FOURTH DIVISION
March 24, 2016

1-15-1700

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DIRECT AUTO INSURANCE CO.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 12 CH 28279
	)	
ROBERT WADE, YOLANDA DAVIS, STATE FARM	)	
MUTUAL AUTOMOBILE INSURANCE CO.,	)	Honorable
	)	Sophia H. Hall,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court of Cook County's judgment, which denied plaintiff's motion for summary judgment in a declaratory judgment action to determine insurance coverage in which plaintiff invoked a criminal act exclusion, is affirmed; although plaintiff did not raise the criminal act exclusion issue during the bench trial, the summary judgment order is properly before this court because the exclusion issue was a question of law and did not merge into the final judgment after trial; the criminal act exclusion is ambiguous and therefore must be construed in favor of coverage. The judgment in favor of defendant, which found that plaintiff's insured's failure to appear at arbitration did not substantially prejudice plaintiff, is affirmed; under the facts of this case plaintiff could have prepared and presented a

defense to the arbitration without its insured's presence, therefore plaintiff failed to establish substantial prejudice.

¶ 2 Plaintiff, Direct Auto Insurance Company (Direct Auto), filed a declaratory judgment action against defendants, Robert Wade (Direct Auto's insured), Yolanda Davis (whose vehicle Wade struck with his vehicle), and State Farm Mutual Automobile Insurance Company (State Farm) (Davis' insurer). State Farm is not a party to these proceedings. Direct Auto sought a declaration that (a) Davis' claim was excluded under a term in Wade's policy excluding coverage for automobiles used in the commission of a criminal act (in this case, driving under the influence (DUI)); and (b) Direct Auto had no duty to pay out any sums, defend, or indemnify Wade because Wade breached the insurance policy by failing to cooperate in legal proceedings based on the accident with Davis. The trial court denied Direct Auto's motion for summary judgment as to the exclusion clause and the matter proceeded to a bench trial on the failure to cooperate issue. After trial the court entered judgment in favor of Davis, finding that Direct Auto failed to satisfy its burden of proof that it was prejudiced by Wade's failure to appear at arbitration on Davis' claim against Wade.

¶ 3 For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 In November 2009 Wade and Davis were in an automobile accident. Wade and Davis gave conflicting stories as to how the accident occurred. Davis claimed that Wade's vehicle struck Davis' vehicle while Davis was at a complete stop at an intersection, and Wade allegedly told his insurer the collision occurred while both vehicles were executing a left hand turn. The State charged Wade with driving under the influence (DUI) at the time of the accident. The circuit court of Cook County found Wade guilty of DUI and sentenced him to supervision.

¶ 6 Davis filed a complaint against Wade. Wade informed Direct Auto of the claim[1], and Direct Auto secured counsel to represent Wade. Wade's attorneys wrote to Wade at the address they received from Direct Auto. In August 2011, Wade's attorneys hired a private investigator to attempt to contact Wade. The private investigator learned that the home at the address where the attorneys had been writing Wade was in foreclosure and Wade no longer lived there. A neighbor indicated Wade still lived in the area and that he (the neighbor) could get a message to Wade's mother. Wade's mother contacted Wade's attorneys and the attorneys instructed the private investigator to cease looking for a current address for Wade.

¶ 7 Wade's attorneys requested a continuation of the mandatory arbitration of Davis' complaint against Wade, which was scheduled for August 4, 2011, because Wade was in the hospital in serious condition. The arbitration was rescheduled for January 3, 2012. Wade's attorneys requested a continuance from the January 3, 2012 date because Wade had just taken a new job and could not attend the arbitration. The arbitration was rescheduled to February 9, 2012. Wade's attorneys wrote to Wade at the original address they had obtained from Direct Auto to inform him of the date for the arbitration. On February 8, 2012, an employee of Wade's attorneys telephoned Wade to remind him of the arbitration the next day. Wade allegedly told this employee he could not attend and hung up. One of Wade's attorneys, Taylor, called back and spoke to Wade. According to Taylor, Wade refused to come to the arbitration.

¶ 8 On February 9, 2012, the arbitration proceeded. The arbitration panel noted that Wade did not appear despite being commanded to do so pursuant to Illinois Supreme Court Rule 237 (eff. July 1, 2005). The panel entered an award in favor of Davis and against Wade in the

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[1] Direct Auto's declaratory judgment action alleged Wade breached a condition in the insurance policy and thereby forfeited coverage by failing to give Direct Auto notice of the accident. Direct Auto has since abandoned that claim.

