2017 IL App (2d) 170092-U
No. 2-17-0092
Order filed November 1, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

AAA MEMBERSELECT INSURANCE COMPANY, Plaintiff and Counterdefendant-Appellee v. DAWN VANDENEYKEL, as Administrator of the Estate of Jeffrey VandenEykel, Deceased, Defendant and Counterplaintiff-Appellant.	)	Appeal from the Circuit Court of Du Page County. No. 15-MR-1430 Honorable Bonnie M. Wheaton, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court
Presiding Justice Hudson concurred in the judgment.
Justice Hutchinson specially concurred.

ORDER

¶ 1 *Held:* The trial court erred in granting plaintiff summary judgment on its claim that defendant was not entitled to UIM coverage, as the snowmobiling trail on which the accident occurred was at least arguably a "public road" per the policy; as the ambiguity had to be resolved against plaintiff, we entered judgment for defendant.

¶ 2 Defendant, Dawn VandenEykel, received $100,000 under an insurance policy held by David Magnus, whose snowmobile ran over her husband, Jeffrey, after Jeffrey's vehicle collided with a deer and he was thrown onto the ground. As the administrator of Jeffrey's estate,

defendant then sought $150,000 underinsured motorist (UIM) coverage under her policy with plaintiff, AAA MemberSelect Insurance Company. Plaintiff filed an action for a declaratory judgment (see 735 ILCS 5/2-701 (West 2016)) and defendant counterclaimed.

¶ 3 The parties stipulated to the pertinent facts and limited the scope of the action to plaintiff's contention that it was not obligated to pay defendant, because Magnus's snowmobile was not an "underinsured motor vehicle," as defined by the policy. Further, the parties agreed that this issue turned solely on plaintiff's contention that Magnus's vehicle was not being driven on a "public road" at the time of the accident. On cross-motions for summary judgment (735 ILCS 5/2-1005(c) (West 2016)), the trial court ruled that the trail was not a public road, and it held for plaintiff. Defendant appeals. We reverse and enter judgment for defendant.

¶ 4 Plaintiff's complaint alleged as follows. Plaintiff is an Illinois corporation with its principal place of business in Michigan. On January 12, 2014, Jeffrey was riding his snowmobile on Public Trail # 8 (PT # 8) in Duncan Township, Michigan. He collided with a deer and was knocked to the ground. Magnus, who was riding right behind Jeffrey, ran him over, fatally injuring him. Defendant's policy with plaintiff provided UIM coverage with limits of $250,000 per person and $500,000 per accident. It obligated plaintiff to pay damages that defendant was legally entitled to recover from the owner or operator of an "underinsured motor vehicle" because of bodily injury caused by an accident. However, "underinsured motor vehicle" did not include any motor vehicle "designed mainly for use off public roads while not on public roads."

¶ 5 The complaint alleged further that, in June 2015, defendant made a claim against Magnus under his policy with State Farm and a UIM claim against plaintiff under her policy. Plaintiff

sought a judgment declaring that it owed her no UIM coverage for the sole reason that Magnus's snowmobile was designed mainly for use off public roads and PT # 8 had not been a public road.

¶ 6 Defendant filed an answer and a counterclaim for a declaratory judgment. She alleged that, at the time of the accident, PT # 8 had been a "public road" as the policy used that term.

¶ 7 The parties stipulated to the following facts. On January 12, 2014, at about 8 p.m., Jeffrey and his friend, Magnus, were riding separate snowmobiles on PT # 8 at or near Kenton, Michigan, approximately 0.4 miles west of National Forest Road # 16. Both snowmobiles had valid permits from the Michigan Department of Natural Resources (DNR). While Jeffrey was riding just ahead of Magnus, a deer suddenly appeared and collided with Jeffrey's snowmobile; he was ejected and came to rest along the trail. Magnus's snowmobile struck Jeffrey, who died from the injuries he sustained.

¶ 8 Paragraph 9 of the stipulation quoted from the May 2013 Michigan Comprehensive Trail Plan (Plan). According to the Plan, Michigan has more than 3,500 miles of designated trail routes throughout the state on state-owned forest land, federally-owned forest land, and some private land. The trails are developed and maintained by the collaborative efforts of state and local governments and private actors. Approximately 24% of the designated trails are " 'ORV (off-road vehicle) Routes,' " which are "open to ORV's of all sizes including trucks, motorcycles, and ATV's." Michigan also maintains a "Snowmobile Trail System" covering approximately 6,500 miles of what the Plan described as " 'marked, well-groomed public snowmobile trails.' " During the winter months, the DNR designates PT # 8 as a snowmobile trail. Throughout the year, it is a designated ORV route. It is also known as a "rail trail."

