

No. 1-15-0469

**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

DIRECT AUTO INSURANCE COMPANY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	
	)	No. 13 CH 22345
ENAS MUSTAFA, DAVID HAHN and	)	
INTERSTATE BANKERS CASUALTY COMPANY	)	
a/s/o ANNA SZEWCZYK,	)	Honorable
	)	Franklin Ulysses Valderrama,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.  
Justices Lampkin and Palmer concurred in the judgment.

**ORDER**

¶1 *Held:* Affirming judgment of circuit court dismissing declaratory judgment action by insurer regarding duty to defend and indemnify; declaratory judgment action was premature where underlying lawsuit against insured had not yet been filed.

¶2 While driving his vehicle in 2013, Enas Mustafa (Mustafa) was involved in an accident with a vehicle driven by David Hahn (Hahn). Interstate Bankers Casualty Company (Interstate) insured the vehicle driven by Hahn; Mustafa was a named insured under an automobile policy (the policy) issued by Direct Auto Insurance Company (Direct Auto). Direct Auto filed a declaratory judgment action in the circuit court of Cook County, seeking a declaration that it

owed no duty to defend or indemnify Mustafa. Interstate filed a motion to dismiss Direct Auto's complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)),<sup>1</sup> arguing that the complaint "fail[ed] to allege that a lawsuit has been filed against Enas Mustafa or that a judgment has been entered against him." The circuit court agreed that the complaint was "premature" and granted the motion to dismiss without prejudice; the court denied Direct Auto's motion to reconsider. Direct Auto appeals the dismissal of its complaint and the denial of its motion to reconsider. For the reasons that follow, we affirm the judgment of the circuit court.

¶3

### BACKGROUND

¶4 On October 1, 2013, Direct Auto filed a complaint for declaratory judgment against Mustafa, Hahn, and "Interstate Bankers Casualty Company a/s/o Anna Szewczyk."<sup>2</sup> The complaint alleged that "[a]s a result of the accident \*\*\*, Defendants HAHN and INTERSTATE have made claims against the [Direct Auto] policy for damages allegedly sustained."

¶5 Count I of the complaint stated that, as of February 14, 2013 – the date of the collision – the 2002 Jeep Liberty that Mustafa was driving was not insured under the Direct Auto policy. The complaint alleged that, although the policy originally insured a 2002 Jeep Liberty, VIN 1J8GL58K82W250233, an endorsement dated August 31, 2012, changed the insured vehicle to a 2002 Jeep Liberty, VIN 1J4GK48K72W281133. Asserting that the "vehicle driven by [Mustafa] at the time of the accident [was] not an insured vehicle," Direct Auto alleged that it owed no duty "to defend or indemnify MUSTAFA in connection with any claim or suit filed against him by FOX or FARMERS." The references to "FOX" and "FARMERS" subsequently were corrected

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<sup>1</sup> Although not specifically designated in the motion to dismiss, it appears that Interstate's motion was filed in accordance with section 2-615(a). 735 ILCS 5/2-615(a) (West 2012).

<sup>2</sup> We understand that "a/s/o" typically means "as subrogee of."

to "HAHN" and "INTERSTATE."

¶6 In Count II,<sup>3</sup> Direct Auto quoted portions of two policy provisions from "Part VI-Conditions":

**"3. Notice. Notice of Loss under Part I, II, III, IV and V.**<sup>4</sup> As a condition precedent to coverage, within 30 days of any accident, occurrence or loss, regardless of fault, the Company must receive **written notice** containing **at least** the following information: a) The time, place and location of the loss; and b) The full name and address of each known person who occupied any vehicle involved in the loss and/or who was present at the scene at the time of the loss; and c) The purpose of the use of the vehicle at the time of the loss; and d) The facts surrounding the loss; and e) Any other information the Company requests in order to conclude its investigation of the loss. \*\*\*

\* \* \*

**6. Assistance and Cooperation of the Insured.** The insured shall cooperate with the Company and, upon the Company's request or through attorneys selected by the Company, provide recorded statement(s); an examination under oath; attend hearings and trials; assist in making settlements; securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject matter of this insurance. \*\*\*"

(Emphasis in original.)

