

No. 1-13-2249

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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ART MIERZYCKI,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
Plaintiff-Appellee,	)	
	)	
and	)	No. 10 CH 36268
	)	
GRICELA CALDERON,	)	
	)	
Plaintiff,	)	Honorable
	)	Lee Preston and David B. Atkins,
v.	)	Judges Presiding
	)	
AMERICAN FAMILY MUTUAL INSURANCE	)	
	)	
Defendant-Appellant.	)	

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PRESIDING JUSTICE CONNORS delivered the judgment of the court.  
Justices Cunningham and Delort concurred in the judgment.

**ORDER**

*Held:* Summary judgment in favor of plaintiff-claimant and against defendant-insurer was proper because defendant failed to prove the applicability of the insurance policy exclusion that one who uses the vehicle "in the course of any business" is not an "insured."

¶ 1 The issue before us is whether plaintiff Art Mierzycki (Mierzycki) is an "insured" under the personal liability umbrella policy (policy) issued by American Family Mutual Insurance (American Family). The "Definition" section of the policy states that an "insured" with respect to a car owned or leased by the named insured on the policy is:

(1) Any person using such a vehicle\*\*\*or

(2) Any person or organization legally responsible for the acts or omission of a person for whom coverage is afforded under this policy while that person is using any such vehicles\*\*\*

A person or organization using or having custody of any such vehicles\*\*\**in the course of any business* or without your specific permission or who exceeds the scope of your permission is not an insured. (Emphasis added.)

¶ 2 The facts of the case have been gleaned from the record, which includes affidavits and responses to defendant's interrogatories.

¶ 3 Gricela Calderon (Calderon), though not a party to the instant appeal, was the owner of a 2003 Chevrolet Avalanche (vehicle). Calderon's son, Jessie Calderon (Jessie) leased the vehicle from her and was the named insured on the American Family policy. Jessie gave plaintiff and Calderon permission to use the vehicle. On December 8, 2009, Calderon drove the vehicle from her home in Bridgeview and collected plaintiff at his office in Joliet at approximately 10 a.m. Plaintiff then drove the vehicle with Calderon as the passenger to Morris to look at a restaurant location. When the landlord at the location failed to show up after 15 or 20 minutes, plaintiff and Calderon drove around Morris and nearby Ottawa to scout out other locations. While driving around, they stopped for snacks and gas.

¶ 4 Around 3 p.m. that afternoon plaintiff and Calderon decided to "quit for the day" and they ate an early dinner at a restaurant in Ottawa. Around 5:30 p.m., plaintiff and Calderon left

the restaurant and started to drive back to plaintiff's office in Joliet, where he left his car earlier that morning. Both plaintiff and Calderon were planning on proceeding to their respective homes upon arriving in Joliet. Around 6:00 p.m., while plaintiff was driving, another car travelling the opposite direction crossed the median and collided with the vehicle. Plaintiff and Calderon claimed serious injuries as a result of the accident.

¶ 5 Plaintiff and Calderon received the limits of liability under the tortfeasor's policy and, American Family paid its uninsured motorist limits to plaintiff and Calderon under the primary policy issued on the vehicle. Plaintiff and Calderon then sought coverage under the personal liability umbrella policy, but American Family denied benefits to both claimants.

¶ 6 On August 23, 2010, plaintiff and Calderon sought a declaration that American Family (1) had a duty to arbitrate, (2) alternatively, had breached a contract, and (3) had committed a vexatious and unreasonable denial under Section 155 of the Insurance Code (215 ILCS 5/155) which warranted the imposition of sanctions. Defendant answered the complaint by denying the allegations. Parties then exchanged discovery, including an interrogatory that requested that plaintiffs state the "purpose and/or use for which the said vehicle was being operated at the time of the occurrence." Plaintiff and Calderon answered, "The vehicle was being operated for work purposes." Subsequently, the parties filed cross motions for summary judgment.

¶ 7 In an order dated July 30, 2012, the trial court denied plaintiff and Calderon's motion for summary judgment and granted defendant's motion for summary judgment as to Calderon because she did not qualify as an "insured" for reasons not pertinent to the instant appeal. The court also denied plaintiff and Calderon's motion for summary judgment on count 3 for sanctions. In the same order, the court denied plaintiff and Calderon's as well as defendant's motions for summary judgment on counts 1 and 2 as to plaintiff Mierzycki reasoning, that there

was a genuine issue of fact as to whether his use of the vehicle comported with the policy's "business pursuits" exclusion which stated that the insurance company would "not cover business pursuits."