amount of $20,000 plus costs. On February 17, 2012, Wade's attorneys filed a notice of rejection of the arbitrator's award. The record contains a letter dated that same day from Wade's attorneys to Wade requesting an explanation of why Wade was not present at the arbitration on February 9, 2012. The record also contains a letter dated February 20, 2012 from Direct Auto to Wade notifying Wade that Direct Auto was "handling this claim under reservations of rights for a coverage investigation" because Wade "failed to cooperate in notifying [Direct Auto] of [the] loss." Direct Auto's letter also stated it was giving Wade notice specifically to inform Wade that failure to cooperate with Direct Auto's investigation could result in a denial of benefits. On March 6, 2012, Davis filed a motion pursuant to Illinois Supreme Court Rules 90(g)[2] and 219(c)[3] to bar Wade from rejecting the arbitrator's award. The motion noted that Wade did not appear, and his "attorney did appear, but he [(Wade's attorney)] did not present any documents or other evidence, nor did he submit a Rule 90(c) disclosure." The motion specifically argued that "[s]ince [Wade] did not appear at the arbitration hearing, despite [Davis'] 237 notice, he [(Wade)] should be debarred from rejecting the arbitration award." On April 26, 2012, the trial court granted Davis' motion to bar Wade from rejecting the award and entered judgment on the arbitrator's award in favor of Davis.

¶ 9 On July 24, 2012, Direct Auto filed its declaratory judgment action seeking a declaration that Wade's claim against Direct Auto is excluded by the policy. The pertinent allegations in Direct Auto's pleading are that (1) Wade breached the insurance policy, which requires Wade to cooperate, attend hearings, and give evidence, because Wade "did not cooperate by appearance

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[2] "Remedies upon a party's failure to comply with notice pursuant to Rule 237(b) may include an order debarring that party from rejecting the award." Ill. S. Ct. R. 90(g) (eff. July 1, 2008).

[3] "If a party, or any person *** fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just." Ill. S. Ct. R. 219(c) (eff. July 1, 2002).

and giving of testimony, and thereby, a Judgment on award was entered debarring any Rejection of award;" and (2) the policy does not provide coverage for autos used in the commission of any criminal act, and DUI is a criminal act that is not a mere traffic violation. In June 2014 Direct Auto filed a motion for summary judgment. In pertinent part, Direct Auto sought summary judgment on its claims that (1) Wade breached a condition precedent to coverage under the policy when he failed to assist and cooperate with Direct Auto by attending the arbitration hearing on February 9, 2012; and (2) Wade's actions were excluded under the policy when Wade was convicted of DUI for the accident that forms the basis of the claim. In support of its claim Wade failed to cooperate in violation of the policy, Direct Auto relied on the testimony of Taylor, one of the attorneys Direct Auto selected to defend Wade. Taylor testified in a discovery deposition attached to the motion for summary judgment that he spoke to Wade by telephone the day before the arbitration and Wade refused to come to the arbitration. When questioned as to why Wade refused to come to the arbitration, Taylor testified: "He wouldn't explain it. He said he wasn't coming in."

¶ 10 Davis filed a response to Direct Auto's motion for summary judgment, and Direct Auto filed a reply to Davis' response. The trial court heard oral argument on the motion for summary judgment although the record does not contain a transcript of that hearing. The court continued the matter for ruling. On September 19, 2014, the trial court denied Direct Auto's motion for summary judgment as to the noncooperation claim "as there are insufficient facts to decide the matter." The court also denied the motion as to the criminal acts exclusion claim. The court added the following language to its order: "and based on the dicta in *Ace v. Bohner* the court holds that the clause violates the public policy of mandatory insurance and declares that said clause shall not be enforced in this case. This ruling is not a § 304A finding and this matter is set for trial in a separate order."

¶ 11 The declaratory judgment action proceeded to trial. Taylor testified at the trial, in part, that when he spoke to Wade the day before the February 9 arbitration, Wade "just refused to come in" with no explanation. Taylor later testified that Wade "was aware of the hearing. He just said he didn't want to come in for it." Taylor further testified that he needed Wade's testimony to present an alternative theory of how the accident occurred, and that he was unable to do so without Wade. He also testified the trial court granted Davis' motion to debar Wade from rejecting the arbitration award based on Wade's failure to cooperate with the court process. On cross-examination, Taylor testified he did not depose the passenger in Davis' auto at the time of the accident or a witness to the accident, both of whom were listed in the police traffic accident report. Taylor opined the passenger in Davis' auto "must have sided with Mr. Wade's version of the facts" because she (the passenger) settled with Direct Auto for a "small amount of money." Taylor agreed he could have brought up the passenger's agreement with Wade in the arbitration. He also testified that if a witness testified in the arbitration but Wade did not appear Wade is still subject to debarment. Taylor testified he did cross-examine and present argument concerning Davis' medical records for her treatment resulting from the accident. He never got to depose a doctor because the arbitration award was debarred. Taylor explained in his testimony that the case management order providing the time to complete discovery is entered after the arbitration. Ill. S. Ct. R. 218 (eff. July 1, 2014). Taylor also testified that his office never lost contact with Wade once contact was established by telephone.

