

No. 1-12-1113

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FOUNDERS INSURANCE COMPANY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	
JOSE J. LEAL, STATE FARM MUTUAL)	
AUTOMOBILE INSURANCE COMPANY a/s/o)	
Scott R. Drafke and Mary Ann Drafke, SCOTT)	
R. DRAFKE and MARY ANN DRAFKE,)	
Individually and as Parents and Next Friends of)	No. 10 CH 46845
Samantha Drafke, a Minor, STATE FARM)	
MUTUAL AUTOMOBILE INSURANCE)	
COMPANY a/s/o Jeanne Markley, and JEANNE)	
MARKLEY, Individually,)	
)	
Defendants-Appellees)	
)	
(Keith Alexander, Kevin Thunderbird, Monique)	
T. Sellers, Funmilayo R. Bada, and Bosede Bada,)	Honorable
)	Mary Lane Mikva,
Defendants).)	Judge Presiding.

ORDER

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

Held: Judgment in favor of defendants in this declaratory judgment action involving an insurance

coverage dispute is affirmed, where the trial court's finding that one of the defendants had permission to use the insured automobile at the time of the accident in question was not against the manifest weight of the evidence.

¶ 1 Plaintiff-appellant, Founders Insurance Company (Founders), brought the instant lawsuit seeking a declaration that it had no duty to defend or indemnify defendant-appellant, Jose J. Leal (Jose), in connection with an automobile accident involving a vehicle Founders insured. Founders contended that Jose did not have permission to drive that vehicle, and that Jose was therefore not entitled to coverage under the language of Founders' insurance policy. After a bench trial, the trial court found that Jose had both actual and implied permission to drive the vehicle, and therefore entered judgement in favor of Jose, defendants-appellants, State Farm Mutual Automobile Insurance Company a/s/o Scott R. Drafke and Mary Ann Drafke (State Farm), Scott R. Drafke and Mary Ann Drafke, individually and as parents and next friends of Samantha Drafke, a minor, State Farm Mutual Automobile Insurance Company a/s/o Jeanne Markley (State Farm), Jeanne Markley, individually, and defendants, Keith Alexander, Kevin Thunderbird, Monique T. Sellers, Funmilayo R. Bada, and Bosede Bada. Founders has now appealed, and for the following reasons we affirm.

¶ 2 I. BACKGROUND

¶ 3 Founders filed its initial complaint for declaratory judgment on October 28, 2010, and the operative amended complaint—which added a number of defendants—on March 14, 2011. In its amended complaint, Founders generally alleged that Mr. Juan Leal (Juan) was the named insured with respect to a policy of insurance Founders had issued to him and which covered a 1995 Ford pick-up truck (Ford). On February 26, 2010, Jose was involved in an automobile accident while driving the Ford.

¶ 4 The various defendants named in the complaint—with the exception of Jose himself—included

No. 1-12-1113

drivers of, passengers in, or owners of other vehicles involved in the accident, as well as State Farm as subrogee for a number of such parties. As a result of this accident, the various named defendants had either made claims, or were anticipated to make claims in the future, against Jose or Founders for bodily injury, property damages, or other damages. Such claims included a subrogation suit filed by State Farm in the circuit court of Cook County, captioned *State Farm Automobile Company a/s/o Scott R. Drafke v. Jose Leal and Juan Leal*, 2010 M1 016534 (State Farm lawsuit).

¶ 5 The amended complaint further alleged that the insurance policy Founders issued to Juan provided liability coverage, with respect to the Ford, only to "Persons Insured." That term was defined to include "the named insured" and "any other person using such automobile with the permission of the named insured." After it was notified of the accident, Founders conducted an investigation as to "the identity and status of Defendant Jose, as he was unknown to Founders." As a result of this investigation, Founders concluded that Jose was a "non-permissive driver" of the Ford. This conclusion was based upon recorded statements obtained from Jose and Juan, as well as an affidavit signed by Juan. Founders alleged that in the recorded statements and in the affidavit, both Jose and Juan had stated that Jose was driving the Ford at the time of accident "with neither the knowledge nor consent of Juan Leal."

¶ 6 As such, Founder's alleged that Jose was not a "Person Insured" under the policy, and Founders therefore had "no duty to defend or indemnify [Jose] for or in connection with the State Farm lawsuit" or the "claims, or potential claims" of the defendants. Founders sought a declaration to that effect, as well as a finding that none of the defendants were "entitled to recover any monies whatsoever from or under Founders['] Policy for or in connection with the State Farm lawsuit or the motor vehicle occurrence of February 26, 2010."