¶ 8 The parties filed renewed motions for summary judgment in which both sides directed the court to the definition of an "insured" rather than the "Exclusions" section of the insurance policy, the latter of which was only in play when some third party tried to recover from the insured as a tortfeasor. Here, the parties explained, it is not the tortfeasor but the injured party who is trying to recover from American Family. Therefore, only the definition of "insured" was at play.

¶ 9 The order addressing the renewed motions for summary judgment again relied on the "Exclusions" section of the insurance policy. The court granted plaintiff Mierzycki's renewed motion for summary judgment and denied defendant's motion. The court distinguished the case law supplied by the defendant to prove that plaintiff Mierzycki was using the vehicle "in the course of any business" when the accident occurred. Subsequently, the case was transferred to a new judge and American Family filed a motion to reconsider the court's denial of summary judgment.

¶ 10 In its order of June 26, 2013, the trial court acknowledged that the definition of an "insured" rather than "Exclusions" was at issue, but again ruled for plaintiff because the exclusion for "business pursuits" was very similar to the "in the course of any business" language in the definition of an "insured." Relying on *Industrial Indemnity Co. v. Vukmarkovic*, 205 Ill. App. 3d 176 (1990), the court concluded that plaintiff's business purposes ended when he went to an out-of-town dinner with Calderon. Notably, the order stated that the provision that denies

coverage to persons using the vehicle "in the course of any business" operates to "limit the definition of an insured."

¶ 11 On appeal, American Family contends that plaintiff does not qualify as an insured under the umbrella policy because he was using the vehicle in the course of business. Furthermore, American Family argues that it is plaintiff's burden to prove that he does in fact qualify as an insured. In response, plaintiff argues that he was not using the vehicle for business at the time of the accident, and because the effect of that language is to deny coverage to people using a vehicle for business, it is the burden of the insurer to prove that plaintiff's claim falls within the exception. We agree with plaintiff and affirm the judgment of the circuit court.

¶ 12 The interpretation of contract language is a question of law, which we review *de novo*. *Shaffer v. Liberty Life Assurance Co. of Boston*, 319 Ill. App. 3d 1048, 1051 (2001). It is important to note that where the parties file cross-motions for summary judgment, as they did here, the parties agree that no issues of material fact exist and invite the court to decide the issue presented as a question of law. *West Bend Mutual Insurance Co. v. Rosemont Expositions Services, Inc.*, 378 Ill. App. 3d 478, 485 (2007) (citing *Harwood v. McDonough*, 344 Ill. App. 3d 242, 245 (2003)). Furthermore, "insurance policies are construed as a whole, and we must consider the type of insurance for which the parties contracted and the purpose of the contract." *Metropolitan Property & Casualty Insurance Co. v. Stranczek*, 2012 IL App (1st) 103760, ¶ 20. Therefore, we do not consider the meaning of a definitional limitation by itself, but instead, in the context of the entire policy and the risks it was intended to protect against. *Id.* That is, the "type of risks covered by the policy must be informed by the risks that are not intended to be covered and \*\*\* the type of risks intended to be excluded from the policies must be informed by the risks that are intended to be covered." *Id.* With this in mind, we note that umbrella insurance

is "insurance that is supplemental, providing coverage that exceeds the basic or usual limits of liability." Black's Law Dictionary, 811 (7th ed. 1999). An umbrella policy, distinct from an underlying primary policy, is intended to protect the insured against excess judgments, and the risks and premiums are calculated accordingly. *Hartbarger v. Country Mutual Insurance Co.*, 107 Ill. App. 3d 391 (1982). In addition to the supplemental umbrella insurance, the named insured in this case also purchased uninsured motorist coverage for an additional premium.

¶ 13 We first address how to construe the language at issue: namely, that an "insured" under the policy does not include "a person or organization using\*\*\*any such vehicles\*\*\*in the course of any business." Defendant contends that the language at issue is not an exclusion but rather part of the definition of an "insured" under the policy. Plaintiff contends the language is an exclusion. We too find that the language is an exclusion notwithstanding the fact that it is located in the section defining an "insured" rather than in the "Exclusions" section of the policy.