¶ 12 The parties submitted written closing arguments. On May 22, 2015, the trial court issued its judgment and decision. The court ruled against Direct Auto and in favor of Davis. The court noted that the burden of proof at the trial was on Direct Auto to prove by a preponderance of the evidence that Wade failed to cooperate and that Direct Auto was prejudiced in its defense of the case. The court found the evidence undisputed that Wade notified Direct Auto of the accident in

a timely manner. The court also found the evidence sufficient to satisfy Direct Auto's burden of proof as to its diligence in seeking to obtain Wade's appearance at the arbitration hearing. Because Wade did not give any reason for not appearing at the arbitration hearing after Taylor contacted him the day before the hearing, the court inferred that Wade refused to appear. However, the court found that Direct Auto's argument that Wade would be debarred from rejecting the arbitrator's award no matter the evidence it might have presented at the arbitration hearing because he did not appear was not sufficient to show that Direct Auto was prejudiced by Wade's failure to appear. The court held that that argument "presumes that Direct Auto could not prevail in the arbitration hearing without Wade." The court noted that Direct Auto made no effort to contact two witnesses to the accident named in the police report and made no effort to obtain medical records from Davis' medical providers named in her attorney's letters. The court concluded that Direct Auto "did not prepare the case for trial." Therefore, the court ruled, Direct Auto "has not provided sufficient evidence to satisfy its burden of proof that it was prejudiced by Wade's failure to appear, because it has not provided evidence that would support a finding that it could not prevail at the hearing without Wade." The court held that Direct Auto failed to prove that the noncooperation provision of its policy applies and ruled against Direct Auto and in favor of Davis.

¶ 13 This appeal followed.

¶ 14 ANALYSIS

¶ 15 This appeal arises in part from an order on a motion for summary judgment on Direct Auto's action for a declaratory judgment that it did not owe coverage to its insured. Direct Auto's first argument on appeal is that the "criminal act" exclusion in its automobile insurance policy is not against public policy and it is entitled to summary judgment on that claim.

> "Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in a light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. [Citations.] The interpretation of an insurance policy is a question of law that may be decided on a motion for summary judgment. [Citation.] This court reviews a trial court's determination on a motion for summary judgment and the interpretation of an insurance policy *de novo*." *Erie Insurance Exchange v. Imperial Marble Corp.*, 2011 IL App (3d) 100380, ¶ 15.

¶ 16 The criminal act exclusion states that the policy does not apply to any claims while the auto is used in the commission of any criminal act other than a traffic violation.

> "[W]hen an insurer seeks to avoid coverage under a policy exclusion, the applicability of the exclusionary clause must be clear and free from doubt. [Citation.] In other words, we must construe any limitations on an insurer's liability liberally in favor of the insured and against the insurer." *Empire Indemnity Insurance Co. v. Chicago Province of Society of Jesus*, 2013 IL App (1st) 112346, ¶ 39.

¶ 17 1. Whether the criminal act exclusion is before this court.

¶ 18 Davis initially responds Direct Auto cannot seek review of the denial of its motion for summary judgment after a trial has taken place, as occurred here, under the merger doctrine. "As a general rule, when a motion for summary judgment is denied and the case proceeds to trial, the denial of summary judgment is not reviewable on appeal because the result of any error is merged into the judgment entered at trial." *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 355 (2002). Davis admits that one exception to this general rule applies

when the issue in the summary judgment motion was purely a question of law. In *Battles v. LaSalle National Bank*, 240 Ill. App. 3d 550, 557 (1992), the defendant filed a motion for summary judgment on the grounds one general partner cannot sue another general partner in Illinois until a final accounting of the partnership has been obtained. *Battles*, 240 Ill. App. 3d at 557. The trial court denied the motion for summary judgment and the matter proceeded to trial, where the jury found in favor of the plaintiff. The issue on appeal was whether the lawsuit was premature because Illinois law requires an accounting of a partnership before damages can be determined. *Id.* at 558. The plaintiffs in *Battles* argued that the denial of the defendant's motion for summary judgment was not reviewable because it merged into the trial. *Id.* The *Battles* court disagreed, reasoning that "the issue of whether an accounting was necessary was a question of law that was not before the jury." *Id.* The court found that "[t]he summary judgment denial did not merge into the judgment because the trial did not deal with the issue raised in the motion for summary judgment." *Id.* Therefore, the denial of the motion for summary judgment was properly reviewable. *Id.*

¶ 19 Davis argues that the issue surrounding the criminal act exclusion was not entirely a question of law and the trial court's ruling suggests its decision was at least partially grounded in the facts of this case. Direct Auto failed to include a transcript of the hearing on its motion for summary judgment in the record; and Davis argues it is impossible on this record to find that the summary judgment ruling involved only a question of law, therefore the exception to the merger doctrine for questions of law is inapplicable. Direct Auto's motion for summary judgment cited the criminal act exclusion in the policy and stated only that "[b]ecause [Wade's] actions are excluded under the policy when he was convicted of [DUI] for the November 13, 2009 accident, Direct Auto respectfully moves this Court for entry of a judgment in its favor and against Defendants." Direct Auto's memorandum reasserted that the policy excludes criminal acts and

DUI is a criminal act, cited the decision in *Bohner v. Ace American Insurance Co.*, 359 Ill. App. 3d 621 (2005), noted that Wade was convicted of DUI for the accident that forms the basis of the claim, and argued simply that "any claims *** due to [DUI] by [Wade] are excluded under the Policy."