¶ 7 A copy of Founders' insurance policy was attached to the complaint. The declaration page to that policy indicates that it was issued to Juan as the "named insured," it insured both the Ford and a 2002 Mercury Mountaineer vehicle, and listed both Juan and Mrs. Maria N. Leal (Maria) as drivers. The policy itself defined "named insured" as "the individual in the declarations and also includes the spouse, if a resident of the same household." The amended complaint also included a copy of Juan's affidavit, in which he averred that "[a]t the time of the accident, Jose Leal was not driving the vehicle with my permission and never had my permission to drive my car."

¶ 8 All of the named defendants filed appearances and answers to Founders' complaint, with the exception of Keith Alexander, Kevin Thunderbird, Monique T. Sellers, and Funmilayo R. Bada. After these four defendants were held to be in default on May 11, 2011, this matter proceeded to a bench trial held on March 15, 2012.¹

¶ 9 That trial began with the testimony of Juan, who testified in Spanish *via* a translator that he lived in Chicago with his wife, Maria, and his two adult sons, Jose and Nicholas. The Ford was the vehicle Juan typically drove, Maria typically drove the Mountaineer, and both were insured by Founders. Jose and Nicholas had their own vehicles.

¶ 10 Juan testified that he recalled giving a voluntarily recorded statement—in Spanish—to Founders shortly after the accident. Juan acknowledged that, in that statement, he told Founders that he did not give Jose permission to drive the Ford at the time of the accident. He also acknowledged

¹A trial memorandum filed by Founders on March 8, 2012, contains the only reference in the record to the fact that—as Founders claims in its appellate brief—a second underlying lawsuit had been filed against Jose and Juan. Specifically, Founders' memorandum noted that a lawsuit was filed against Juan and Jose in the circuit court of Cook County on February 27, 2012, on behalf of Mrs. Drafke, Mrs. Drafke's minor daughter, Samantha, and Ms. Markley (case No. 2012 L 002181).

No. 1-12-1113

that he did not indicate during that statement that Jose had Maria's permission to use the Ford, because he did not know this fact at the time he gave the statement. Indeed, he did not recall if he was even asked that question by Founders at that time. Furthermore, Juan confirmed that he signed an affidavit prepared by Founders, in English, after it had been translated into Spanish. Juan confirmed that this affidavit stated that Jose did not have his permission to drive the Ford at the time of the accident.

¶ 11 However, Juan also testified that he had come to understand that Maria had indeed given Juan permission to drive the Ford. In fact, Juan had previously testified to this fact at a deposition taken in connection with the underlying State Farm lawsuit in May of 2011.

¶ 12 Jose also testified in Spanish *via* a translator, and began by stating that he lived in Chicago with his parents, Juan and Maria, and his brother, Nicholas. Prior to the accident, Juan had only used his father's Ford on a couple of occasions to drive to school, and each time obtained permission. He usually drove to work in his own vehicle, but it had "broken down" shortly before the accident. While his brother had since driven Jose to work a number of times, Nicholas was unavailable to do so at the time of the accident. Therefore, Jose testified that he obtained his mother's permission to drive the Ford at that time.

¶ 13 Jose acknowledged that he gave a recorded statement to Founders about the accident in which he generally indicated that he did not have permission to use the Ford at the time of the accident. However, he testified that Founders had only asked questions about his father at that time, and therefore his response was intended to reflect that he did not have his father's permission. Jose testified that he never told Founders about obtaining his mother's permission because they never asked that question and he was nervous. In contrast, Jose did previously indicate that his mother

No. 1-12-1113

gave him permission during a deposition taken in connection with the underlying subrogation suit. Jose explained that he provided this information during the deposition "because they had asked me a question who else had given me permission and it was my mom." Jose testified that he would have told Founders about obtaining permission from his mother, if they only would have asked him that question.

¶ 14 Maria testified, again *via* a translator, that she was Juan's wife and the mother of Jose. Maria also testified that she gave Jose permission to use the Ford at the time of the accident. While she was initially contacted by Founders about the accident, she never received a return phone call after she responded to Founder's initial phone call. Thus, she never told Founders about this fact until she testified at a deposition for this matter in October of 2011. Indeed, she did not even tell Juan about this fact until shortly before he gave his deposition testimony in May of 2011. Nevertheless, Maria testified that she would have told both Juan and Founders about giving Jose permission earlier if they had asked her that question.