According to the complaint, Direct Auto's "first notice of the accident was received on February

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<sup>3</sup> Count II is captioned, "**Count II – NON COOPERATION (in the alternative).**"

<sup>4</sup> The complaint incorrectly referenced "Part I, II, II, IV and V"; the policy language is "Part I, II, III, IV and V."

21, 2013 from HAHN" and Mustafa "never reported the loss or the details of the accident" to Direct Auto. The complaint further alleged that Mustafa "has not communicated" with Direct Auto, despite "numerous requests" to Mustafa "for assistance and cooperation regarding the accident, including but not limited to: requesting an accident report and requesting that MUSTAFA speak with [Direct Auto] representatives regarding the loss and coverage issues."

¶7 Count II of the complaint stated, in part: (a) the notice provided to Direct Auto "did not fulfill the requirements" under the policy; (b) the "failure to report the loss pursuant to" the policy requirements was a breach of Mustafa's insurance contract with Direct Auto; and (c) Mustafa "materially breached the terms and conditions" of the policy by his failure to respond to Direct Auto's requests for assistance and cooperation. The complaint further alleged:

"28. Because MUSTAFA breached the [Direct Auto] Policy, [Direct Auto] has and owes no duty to defend or indemnify MUSTAFA for or in connection with any claims or suits brought against him for the loss described herein;

29. Because MUSTAFA breached the [Direct Auto] Policy, Defendants HAHN and INTERSTATE are entitled to no monies whatsoever under the [Direct Auto] Policy for or in connection with any claim or suit arising from or derivative of the accident described herein.

30. An actual controversy exists between [Direct Auto] and the Defendants hereto, and, by the terms and provisions of Section 2-701 of the Illinois Compiled Statutes, 735 ILCS 5/2-701, this Court is vested with the power to declare and adjudicate the rights and liabilities of the parties hereto \*\*\*."

Direct Auto requested, among other things, that the court "find and declare that Defendant MUSTAFA breached the [Direct Auto] policy, and that [Direct Auto], accordingly, has and owes

no duty whatsoever under the [Direct Auto] policy to defend or indemnify MUSTAFA in the connection [*sic*] with any claim or suit filed against him" by Hahn or Interstate.<sup>5</sup> A copy of the policy was appended to the complaint.

¶8 Hahn and Interstate filed an answer to the complaint.<sup>6</sup> On February 26, 2014, Direct Auto filed a motion for leave to amend its complaint. In the motion, Direct Auto requested leave to: (a) "withdraw Count I (unlisted vehicle)";<sup>7</sup> and (b) amend the complaint to reflect that Direct Auto's "first notice of the accident was received on February 18, 2013 from Mustafa's agent." On March 31, 2014, Direct Auto was granted leave to file the amended complaint. The amended complaint, filed on the same date, set forth allegations substantially similar to those asserted in Count II of the original complaint.

¶9 On April 28, 2014, Interstate filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure.<sup>8</sup> 735 ILCS 5/2-615 (West 2014). The motion provided, in pertinent part, as follows: "A declaratory judgment action brought to determine an insurer's duty to defend is ripe upon the filing of a complaint against the insured and a declaratory judgment action brought to determine an insurer's duty to indemnify is ripe when and [*sic*] insured becomes legally obligated to pay the damages in the underlying action." In response to the motion to dismiss, Direct Auto tendered an Illinois Supreme Court decision, *Haddick v. Valor Insurance*,

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<sup>5</sup> The complaint references "FOX or FARMERS"; we understand this reference to mean "Hahn or Interstate," as reflected in the amended complaint (described below).

<sup>6</sup> On December 2, 2013, Hahn and Interstate filed a motion to vacate any defaults and for leave to file an appearance and answer *instanter*. An order entered on December 12, 2013, provided, in part, that a motion to default Hahn was granted and "Interstate granted leave to Appear + Answer." On December 18, 2013, Hahn *and* Interstate filed an answer to the complaint. Mustafa was "found in default" in an order entered on January 31, 2014.