¶ 20 We disagree with Davis' contention that Direct Auto's motion for summary judgment was decided on a question of fact that merged into the judgment following trial; nor do we need a transcript of the summary judgment hearing to resolve this issue. The question presented was whether the criminal act exclusion in Wade's policy applied to DUI. The criminal act exclusion was not an issue in the trial. See *Battles*, 240 Ill. App. 3d at 558. Further, the summary judgment motion itself presented the court with a question of law.

> "The construction of the provisions of an insurance policy is a question of law, subject to *de novo* review. [Citation.] *** A court's primary objective is to ascertain and give effect to the intention of the parties as expressed in the agreement. [Citation.] In performing that task, the court must construe the policy as a whole, taking into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract. [Citations.] The words of a policy should be accorded their plain and ordinary meaning. [Citation.] Where the provisions of a policy are clear and unambiguous, they will be applied as written ([citation]) unless doing so would violate public policy ([citation])." *Nicor, Inc. v. Associated Electric & Gas Insurance Services Ltd.*, 223 Ill. 2d 407, 416-17 (2006).

¶ 21 Davis makes no argument the language in the insurance policy in this case is not clear and unambiguous. Davis' only argument is that the provision in the insurance policy does not apply because DUI is a traffic violation and the criminal act exclusion in the policy specifically

exempts traffic violations from its reach. We will not consider a policy term ambiguous merely because the parties can suggest creative possibilities for its meaning. "Rather, ambiguity exists only if the term is susceptible to more than one reasonable interpretation." *Id.* at 417. "Governing legal authority must, of course, be taken into account as well, for a policy term may be considered unambiguous where it has acquired an established legal meaning." *Id.* Therefore, we find that the interpretation of the contract in this case raises a question of law.

¶ 22 We recognize that our supreme court also noted that "[b]ecause insurance contracts are issued under given circumstances, they are not to be interpreted in a factual vacuum. A policy term that appears unambiguous at first blush might not be such when viewed in the context of the particular factual setting in which the policy was issued." *Id.* at 417. The factual setting in which the policy at issue here was issued is simply that of automobile liability insurance which is mandatory in Illinois. 625 ILCS 5/7-601 (West 2012). There is no question of fact for a trier of fact (and none was submitted in the trial in this case). Therefore, this court may review the denial of Direct Auto's motion for summary judgment on the issue of the criminal act exclusion *de novo*. See *Nicor, Inc.*, 223 Ill. 2d at 432 (affirming appellate court, which construed the scope of a term in an insurance contract as a matter of law "[b]ased on *** line of cases, applied in the factual context of this case and in light of the language used in the pertinent policies"). See also *Nicor, Inc. v. Associated Electric & Gas Insurance Services Ltd.*, 362 Ill. App. 3d 745, 749 (2005) ("The determination of the scope of an insurance policy is a question of law appropriately decided in a motion for summary judgment."). This rule applies even in the absence of cross-motions for summary judgment. See, *e.g.*, *Young v. Alden Gardens of Waterford, LLC*, 2015 IL App (1st) 131887, ¶ 43.

¶ 23 The fact that Davis attempted to distinguish *Bohner* on the facts of the two cases does not transform the issue raised in Direct Auto's motion for summary judgment into a question of fact.

The *Bohner* court held that the terms of the insurance policy at issue in that case were "clear and unambiguous." *Bohner*, 359 Ill. App. 3d at 623. "The plaintiff's insurance policy excludes from coverage losses due to dishonest, fraudulent, criminal, or illegal acts of the policyholder. Driving under the influence is a criminal act in the State of Illinois. *** Accordingly, losses due to driving under the influence by the plaintiff are not covered under the insurance policy here." *Id.* at 623-24. The *Bohner* court went on to discuss the plaintiff's argument in that case that the exclusion at issue contravened public policy. *Id.* at 624. The court determined that because of the nature of the policy, it was not faced with the public policy concerns the plaintiff in *Bohner* raised. *Id.* at 626. Thus, *Bohner* does not stand for the proposition that criminal act exclusions are unenforceable in automobile liability insurance policies as a matter of public policy—it just never addressed that question. Even if the *Bohner* court had addressed the public policy question, in Illinois that question is determined as a matter of law. Our supreme court has instructed that "[w]hether a provision in a contract, insurance policy, or other agreement is invalid because it violates public policy is a question of law." *Phoenix Insurance Co. v. Rosen*, 242 Ill. 2d 48, 54 (2011).

¶ 24 Davis also argues no exceptions to the merger doctrine apply because Direct Auto forfeited this claim when it failed to raise the issue during trial**.** We disagree. Direct Auto's motion for summary judgment on the application of the criminal act exclusion to the claim in this case presents a question of law that would not be before the trier of fact at trial and which we may decide *de novo*. We will reverse the judgment if Direct Auto is entitled to judgment as a matter of law. See *Labate v. Data Forms, Inc.*, 288 Ill. App. 3d 738, 740 (1997) ("where the issue raised in the summary judgment motion is one of law and would not be before the jury at trial, the order denying the motion does not merge and may be reviewed by the appellate court" (citing *Walters v. Yellow Cab Co.*, 273 Ill. App. 3d 729, 736 (1995))). Thus, the merger doctrine

does not preclude consideration of the applicability of Direct Auto's criminal act exclusion in this appeal.