¶ 14 The location of certain language within an insurance contract does not necessarily indicate which party bears the burden of proof on that provision. *Rutgens Distributors, Inc. v. U.S. Fidelity & Guaranty Co.*, 94 Ill. App. 3d 753, 759 (1981). In *Rutgens*, the court stated that "whether an insurer attempts to avoid policy coverage by relying upon an express policy exclusion, or by relying upon a clause which limits coverage through a narrow definition of the insured or the risk insured against, the ultimate same result is accomplished." *Id.* Following *Rutgens*, we do not find that the location of the language at issue within the definition of an "insured" is dispositive and conclude that it is an exclusion by which the insurer attempts to avoid policy coverage.

¶ 15 Once the insured has brought himself within the terms of his policy, then the insurer must prove the applicability of an exclusion if it wishes to escape liability. *University of Illinois v. Continental Casualty Co.*, 234 Ill. App. 3d 340, 355 (1992).

¶ 16 We first turn to plaintiff's burden to bring himself within the terms of the policy at issue. The policy is a personal liability umbrella policy that includes an endorsement for "Uninsured and Underinsured Motorist Coverage Endorsement." In relevant part, the policy states that an "insured" is "(1) Any person using such a vehicle or watercraft." The plaintiff must prove that he was "using such a vehicle." That is plaintiff's only burden, having found that the limitation on "insured," excluding any person using the vehicle "in the course of any business," is the burden of defendant. *Rutgens*, 94 Ill. App. 3d at 757 (explaining that a claimant seeking coverage under an insurance policy for "loss caused by explosion," did not have the burden to prove the *cause* of the explosion because the insurer, by the terms of the policy, limited its coverage by excluding explosions from specified causes). Neither party denies that plaintiff, who was operating the vehicle at the time of the occurrence, was "using" the vehicle. Therefore, plaintiff has brought himself within the terms of coverage of the policy.

¶ 17 We turn next to defendant's burden to prove that the exclusion applies. When considering whether a particular automobile accident is covered under a specific policy, courts focus on the use of the vehicle at the time of the occurrence. *State Farm Mutual Auto Insurance Co. v. Mohan*, 85 Ill. App. 2d 10, 20 (1967). We agree with the trial court that the information defendant supplied did not prove that the plaintiff's business purpose continued through the two-and-a-half hour out-of-town dinner.

¶ 18 The policy defines "business" as "any profit motivated full or part-time employment, trade, profession or occupation." Similarly, Black's Dictionary defines "business" as a

"commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain." Black's Law Dictionary, 192 (7th ed. 1999). Defendant has supplied no proof that plaintiff and Calderon furthered some commercial enterprise while at dinner or that the dinner was part of plaintiff's full or part-time employment.

¶ 19 This case is more like *Vukmarkovic* than defendant would like to admit. In *Vukmarkovic*, the claimant was an employee of a livery service who was driving the limousine he used for his job when he hit and injured a pedestrian. *Vukmarkovic*, 205 Ill. App. 3d at 180. On the night of the accident, the claimant dropped off his last trip around midnight, and took the limo to dinner and to socialize until 4:30 a.m. when he hit a pedestrian on his way home. The claimant had permission to use the limo for business as well as personal pursuits. *Id.* After being sued in a personal injury lawsuit, the claimant sought coverage under a personal umbrella liability extension which excluded coverage for "any business activities." *Id.* at 178. We found that, at the time of the occurrence, the vehicle was not being used for a purpose "primarily related to a business pursuit" despite the fact that the owner of the limo purchased it for a business investment and that the claimant was "on call" for his livery service 24 hours per day. *Id.* at 187. Therefore, the exclusion in the umbrella policy did not apply. *Id.*

¶ 20 Like the insurer argued in that case, defendant here argues that dinner was a minor interruption of plaintiff's business pursuit in looking for restaurant locations. Defendant points us to language in *Vukmarkovic* which distinguished the claimant's personal use of the limo from situations in which a "driver was driving from one job to another" or "from a lunch break to another job" or "on his return home directly after dropping off his last fare." But, defendant has supplied no facts to convince us that any of these situations apply: plaintiff was not driving toward any other restaurant locations, he was not going to another job or back to work in Joliet,

and he did not proceed directly to his own home after viewing the locations. The only minor interruption here occurred much earlier in the day, when plaintiff and Calderon stopped for gas and snacks and then continued their business pursuit.