¶ 15 The trial court also heard testimony from Ms. Tirza Fernandez, a Founders' claims assistant. Ms. Fernandez testified that she took a recorded statement from Juan in Spanish and subsequently translated and transcribed that statement into English. She also translated and transcribed a recorded statement obtained from Jose that was taken by another Founders employee, Mr. Prudencio Castillo. With respect to Juan's statement, Ms. Fernandez asked him specific questions from a template provided by Founders. Juan told Ms. Fernandez that, while Jose had previously been given permission to use the Ford on a few occasions to drive to school, Jose had not obtained Juan's permission to use the Ford at the time of the accident. Ms. Fernandez did acknowledge that she never asked Juan if his wife had given Jose permission to drive the Ford.

No. 1-12-1113

¶ 16 Finally, the trial court heard testimony from Mr. Castillo, a senior claims analyst for Founders. Mr. Castillo testified that he was involved in Founders' investigation into the accident in his prior capacity as a coverage adjuster. In that role, Mr. Castillo reviewed the claim file, which included the recorded statement and signed affidavit previously obtained from Juan. On the basis of that review, it appeared to Mr. Castillo that Jose did not have permission to drive the Ford at the time of the accident. Nevertheless, Mr. Castillo contacted Jose to obtain a recorded statement in order to confirm the information that had previously been provided to Founders.

¶ 17 Mr. Castillo testified that, in obtaining that statement, Jose was asked generally if he had permission to drive the Ford and he answered "no." Jose did not indicate that his mother had given him permission to do so in that statement, even when he was asked why he drove the Ford without his father's permission. Indeed, Jose never mentioned his mother at all in the statement, and said that driving the Ford was "wrong." Mr. Castillo did acknowledge that he never asked either Juan or Jose if Maria had provided Jose with permission to drive the Ford, even though she would have been authorized to do so as a named insured under the policy.

¶ 18 It was not until after Juan and Jose gave their depositions in the underlying subrogation lawsuit that Mr. Castillo learned that there was a contention that Maria had given Jose permission to use the Ford. In response to that revelation, Mr. Castillo called Maria to obtain a recorded statement. Maria could not talk at that time, so Mr. Castillo sent her a letter in Spanish asking her to contact Founders and provide a statement about this matter. According to Mr. Castillo, Maria did not respond to that letter. As a result of his investigation, Mr. Castillo sent Jose a letter—in English—indicating that he would be defended in the underlying subrogation lawsuit under a reservation of rights due to Founders' conclusion that Jose did not have permission to use the Ford.

No. 1-12-1113

¶ 19 The trial court accepted into evidence, *inter alia*, the insurance policy, Juan's affidavit, the transcriptions of the two recorded statements, and the letters sent to Maria and Jose. Thereafter, the parties provided arguments and the trial court took the matter under advisement.

¶ 20 On March 22, 2012, the trial court entered a written order which first concluded that the evidence presented at trial "clearly negated any possibility that Jose was a 'person insured' under the Founders' Policy on the basis that he had the express permission of Juan to drive the Ford Pick Up." However, the trial court further noted that "Founders also had a duty to defend and to insure Jose if he had express permission from Maria." The trial court then reviewed the evidence and noted the various attacks Founder's had made on the credibility of the testimony of Juan, Jose, and Maria. These included, *inter alia*, Founders' assertions that their testimony was not credible because: (1) neither Juan nor Jose told Founders about Maria's grant of permission until their depositions in the underlying subrogation lawsuit; (2) there were inconsistencies as to when Maria told Juan she had given Jose permission; (3) Maria failed to response to Founders' attempts to contact her; and (4) Juan, Jose, and Maria did not make eye contact with Founders' attorney at trial.

¶ 21 The trial court found many of these issues of credibility to be "insignificant," while other aspects of the testimony of Juan, Jose, and Maria were indeed "troubling." However, the trial court also noted that the evidence clearly established that "neither of the Founders' representatives who interviewed Juan and Jose ever asked them whether Maria had given Jose permission to drive the Pick Up." In the end, the trial court concluded that, "despite vigorous and effective cross examination by the Founders' attorney, the court finds that Founders failed to negate this testimony as to Maria's giving her son permission to drive the car." In addition, the trial court found that the evidence also established the Jose had "implied permission" to drive the Ford. As such, the trial

No. 1-12-1113

court found that "Jose was a 'person insured' under the Founders policy at the time of the accident" and judgment was therefore entered in favor of the defendants. Founders filed a timely notice of appeal.