¶ 25 2. Whether the criminal act exclusion unambiguously applies.

¶ 26 Turning to the merits of the issue, Direct Auto argues the criminal act exclusion applies under *Bohner*, which Direct Auto contends held DUI is not a mere traffic infraction, and under our supreme court's decision in *Founders v. Munoz*, 237 Ill. 2d 424, 433 (2010), which Direct Auto contends stands for the proposition that unless a provision of the Insurance Code prohibits an exclusion in an insurance policy, an unambiguous exclusion must be enforced as written. Davis responds the criminal act exclusion does not apply because DUI is a traffic violation and, regardless, the provision violates public policy because its enforcement would leave innocent victims without coverage.

¶ 27 The criminal act exclusion in Wade's policy reads as follows: "This policy does not apply and does not provide coverage *** to any claims, suits or injuries while occupying any auto while the auto is used in the commission of any criminal act, other than a traffic violation, and including while fleeing and eluding the police or other law enforcement or government agencies." In contrast, the policy in *Bohner* excluded loss or damage "arising directly or indirectly out of any dishonest, fraudulent, criminal, or illegal act by [the plaintiff or his agents]." (Internal quotation marks omitted.) *Bohner*, 359 Ill. App. 3d at 622.

¶ 28 The question of whether this provision applies in this case raises a question of contract interpretation. "When construing the language of an insurance policy, a court's primary objective is to ascertain and give effect to the intentions of the parties as expressed by the words of the policy. [Citation.] *** If the words used in the policy are clear and unambiguous, they must be given their plain, ordinary, and popular meaning. [Citation.]" *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004). "If the terms of an insurance policy are

susceptible to more than one meaning, they are considered ambiguous, and any doubts regarding coverage must be resolved in the insured's favor." *Skolnik v. Allied Property & Casualty Insurance Co.*, 2015 IL App (1st) 142438, ¶ 25. Whether an insurance contract is ambiguous is a question of law. *Home Insurance Co.*, 213 Ill. 2d at 154.

¶ 29 In *Bohner*, the court held that the plaintiff's insurance policy excluded coverage for criminal acts, including driving under the influence. *Bohner*, 359 Ill. App. 3d at 626-27. The policy provision excluded loss or damage " 'arising directly or indirectly out of any dishonest, fraudulent, criminal, or illegal act by [the plaintiff or his agents].' " *Id.* at 622. In that case, the insurance policy was an "auto gap" insurance policy, which provided that in the event that the plaintiff's vehicle was in an accident that resulted in a total loss, the defendant insurance company would pay the difference between the fair market value of the vehicle and the outstanding loan amount. *Id.* at 622.

¶ 30 Davis argues that because the type of insurance policy and the nature of the accident in this case "are starkly different than those in *Bohner*, this Court must decline to follow *Bohner* and must not grant Direct Auto summary judgment on the basis of the criminal use exclusion." In conclusion Davis argued that *Bohner* "is limited to single-car, 'auto-gap' policies and does not apply to situations where a defendant has an automobile liability policy and injuries [*sic*] an innocent third party victim." Direct Auto asks this court to find that DUI is not a mere traffic infraction.

¶ 31 We find *Bohner* distinguishable from this case, but not for the reason Davis proffered. The focus in *Bohner* was on whether DUI could be included within the meaning of "criminal act" for purposes of the policy exclusion at issue in that case. The policy in *Bohner* "excluded loss or damage 'arising directly or indirectly out of any dishonest, fraudulent, criminal, or illegal act by [the plaintiff or his agents].' " *Id.* at 622. In that case, the majority criticized a dissenting

justice's "comparison of DUI to petty, nonjailable offenses such as failure to reduce speed, driving too fast for conditions, and improper lane usage." *Id.* at 625. The majority in *Bohner* reasoned that "DUI is much more serious than petty violations of the rules of the road" and concluded that the fact "the legislature chose to define DUI in terms of strict liability does not negate the criminality of DUI." *Id.* The *Bohner* court also rejected attempts to escape application of the exclusion by minimizing the "criminality" of the conduct by "categorizing DUI as an unintentional or negligent act." *Id.* The court held that it is more accurate to say that DUI is a strict liability offense. *Id.* In this case, even if we accept the *Bohner* court's conclusion that DUI is a "criminal act" for purposes of liability exclusions in insurance policies, the policy at issue in this case expressly exempts "traffic offenses" from the definition of "criminal acts" ("criminal acts, other than a traffic violation"). The question here, therefore, is not whether DUI is a "criminal act" (the question in *Bohner*), but whether DUI is exempted from this exclusion because it is also a "traffic offense."