¶ 21 Defendant contends that the scope of employment for purposes of workers' compensation coverage is the same as the "in the conduct of any business" language in the insurance policy at bar. But, the question before us is not a broad one about the scope of employment. In fact, we are not concerned with plaintiff's employment except to the extent that he was engaged in it or some other commercial purpose at the time of the accident. *Mohan*, 85 Ill. App. 2d at 20. Focusing on the use of the vehicle at the time of the occurrence, we cannot conclude that plaintiff is akin to the "traveling salesman" in workers' compensation cases. See, e.g., *Urban v. Industrial Comm'n*, 34 Ill. 2d 159 (1966) (finding that a traveling salesman, who had many customers throughout the Chicagoland area and was injured while driving in the general direction of his home, was injured in the course of his employment). Defendants have supplied no information about the frequency of plaintiff's trips scouting for restaurant locations or any evidence about the traveling nature of plaintiff's business.

¶ 22 Furthermore, defendant has not demonstrated that the dinner was either "incidental" or a "minor personal purpose," a proposition for which defendant relies on *Walker v. State Farm*, 40 Ill. App. 2d 463 (1963) and *Allstate v. Hutcheson*, 231 Ill. App. 3d 973 (1992). In both *Walker* and *Hutcheson*, the court found that an automobile business exclusion applied, barring coverage because the plaintiffs combined business with an additional incidental or minor personal purpose. *Walker*, 40 Ill. App. 2d at 467; *Allstate*, 231 Ill. App. 3d at 981. Nothing persuades us that a two-and-a-half hour dinner, which took up almost as much of the day as the business purpose of scouting for restaurant locations, was a minor personal purpose.

¶ 23 Admittedly, there are two factors that weigh in favor of the insurer's position in this case: (1) plaintiff and Calderon answered defendant's interrogatories by stating that at the time of the occurrence the "purpose and/or use for which the said vehicle was being operated" was for "work purposes" and (2) the fact that the plaintiff and Calderon had to return to the location of plaintiff's employment in Joliet before proceeding home. Although both factors weigh slightly against the conclusion that the plaintiff's business purpose had ended with the out-of-town dinner, we find that a liberal construction of the policy to protect an individual from injuries as a result of a collision with an uninsured motorist supports our initial conclusion in favor of coverage. First, the "legislature of the State of Illinois has shown that the public policy of this State is to attempt to protect individuals from injuries and death as result of collisions with uninsured motorists." *Andeen v. Country Mutual Insurance Co.*, 70 Ill. App. 2d 357, 365-66 (1966) (citing *Sobina v. Busby*, 62 Ill. App. 2d 1 (1965)). Although the umbrella policy at bar is not subject to statutory construction as was the case in *Andeen (Cope)*, 326 Ill. App. 3d at 472), the goal of protecting individuals from harm caused by uninsured motorists is equally applicable to uninsured motorist coverage that is not statutorily mandated. Second, insurance policies must be interpreted in favor of the insured, and any ambiguities will be construed most strongly against the insurer and liberally in favor of the insured. *Lenkutis v. New York Life Insurance Co.*, 374 Ill. 136, 140 (1940). Third, defendant did not challenge the affidavits in which plaintiff stated he and Calderon had "quit for the day" as being inconsistent with the interrogatory answer that the vehicle was being used "for work purposes." Without challenging the same in the trial court, defendant cannot do so on appeal. *Village of Roselle v. Commonwealth Edison Co.*, 368 Ill. App. 3d 1097, 1099 (2006). Furthermore, plaintiff's answer to defendant's interrogatory provides a legal conclusion that would not be considered an evidentiary admission. *Ferry v.*

*Checker Taxi Co.*, 165 Ill. App. 3d 744, 748 (1987). Just as there were factors that detracted from the conclusion that the claimant in *Vukmarkovic* was on a personal, rather than business endeavor, the two factors here detract from, but do not preclude, the conclusion that plaintiff's business purposes had ended at the time of the early dinner. Defendant has not proven the applicability of the business exclusion "in the conduct of any business" and the trial court's finding that the plaintiff is an "insured" stands.

¶ 24 Affirmed.