<sup>7</sup> According to the amended complaint, "the VIN originally associated with the MUSTAFA vehicle was an incorrect VIN." The VIN "was corrected via Law Enforcement Certification."

<sup>8</sup> Neither the motion to dismiss nor the court's orders regarding the motion specifically reference the *amended* complaint. In any event, we view the dismissal without prejudice as a dismissal of the action in its entirety.

198 Ill. 2d 409 (2001).<sup>9</sup>

¶10 On June 12, 2014, the circuit court entered a memorandum opinion and order granting Interstate's motion to dismiss, without prejudice. Noting that "there has been no underlying complaint or lawsuit filed against the policyholder, Mustafa, nor has there been any judgment entered against him," the court concluded that Direct Auto's complaint was "premature." Direct Auto filed a motion to reconsider; the court denied the motion in a memorandum opinion and order entered on January 20, 2015. Direct Auto timely appealed the orders granting Interstate's motion to dismiss and denying Direct Auto's motion to reconsider.

¶11 ANALYSIS

¶12 "A section 2-615 motion to dismiss tests the legal sufficiency of a complaint." *Hadley v. Doe*, 2015 IL 118000, ¶29. "The question to be answered is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, state sufficient facts to establish a cause of action upon which relief may be granted. *Id.* "All facts apparent from the face of the complaint, including any attached exhibits, must be considered." *Id.* "A circuit court should not dismiss a complaint under section 2-615 unless it is clearly apparent no set of facts can be proved that would entitle the plaintiff to recovery." *Id.* The standard of review is *de novo*. *Id.*

¶13 On appeal, Direct Auto contends that "[w]here insurers have a duty to settle once a claim is made, they also have a duty to file a declaratory judgment action if they wish to take a coverage position." Direct Auto asserts that "[t]o rule that insurers cannot file a declaratory judgment action *unless* suit is filed relieves insurers of the obligation to take a position, file suit

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<sup>9</sup> As discussed further below, certain references to *Haddick* in the pleadings and the circuit court orders are to the decision of the Illinois Supreme Court (198 Ill. 2d 409 (2001)) and others are to the decision of the Illinois Appellate Court (315 Ill. App. 3d 752 (2000)).

and advise their insureds and claimants of the same." Interstate responds that Direct Auto's "declaratory judgment action was premature, as there was no controversy ripe for adjudication, and courts have no authority to render advisory opinions." Interstate further argues, in part, that: (a) "Direct Auto's coverage dispute turns upon facts which must necessarily be determined in a tort action before those facts are decided in a declaratory judgment action"; and (b) "Direct Auto's declaratory judgment action improperly asks the court to speculate as to how both Mustafa and Direct auto [sic] might behave in some future lawsuit and asks the court to speculate as to the effects of their future conduct on the future outcome of a tort lawsuit."

¶14 Direct Auto's amended complaint alleged, in part, that "Defendants HAHN and INTERSTATE have made claims against the [Direct Auto] policy for damages allegedly sustained." Although nothing in the amended complaint or the attachments thereto describes the form or nature of the "claims," the parties agree that no lawsuit had been filed by Hahn and/or Interstate against Mustafa and/or Direct Auto as of the time of the filing of the complaint or amended complaint. Despite the absence of an underlying suit, Direct Auto sought a declaration that it owed no duty to defend or to indemnify Mustafa.

¶15 The Illinois Supreme Court has explained how to determine an insurer's duty to defend. For example, in *Outboard Marine Corp. v. Liberty Mutual Ins.*, 154 Ill. 2d 90, 107-08 (1992), the court stated:

"To determine whether the insurer has a duty to defend the insured, the court must look to the allegations in the underlying complaint and compare these allegations to the relevant provisions of the insurance policy. [Citations.] If the facts alleged in the underlying complaint fall within, or potentially within, the policy's coverage, the insurer's duty to defend arises. [Citations.] Refusal to defend is

unjustifiable unless it is clear from the face of the underlying complaint that the facts alleged do not fall potentially within the policy's coverage [Citations.]"