¶ 32 Ambiguity exists where language is obscure in meaning through indefiniteness of expression. *American Zurich Insurance Co. v. Wilcox & Christopoulos, L.L.C.*, 2013 IL App (1st) 120402, ¶ 38. A person of ordinary intelligence might conclude that DUI is a traffic offense and is exempted from the exclusion from coverage for criminal acts. The offense of DUI is defined in Chapter 11 of the Illinois Vehicle Code along with other traffic offenses. 625 ILCS 5/11-100 through 11-1516 (West 2012) ("Rules of the Road"). A person is charged with misdemeanor DUI by the issuance of a uniform traffic citation. See, *e.g.*, *People v. McClurg*, 195 Ill. App. 3d 381, 386-88 (1990). Notably, the criminal act exclusion in this case does not contain any language to distinguish between felony criminal acts or misdemeanor traffic offenses. See also *People v. Krueger*, 99 Ill. App. 2d 431, 443 (1968) (in jury trial, finding no

prejudice to DUI defendant from prosecutor's reference "to the traffic violation as a 'quasi-criminal case' " or from trial court's comment that the charge was not a crime but merely a misdemeanor). On the other hand, a person of ordinary intelligence might also conclude that DUI is a criminal act separate and apart from ordinary traffic offenses and is excluded from coverage. See *Bohner*, 359 Ill. App. 3d at 625. Therefore, we find that the policy is ambiguous. See generally *American States Insurance Co. v. Koloms*, 281 Ill. App. 3d 725, 729-30 (1996) ("the reasoning employed by the courts construing exclusion clauses comparable to that at bar, as well as the conflicting interpretations that have resulted from those cases, lend some credence to the proposition that the clause is ambiguous"). Because the policy is ambiguous on this point it must be construed in favor of finding coverage. *Skolnik*, 2015 IL App (1st) 142438, ¶ 25. Therefore, we hold that the criminal act exclusion does not apply where Wade was convicted of DUI for the collision in this case. We recognize the trial court denied the motion for summary judgment on the grounds that the exclusion violated public policy. However we may affirm the trial court's decision based upon any reason found in the record. *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784, ¶ 62. In light of this holding, we have no reason to decide and express no opinion on whether the exclusion is violative of public policy.

¶ 33 3. Whether Wade failed to cooperate with Direct Auto causing substantial prejudice.

¶ 34 Next, Direct Auto argues that the trial court's judgment should be reversed because the court applied the wrong standard to determine the "materiality" of Wade's failure to appear at the arbitration when resolving Direct Auto's claim Wade breached the cooperation clause in the insurance policy. "Whether the insured breached the cooperation clause requires the insurer show an exercise of a reasonable degree of diligence in seeking the insured's participation and that the insured's lack of participation represented a willful refusal to cooperate. [Citations.]"

American Access Casualty Co. v. Alassouli, 2015 IL App (1st) 141413, ¶ 25. "To be a defense under an insurance policy, the alleged breach of the cooperation clause needs to substantially prejudice the insurer *** in defending an underlying action. [Citation.] An insurer must demonstrate that 'it was actually hampered' in its investigation or defense by the insured's violation of the cooperation clause. [Citation.]" *Id.* ¶ 39.

¶ 35 Direct Auto asks this court to review *de novo* whether the trial court applied the correct legal standard to determine if Wade's alleged noncooperation substantially prejudiced Direct Auto's defense during the arbitration. Davis asks this court to affirm the trial court on the alternative ground that Direct Auto failed to establish its diligence in securing Wade's presence at the arbitration. The insurer has to act in good faith to secure the insured's cooperation. *Id.* ¶ 25. "An insurer's exercise of reasonable diligence and the insured's failure to participate by refusing to cooperate both involve questions of fact that must be shown by a preponderance of the evidence. [Citation.]" *Id.* In this case the trial court found that the evidence was sufficient to satisfy Direct Auto's burden of proof as to diligence in seeking to obtain Wade's appearance at the arbitration hearing, but Davis argues this court can affirm the trial court's judgment on any basis appearing in the record. *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 54 (2009) (finding, in case involving bench trial, reviewing court may affirm the trial court's judgment on any basis which appears in the record, regardless of the basis relied upon by the circuit court).

> "[T]he proper standard of review to be applied to declaratory judgments depends on the nature of the proceedings in the trial court:
>
> > '[W]hether appellate review of trial courts' decisions is deferential is a function of the division of labor between trial courts and courts of review. Courts of review accord deference to

> those trial court decisions that are within the special competence of the trial courts [such as the admissibility of evidence, credibility determinations, and the weighing of conflicting evidence], and only to those decisions. When we are reviewing a type of decision that the trial court was better qualified to make, we must proceed with due recognition of the trial court's superior vantage point. Otherwise, we must exercise our prerogative to decide the issue without deference to the trial court.' [Citations.]" *Pekin Insurance Co. v. Hallmark Homes, L.L.C.*, 392 Ill. App. 3d 589, 593 (2009).

