

¶ 12 On appeal, the Estate contends that the trial court erred in granting summary judgment because Williams use of Dixon's car did not constitute "regular use" under the policy and, Williams' inconsistent statements during her examination under oath and discovery deposition created a question of fact, which should preclude summary judgment.

¶ 13 The policy includes as an "insured car:"

> "Any other private passenger car, utility car, or utility trailer being driven by you or a family member which is not furnished or available for regular use nor owned by you or a

> family member."

¶ 14 The policy also contains the following exclusion:

> "Bodily injury or property damage arising out of the ownership, maintenance or use of any vehicle other than your insured car, which is owned by or furnished or available for regular use by you or a family member."

¶ 15 When the insurer asserts the "regular use" exclusion, the insured has the burden of proving coverage by a preponderance of the evidence. *State Farm Mutual Automobile Insurance Co. v. Dreher*, 190 Ill. App. 3d 182, 185 (1989). The reason for the "regular use" exclusion is to limit the insurer's liability to the vehicle for which the insured has purchased a policy, with a few exceptions. *Auto-Owners Insurance Co. v. Stubban*, 371 Ill. App. 3d 513, 515-516 (2007), *quoting Rodenkirk v. State Farm Mutual Automobile Ins. Co.*, 325 Ill. App. 421, 433 (1945). If the insured only pays for one policy, then that policy should not cover another car that the insured has available for his or her "regular use."

¶ 16 Here, we must determine whether Dixon's car was available for Williams' "regular use." If it was, then Dixon's car does not fall within the policy's definition of "insured car" and is also specifically excluded by the policy's above quoted exclusion.

¶ 17 According to Williams' examination under oath, she drove Dixon's car "on and off" about two to four days each week for about two months. There were no restrictions on her use of the car and she drove it as she "saw fit." According to Williams' discovery

deposition, she drove Dixon's car on average one or two days a week for about a month.

¶ 18 We find that Dixon's car was "furnished or available" for Williams' "regular use." When Williams and Dixon traded cars, whether it was for one to two days a week or up to three or four days a week, Williams was able to use the car however she wanted and there were no restrictions placed on her use. The duration of the arrangement was open-ended and lasted for one to two months until Williams left the country. Under these circumstances, we find that it was available for Williams' regular use.

¶ 19 Our determination is supported by several Illinois cases that have repeatedly denied insurance coverage for accidents involving a non-owned vehicle that was "furnished or available" for the "regular use" of the insured. In *Dreher*, the insured was involved in an accident while driving his mother's car. His mother would come to his house to care for his children and he would drive her car to work. She would then drive the car home each evening. He would also use the car when his mother was on vacation. The insured's automobile insurance policy, which was purchased for a car he owned, excluded coverage for a "non-owned" car that was "furnished or available for * * * regular or frequent use." *Dreher*, 190 Ill. App. 3d at 183. This court determined that the insured's mother's car was available for his "regular or frequent use" because there were no restrictions imposed on his usage and he drove the car nearly daily for four or five months, even though his use fluctuated slightly each week. *Dreher*, 190 Ill. App. 3d at 185. Therefore, the car was excluded from coverage and the insurer was not liable

for damages arising out of the accident. *Dreher*, 190 Ill. App. 3d at 186. Here, similarly, there were no restrictions placed on Williams' use of Dixon's car and she drove it several times a week for a month or two.

¶ 20 In *Ryan v. State Farm Mutual Automobile Insurance Co.*, 397 Ill. App. 3d 48, (2009), the insured, a Chicago police officer, was injured in a collision with an uninsured motorist while driving a patrol car owned by the City of Chicago. The insured made a claim under his insurance policy that was issued for a vehicle that he owned. The policy excluded coverage for any vehicle not insured under the policy that was "furnished or available for * * * regular use." This court determined that the patrol car was available for the insured's "regular use" because it was part of the pool of vehicles that he could use while on duty as a patrol officer, regardless how often he actually used the vehicle. *Ryan*, 397 Ill. App. 3d at 51. The court focused on the "availability" of the use of the vehicle rather than "actual use." *Ryan*, 397 Ill. App. 3d at 51. Therefore, the insured's claim was excluded from coverage and summary judgment in favor of the insured was proper. *Ryan*, 397 Ill. App. 3d at 53. Here, similarly, when Williams and Dixon traded cars, Dixon's car was available for Williams' "regular use" regardless of how often she actually drove the car.

¶ 21 The Estate relies on *Knack v. Phillips*, 134 Ill. App. 3d 117 (1985) for support. In *Knack*, the insured was driving her fiancee's car when she was involved in an accident. The owner of the car, who was in the Navy and had been assigned to Great Lakes Naval Station, stated in his deposition that he let the insured use his car during the

week to go to her part-time job and to pick him up on weekends. The insured also made some limited personal use of the car. She had been driving the car for about two weeks before the accident occurred. The insured's mother was the insurance policy holder and the insured was a member of her household. The policy excluded from coverage a "non-owned auto" that was "available or furnished for * * * regular use." The insurer filed a complaint for declaratory judgment alleging that the car was excluded from coverage under the policy. This court determined that the car was not available for the insured's "regular use" because the insured's use of the car was: temporary and the duration of the arrangement was never agreed on; mostly limited to driving back and forth to work; and, limited to when the owner was not using the car. *Knack*, 134 Ill. App. 3d at 122. This court noted that the insured's use of the car was more consistent with a "limited and casual use" rather than a "regular use," so the policy's exclusion did not apply. *Knack*, 134 Ill. App. 3d at 122.

¶ 22 *Knack* is distinguishable because, as stated above, there were no restrictions placed on Williams' use of Dixon's car and she used the car as she "saw fit." The arrangement between Williams and Dixon was not the "limited and casual use" as in *Knack*.

¶ 23 Furthermore, the minor differences between Williams' examination under oath and her discovery deposition, do not change our determination. These differences or, what the Estate refers to as "inconsistencies," also do not create a question of fact as to preclude summary judgment.

¶ 24 Accordingly, we affirm the judgment of the circuit court.

¶ 25 Affirmed.