Therefore, our supreme court consistently has directed courts to compare the allegations of the "underlying complaint" with the insurance policy provisions to determine whether a duty to defend exists. *E.g., Northbrook Property and Casualty Co. v. Transportation Joint Agreement*, 194 Ill. 2d 96 (2000) ("To determine an insurer's duty to defend its insured, a court must look to the allegations of the underlying complaints"); *United States Fidelity & Casualty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64 (1991) (same).<sup>10</sup> Here, at the time of the circuit court's decision, there was no "underlying complaint" against Mustafa and thus no basis for the circuit court to determine whether Direct Auto owed Mustafa a duty to defend.

¶16 We further note that Mustafa's insurance policy with Direct Auto provides, in pertinent part, that Direct Auto "shall defend *any suit* alleging such bodily injury or property damage covered under this policy seeking compensatory damages only and not seeking any punitive or exemplary damages which are payable under the terms of this policy with attorneys hired and paid by the Company, even if any of the allegations of the suit are groundless, false or fraudulent." As the circuit court noted, the policy does not contain any definition of "suit." "[T]he usage of the word is clear and unambiguous" in the policy, and thus "the word must be given its plain and ordinary meaning." *Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 166 Ill. 2d 520, 532 (1995). Our supreme court has recognized that the word "suit" refers to "a

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<sup>10</sup> In *Pekin Ins. Co. v. Wilson*, 237 Ill. 2d 446, 458 (2010), the Illinois Supreme Court considered "whether other pleadings in the underlying action may be considered in determining the duty to defend." The court concluded that the trial court erred in basing its determination of the duty to defend *solely* upon the allegations of the underlying complaint. *Id.* at 458-59. "In the few cases where courts have looked beyond the underlying complaint on a coverage question, the outside information came from pleadings or filed documents that affected whether the *complaint's* allegations fell within the policy language." (Emphasis added.) *Illinois State Bar Ass'n Mut. Ins. Co. v. Cavenagh*, 2012 IL 111810, ¶45.



proceeding in a court of law." *Id.* at 532. The parties acknowledge that no underlying "suit" – proceeding in a court of law – was filed before or during the circuit court proceedings in the instant case. Thus, the circuit court did not err in finding Direct Auto's declaratory judgment complaint to be "premature."

¶17 The Illinois Supreme Court also has explained how to determine if an insurer owes a duty to indemnify. The *Outboard Marine* court stated, in part:

"An insurer's duty to indemnify is narrower than its duty to defend its insured. [Citations.] The duty to indemnify ' ' will not be defined until the adjudication of the very action which [the insurer] should have defended." ' [Citations.] In other words, the question of whether the insurer has a duty to indemnify the insured for a particular liability is only ripe for consideration if the insured has already incurred the liability in the underlying claim against it." *Outboard Marine*, 154 Ill. 2d at 127.

We conclude that the circuit court did not err in its conclusion that "because no underlying suit has been filed, adjudication on [Direct Auto]'s duty to indemnify is not ripe as Mustafa faces no obligation to pay damages from an underlying suit."<sup>11</sup> See *id.*

¶18 The cases cited by Direct Auto are inapposite. Direct Auto primarily relies upon *Haddick v. Valor Insurance*, 198 Ill. 2d 409 (2001). According to Direct Auto, "*Haddick* stands for the proposition that once a *claim* is made (not a suit filed), the insurer has a duty to act on behalf of

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<sup>11</sup> We recognize that there are cases – particularly in the environmental law context – where courts reviewing "indemnity-only policies that did not include any 'suit' language" concluded that 'the policy language, standing alone, does not require the insured to have been served as the defendant or respondent in an adversarial proceeding before the duty to indemnify arises.' " *Selective Ins. Co. of South Carolina v. Cherrytree Companies, Inc.*, 2013 IL App (3d) 120959, ¶31, citing *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 156 (2004). The instant case does not involve an indemnity-only policy and expressly includes "suit" language.

the policy holder to resolve the dispute." However, Direct Auto's reliance on *Haddick* is misplaced for a number of reasons.