¶ 36 A reviewing court will find that the trial court's finding is against the manifest weight of the evidence where the finding is unreasonable, arbitrary, or not based on the evidence presented, or where the opposite conclusion is clearly evident. *Certain Underwriters at Lloyd's, London v. Abbott Laboratories*, 2014 IL App (1st) 132020, ¶ 50. We cannot say that the trial court's finding that Direct Auto exercised a reasonable degree of diligence in seeking Wade's participation is against the manifest weight of the evidence.

¶ 37 Davis questions the wisdom of having Direct Auto's investigator stop looking for a current address for Wade but acknowledges that at that point Direct Auto was in contact with Wade by telephone and Wade was cooperating. Davis argues it was not reasonable to send notice of the February 9 arbitration to Wade at the address Direct Auto knew Wade no longer occupied, but the trial court inferred that letters sent to that address were received. The trial court's inference is reasonable and supported by the record where, as the trial court noted, Wade's attorney obtained continuances of two prior arbitration dates based on reasons provided by Wade's mother. Davis also argues Direct Auto did not meet its burden to prove that Wade's lack of participation represented a willful refusal to cooperate. Davis argues that Wade's initial

statement to an employee of his attorney that "I cannot make it" is not evidence of his willful refusal to cooperate, but might be attributable to the fact that call was the first time Wade learned of the arbitration scheduled for the next day. However, the trial court found that the evidence "does not show that Wade gave any reason for not appearing at the arbitration hearing the next day." The evidence that Wade gave no reason for his failure to appear was sufficient for the trial court to infer that Wade refused to appear. The court's finding is based on the evidence and we cannot say that finding is unreasonable or arbitrary.

¶ 38 Turning to whether Wade's willful refusal to cooperate substantially prejudiced the defense at the arbitration, Direct Auto argues the question "is not 'whether Direct Auto would have won' the Arbitration but whether Direct Auto was hampered by Wade's failure to appear." Direct Auto argues that Wade's attorney was "hampered" in that (1) Wade violated Illinois Supreme Court Rule 236 when he failed to appear, which was the basis of the debarring order that would have been entered regardless of what evidence was presented; (2) he was not present to give his version of events, without which Direct Auto asserts Wade's attorney could not present a credible alternative to Davis' version of events; and (3) the order debarring Wade from rejecting the arbitration award cost Wade the right to proceed to a jury trial, which would have placed additional procedural and practical hurdles before Davis. Direct Auto argues the trial court's analysis of what "material" means is faulty because regardless if it could have prevailed, the presentation of the defense was hindered by Wade's absence. In resolving this issue, we remain "[m]indful of the fact that the public is the beneficiary of the automobile policy, [and] that the prime objective of the cooperation clause is to prevent collusion between the injured and insured, as well as to enable the insurer to prepare its defense." *M.F.A. Mutual Insurance Co. v. Cheek*, 66 Ill. 2d 492, 498 (1977).

¶ 39 In *United Auto Insurance Co. v. Buckley*, 2011 IL App (1st) 103666, ¶ 1, an insurer sought a declaratory judgment that there was no coverage under its policy because the insured breached the assistance and cooperation provision in the policy by failing to appear at the arbitration hearing. The insured had participated in discovery, which produced police reports that included the names and addresses of witnesses to the accident. *Id.* ¶ 6. The injured party sent the insured notice of his intention to submit medical records and bills at the arbitration hearing. *Id.* ¶ 7. After two continuances requested by the insured, the matter was scheduled for arbitration on June 5, 2008. *Id.* ¶ 8. The insured failed to appear at the arbitration but his attorneys did appear on his behalf. *Id.* The insured later averred that his failure to appear was due to inadvertence in that he knew the date of the arbitration but believed that date fell on a different day of the week. *Id.* ¶ 10. The arbitrators entered an award in favor of the injured party and the insured's attorneys timely filed a notice of rejection of the award. *Id.* ¶¶ 9, 10. The trial court debarred the insured from rejecting the award and entered judgment on the award. *Id.* ¶ 10.

¶ 40 The *Buckley* court discussed issues of whether the injured party could claim the insured did not breach the cooperation clause after having obtained a favorable ruling on a motion to debar the insured from rejecting the arbitrators' award when the insured failed to appear at the arbitration. *Id.* ¶¶ 34-52. That discussion is not germane, and after resolving those issues, the *Buckley* court turned to the insurer's argument that it was prejudiced by the insured's failure to appear "because his 'absence at arbitration prevented any testimony regarding what [the insured] saw and experienced' at the time of the collision." *Id.* ¶ 52. The *Buckley* court rejected that argument. The insured in *Buckley* admitted fault for the collision. Additionally, the police reports listed the names and addresses of five witnesses. The court noted that the insurer had not shown or argued that "these witnesses could not have been called to testify as to the nature of the

collision and the impact." *Id.* ¶ 53. The court held that under the circumstances the insured's presence at the arbitration was not necessary to defend the claim of negligence. *Id.* The court also found that the insurer had an opportunity to fully review the medical evidence prior to arbitration and to prepare a defense. The court held that the insured's "absence from the arbitration hearing did not prevent [the insurer] from challenging the damages evidence or from cross-examination of [the injured party] as to his injuries and treatment." *Id.* The court concluded the insurer had not shown it was dependent upon the insured "for full and complete disclosure of the facts or preparation of the defense to [the] personal injury suit." *Id.* The *Buckley* court held the insurer "did not establish substantial prejudice." *Id.*