¶ 22

II. ANALYSIS

¶ 23 On appeal, Founders contends that the judgment against it should be reversed—and that a judgment in its favor should be entered in its stead—because the trial court's findings that Jose had both actual and implied permission to drive the Ford were incorrect. We disagree, as we conclude that the trial court's finding that Jose had Maria's permission to use the Ford was not against the manifest weight of the evidence.²

¶ 24 As the plaintiff in this action for declaratory relief, Founders had the burden of proving it was entitled to a declaratory judgment that Jose was not entitled to insurance coverage because he was not a permissive driver of the Ford. See *Farmers Automobile Insurance Association v. Gitelson*, 344 Ill. App. 3d 888, 896 (2003). In reviewing the trial court's resolution of this issue, we are bound by the trial court's factual findings unless they are against the manifest weight of the evidence. *Federal Insurance Co. v. Binney & Smith, Inc.*, 393 Ill. App. 3d 277, 282 (2009) (citing *U.S. Gypsum Co. v. Admiral Insurance Co.*, 268 Ill. App. 3d 598, 619 (1995)). A finding is against the

² None of the parties to this dispute have questioned—either in the trial court or on appeal—whether resolution of these issues could possibly violate the so-called "*Peppers doctrine*," pursuant to which "it is generally inappropriate for a court considering a declaratory judgment action to decide issues of ultimate fact that could bind the parties to the underlying litigation." *Allstate Insurance Co. v. Kovar*, 363 Ill. App. 3d 493, 501 (2006) (citing *Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187, 197 (1976)). Because this issue has never been raised by the parties, it has been waived and will not be further considered in this order. *Vine Street Clinic v. HealthLink, Inc.*, 222 Ill. 2d 276, 301 (2006) ("issues not raised in either the trial court or the appellate court are considered waived.").

No. 1-12-1113

manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence. *Webb v. Mount Sinai Hospital & Medical Center of Chicago, Inc.*, 347 Ill. App. 3d 817, 826 (2004). However, the construction of an insurance policy's provisions, and the ultimate determination of the parties' rights and obligations under that policy, are questions of law which we review *de novo*. *Binney & Smith, Inc.*, 393 Ill. App. 3d at 282 (citing *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992)).

¶ 25 Here, there is no dispute that the policy of insurance issued by Founders provided liability coverage—with respect to the use of the Ford—to Juan and Maria as "named insureds" and to "any other person using such automobile with the permission of the named insured." Founders was in fact *required* to "cover the named insured and any other person using the vehicle with the named insured's permission." *State Farm Mutual Automobile Insurance Co. v. Universal Underwriters Group*, 182 Ill. 2d 240, 244 (1998); 625 ILCS 5/7-317(b) (West 2010). As such, with respect to the issue of express permission, the only question remaining for the trial court to answer was whether Jose used the Ford with the permission of either Juan or Maria.

¶ 26 At trial, the trial court was presented with testimony from Juan, Jose, and Maria that Maria did in fact give Jose permission to drive the Ford at the time of the accident. It was also presented with evidence and arguments that could arguably cast doubt upon this testimony. Ultimately, the trial court found the testimony of Juan, Jose, and Maria on this point was sufficiently credible to support a finding that Jose did have express permission to drive the Ford, and that he was therefore entitled to coverage under Founders' policy. That finding of fact is entitled to great deference by this court, because the circuit court was "in a superior position to observe the witnesses while

No. 1-12-1113

testifying, to judge their credibility, and determine the weight of their testimony." *Southwest Bank of St. Louis v. Pouloukefalos*, 401 Ill. App. 3d 884, 891 (2010). Indeed, "resolving conflicts relating to the credibility of witnesses and the weight to be afforded their testimony is the province of the trial court." *Id.*

¶ 27 On appeal, Founders essentially reasserts the credibility attacks it made below and asks this court to reverse the trial court's conclusion that Jose had express permission from Maria because the evidence clearly established that Juan, Jose, and Maria "concocted their 'story' in a vain and desperate attempt to gain coverage." We decline to do so, because such credibility determinations were the province of the trial court to make, and our review of the record reflects that the trial court's conclusion that Juan, Jose, and Maria were credible witnesses and that Jose therefore had express permission to drive the Ford was not unreasonable, arbitrary, or not based on the evidence. *Webb*, 347 Ill. App. 3d at 826. If anything, the record establishes that any confusion surrounding the issue of Jose's permission to drive the Ford in this case may have resulted from Founders' failure to initially—and specifically—ask Juan or Jose about Maria's possible involvement.

¶ 28 Finally, because we affirm the trial court's findings with respect to Jose's express permission to drive the Ford, we need not address whether the trial court also properly concluded that Jose had implied permission to do so.

¶ 29

III. CONCLUSION

¶ 30 For the foregoing reasons, we affirm the judgement of the circuit court.

¶ 31 Affirmed.