¶19 In *Haddick*, Ella Haddick (Haddick), the administrator of the estate of a passenger who was killed in a single-vehicle accident, filed suit against the driver's insurance company, Valor Insurance Company (Valor). *Haddick*, 315 Ill. App. 3d at 753. Haddick alleged that Valor acted in bad faith when it had refused to settle a claim against its policyholder within the policy limits. *Id.* The trial court granted Valor's motion to dismiss, finding that Valor had no duty to settle prior to the filing of a lawsuit against its policyholder.<sup>12</sup> *Id.* Reversing the trial court, the appellate court held, in part, "that an insurance company has a duty to act in good faith in settling a claim against its policyholder in a timely manner both before and after suit is filed." *Id.*<sup>13</sup> Addressing an issue "of first impression in Illinois," the appellate court reasoned:

"Whether a third-party has filed suit and then attempts to negotiate settlement or is attempting to negotiate settlement under the threat of litigation, the policyholder is without authority to negotiate on his own behalf. The policyholder relinquished that right when he entered into an insurance contract with the insurer, paying the insurer periodic premiums in exchange for the insurer's promise to defend and indemnify him in the event of a car accident from which claim is made or suit is brought. Thus, the same threat exists to the policyholder that the insurer will wrongly refuse to settle within the policy limits and a judgment will be entered against him in excess of the policy whether the third-party attempted to negotiate

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<sup>12</sup> We note that Haddick ultimately obtained a verdict against the driver significantly in excess of the policy limits; the driver assigned to Haddick his causes of action against Valor. *Id.* at 754.

<sup>13</sup> The appellate court further held that "a plaintiff may maintain a cause of action against an insurance company for failure to settle a claim in good faith though the plaintiff withdrew her offer to settle within the policy limits before filing suit." *Id.*

a settlement prior to or after filing suit." *Id.* at 757.

The appellate court also observed that "many insurance contracts specifically provide for a duty on the part of the insurer to investigate reported accidents and negotiate settlements both before and after a suit is filed." *Id.* The Illinois Supreme Court affirmed the judgment of the appellate court, which reversed the judgment of the circuit court and remanded the case for further proceedings. *Haddick*, 198 Ill. 2d at 419.

¶20 As a threshold matter, we are uncertain whether Direct Auto tendered the Illinois Appellate Court decision or the Illinois Supreme Court decision in *Haddick*.<sup>14</sup> The distinction is relevant because Direct Auto – citing the *Haddick* appellate court decision – argues on appeal that "[a]s a matter of first impression, the *Haddick* court determined that the insurer's duty to the policy holder is created 'not upon the instigation of suit by a third-party but upon the conception of the insurance contract.' *Id.* at 756." However, our supreme court expressly stated, "Our decision today affirms the appellate court's holding, but rejects its blanket conclusion that the duty to settle arises from the 'conception of the insurance contract.'" *Haddick*, 198 Ill. 2d at 419.

¶21 In any event, *Haddick* is distinguishable from the instant case. *Haddick* does not address the issue herein: the timing of a declaratory judgment action to determine an insurer's duty to defend and/or indemnify. Furthermore, contrary to Direct Auto's assertion, *Haddick* does not "create[] a duty upon the insurance company to settle once a claim is made[.]" Our supreme court instead concluded that "an insurance provider's duty to settle arises once a third-party claimant has made a demand for settlement of a claim within policy limits and, at the time of the

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<sup>14</sup> The circuit court entered an order on May 5, 2014, indicating that Direct Auto "tendered the Illinois Supreme Court case *Haddick v. Valor*." In its memorandum opinion and order entered on June 12, 2014, the circuit court stated that Direct Auto "tendered *Haddick v. Valor Ins.*, 315 Ill. App. 3d 752 (3d Dist. 2000), to the Court." In its motion to reconsider, Direct Auto cited the appellate decision in *Haddick*; in its reply to Interstate's response, it cited the supreme court decision. The order denying the motion to reconsider discussed the appellate court decision.

demand, there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against its insured." *Id.* In addition, *Haddick* did not involve a coverage dispute. Indeed, none of the cases cited by Direct Auto stand for the proposition that an insurer is estopped from asserting a coverage position if a declaratory judgment action is not filed pre-suit.