¶ 41 We find that the trial court did not apply an incorrect legal standard. The trial court found that Direct Auto had not "provided sufficient evidence to satisfy its burden of proof that it was *prejudiced by Wade's failure to appear*." (Emphasis added.) The court's finding that Direct Auto failed to prove it was prejudiced, because Direct Auto failed to provide evidence to support a finding that it could not prevail in the arbitration without Wade, properly addresses whether Direct Auto was hampered in the defense of that proceeding. The evidence before the trial court established that Direct Auto could have presented a defense in the arbitration, and Direct Auto failed to establish that it could not present a defense without Wade. This is the proper standard under *Alassouli* and *Buckley*, and the trial court's findings are not against the manifest weight of the evidence. Direct Auto's arguments to show it was prejudiced go primarily to the consequences of its loss at the arbitration, not whether said loss was unavoidable without Wade.

¶ 42 Direct Auto argues that calling witnesses would not have relieved Wade of his obligation to appear and he still would have been subject to a motion to debar the arbitrators' award. That is only true if the arbitrators entered an award in favor of Davis. The question for purposes of

deciding whether Direct Auto proved Wade violated the cooperation clause is whether Wade's attorneys were substantially prejudiced in preparing a defense that could have resulted in the arbitrators entering an award for Wade. The consequence of an award in favor of Davis is inapposite to that determination. For the same reason, Direct Auto's argument that Wade's failure to appear made jury trial unavailable, because the trial court entered a judgment on the arbitration award, must also fail. The judgment on award was the result of the failure to appear *and* the award in Davis' favor. That result has no bearing on whether Wade's attorneys could have prepared a defense that may have resulted in an award in favor of Wade. Direct Auto's argument it needed to present an alternative version of the accident "from the horse's mouth" is based on speculation, which is not sufficient to prove substantial prejudice so as to relieve the insurer of liability. *State Farm Mutual Automobile Insurance Co. v. McSpadden*, 88 Ill. App. 3d 1135, 1139 (1980) ("Inasmuch as prejudice cannot be presumed, such speculation falls short of proving substantial prejudice."). Wade's own testimony as to the facts of the collision may or may not have been more persuasive to the arbitrators than Davis' passenger's testimony.

¶ 43 In this case, although Wade did not admit he was at fault for the collision, Direct Auto has not shown it was dependent on Wade for a full and complete disclosure of the facts or preparation of the defense. Moreover, Wade's testimony would have been of questionable value given that he was convicted of driving under the influence at the time of the accident. The arbitrators could have reasonably questioned Wade's ability to recall the events surrounding the accident considering that he was determined to be legally intoxicated at the time. See *O'Brien v. Hertl*, 238 Ill. App. 3d 217, 223 (1992) (evidence of consumption of alcohol is relevant for the purpose of impeaching ability to accurately recall the events surrounding the accident). This case is distinguishable from *Founders Insurance Co. v. Shaikh*, 405 Ill. App. 3d 367, 379 (2010), in which the insured was "the *only* known witness to the collision besides" the injured party.

(Emphasis added.) Here, as in *Buckley*, Direct Auto had names of additional witnesses to the accident other than Wade and Davis. Wade's attorney believed one of those witnesses, Davis' passenger, would corroborate Wade's version of the collision. Even if ultimately she did not, Direct Auto made no efforts to contact her. That same witness could have also provided testimony as to the speed and force of the impact and any complaints of injuries by Davis immediately after the collision. A disinterested third-party witness was also listed in the police reports who also could have provided information about the collision or been called to testify. We cannot say that Direct Auto was dependent on Wade for a complete disclosure of the facts. The trial court also found that Direct Auto presented no evidence that it made any effort to obtain the medical records from Davis' medical providers named in Davis' attorney's letter. Wade's attorney testified that Davis' medical records were submitted pursuant to Illinois Supreme Court Rule 90(c) (eff. July 1, 2008),[4] and that he cross-examined and argued upon those medical records. As in *Buckley*, here Wade's attorneys reviewed Davis' medical bills and could have prepared a defense based thereon.

¶ 44 The finding that a defense was available at the arbitration without Wade is supported by evidence and is not arbitrary, nor is the opposite conclusion clearly evident. The trial court's judgment that Direct Auto failed to prove Wade violated the cooperation clause in the policy relieving Direct Auto of liability is, therefore, affirmed.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, the circuit court of Cook County is affirmed.

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[4] "All documents referred to under this provision shall be accompanied by a summary cover sheet listing each item that is included detailing the money damages incurred by the categories as set forth in this rule and specifying whether each bill is paid or unpaid. If at least 30 days' written notice of the intention to offer the following documents in evidence is given to every other party, accompanied by a copy of the document, a party may offer in evidence, without foundation or other proof: [medical bills.]"

¶ 47 Affirmed.