¶22 In *Gibraltar Ins. Co. v. Varkalis*, 46 Ill. 2d 481 (1970), cited by Direct Auto, the automobile insured had murdered the decedent, Veronica Varkalis, by "pushing her out of the automobile and driving it repeatedly over her body." *Id.* at 482-83. A wrongful death action was brought against the insured and the insurer, through counsel, filed an appearance on behalf of the insured. *Id.* at 483-84. A few years after the administrator of the decedent's estate filed a wrongful death action against the insured, the insurer filed a declaratory judgment action, seeking a judicial declaration that it was under no responsibility to defend the insured or to pay any judgment rendered against the insured in the wrongful death action. *Id.* The *Gibraltar* trial and appellate courts concluded that the declaratory judgment action was barred by the statute of limitations; the appellate court further held that the insurer "was, by virtue of its conduct as shown by the pleadings, estopped from asserting its policy defense." *Id.* On appeal, the Illinois Supreme Court concluded that the action accrued on "the date of the writing, and apparently, the delivery of the letter from [the administrator's] counsel in the wrongful death action to [the insurer] advising the latter that no appearance had yet been filed on behalf of its insured in that lawsuit." *Id.* at 486. The Illinois Supreme Court concluded that the declaratory judgment action was filed "well within" the statute of limitations. *Id.*<sup>15</sup> In so holding, the *Gibraltar* court stated

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<sup>15</sup> However, our supreme court affirmed the lower court decisions, concluding that the insurer waived its right to assert a policy defense by the continued representation of the insured by counsel retained by the insurer for more than one year. *Id.* at 487.

that "no actual controversy arises among the parties until such time as the issuing company is called upon to either pay or defend a claim on behalf of its insured under the terms of the policy in question." *Id.* at 485. While Direct Auto appears to cite this language as support for its position that a pre-suit declaratory judgment action is permissible, an underlying action had been filed in *Gibraltar*, unlike in the instant case; the *Gibraltar* wrongful death action was filed years prior to the insurer's initiation of the declaratory judgment action. Simply put, a fundamental issue in *Gibraltar* was whether the declaratory judgment action was late, not, as here, whether it was premature.

¶23 The other cases cited by Direct Auto are equally unavailing. For example, Direct Auto quotes *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 489 (2008), for the proposition that the "mere existence of a claim, assertion or challenge to plaintiff's legal interests, \*\*\* which cast[s] doubt, insecurity, and uncertainty upon plaintiff's rights or status, damages plaintiff's pecuniary or material interests and establishes a condition of justiciability." (Internal quotations marks omitted.) *Morr-Fitz* was not an insurance case; the decision addressed a declaratory judgment action filed by pharmacists, seeking to invalidate an administrative rule forcing pharmacies to dispense emergency contraception. *Id.* at 477. As Interstate correctly observes, "[g]eneral statements of the law concerning the concept of justiciability do not preempt the ripeness doctrine as it has been specifically applied to declaratory judgment actions to determine coverage under an insurance policy."

¶24

#### CONCLUSION

¶25 For the foregoing reasons, we affirm the judgment of the circuit court granting Interstate's motion to dismiss without prejudice.<sup>16</sup>

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<sup>16</sup> On February 9, 2015, Hahn filed a lawsuit against Mustafa in the circuit court of Cook County,

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¶26 Affirmed.

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assigned case number 2015-L-001327 (the Hahn lawsuit). The Hahn lawsuit was initiated after the circuit court's denial of Direct Auto's motion to reconsider but prior to its notice of appeal in the instant case. This Rule 23 order solely addresses the decision of the circuit court in the instant case; we express no opinion regarding the merits of any other pending or future declaratory judgment action relating to the events described herein.