¶ 9 The stipulation continued as follows. A Michigan statute defines "forest road" as " 'a hard surfaced road, gravel or dirt road, or other route capable of travel by a 2-wheel, 4-wheel

[*sic*] conventional vehicle designed for road use. Forest road does not include a street, country road, or highway.' " Mich. Comp .Laws Ann. § 324.8110(h) (West ____). Further, the Plan's definition of " 'forest road' " includes " 'all snowmobile trails, including new abandoned rail-trail acquisitions.' " The American Heritage Dictionary defines "road" as " 'an open, generally public way, for the passage of vehicles, people, and animals.' " See https://ahdictionary.com/word/search.html?q=road (last visited Aug. 31, 2017). Random House Webster's Dictionary defines "public" as that which is "open to all persons." See http://www.kdictionaries_online.com/DictionaryPage.aspx?Application Code = 18# && Dictionary Entry = public & Search Mode = Entry (last visited Aug. 31, 2017). At the time and location of the accident, PT # 8 was open for travel by members of the public who possessed permits.

¶ 10 The stipulation attached a topographical map of PT # 8. According to police reports on the accident, the trail had been in good condition and had more than an adequate amount of snow. The trail's sides sloped down, suggesting that it was formerly a railroad. Its width was consistent, approximately 11.5 feet.

¶ 11 The stipulation continued as follows. Magnus's policy provided coverage with a limit of $100,000 per person for bodily injury. Defendant and Magnus settled for the limit. Later, defendant made a demand under the UIM provision of her policy with plaintiff. Plaintiff had drafted the policy. Jeffrey was insured and his estate was legally entitled to recover from Magnus. After a setoff, there remained $150,000 of available UIM coverage under the policy.

¶ 12 Paragraph 26 of the stipulation stated as follows:

> "The Parties agree that the only dispute under this policy and in this Declaratory Judgment action is whether or not the [*sic*] Mr. Magnus' underinsured motor vehicle was

> 'upon a public road,' as defined in [defendant's policy] at the time of the occurrence, or whether the policy terminology 'public road' is ambiguous."

Also, the parties stipulated that the exhibits "may be referenced and relied on as the best evidence for purposes of this litigation." Among the exhibits were maps of the trail and the surrounding region; two photographs of portions of the trail; and the dictionary definitions and police reports noted earlier.

¶ 13 Both parties moved for summary judgment. Plaintiff argued that Magnus's snowmobile was not an "underinsured motor vehicle" per defendant's policy. Paragraph 26 of the stipulation implied that the parties agreed that the snowmobile was designed mainly for use off public roads. Thus, the only issue was whether, on January 12, 2014, PT # 8 had been a "public road," a term undefined by the policy. According to plaintiff, the closest authority was the Michigan Supreme Court's opinion in *Duffy v. Michigan Department of Natural Resources*, 805 N.W.2d 399 (Mich. 2011), which, although not binding on Illinois courts, persuasively held that a similar trail was not a "public road" as that term was defined by the Michigan tort-immunity statute. As the trial court relied considerably on *Duffy*, we set out the case in detail.

¶ 14 In *Duffy*, the plaintiff was injured while riding an ORV on the Little Manistee Trail and Route (LM Trail), which was also a designated snowmobile trail. She sued the State of Michigan and the DNR, relying on a statutory exception that created a duty to keep a " 'highway' " in reasonable repair and reasonably safe condition. *Id.* at 403 (quoting Mich. Comp. Laws Ann. § 691.1402(1) (West ____). Under this section (section 1402(1)), immunity remained as to " 'sidewalks, trailways, crosswalks, or any other installations outside of the improved portion of the highway designed for vehicular travel.' " *Id.* (quoting Mich. Comp. Laws Ann.§ 691.1402(1) (West ____). Section 1401.(e) of the statute defined " 'highway' " as

" 'a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway' but not 'alleys, trees, and utility poles.' " *Id.* (quoting Mich. Comp. Laws Ann. § 691.1401(e) (West ____). The statute did not define either "road" or "trailway." *Id.*. Thus, although the statute made a trailway (whatever that was) a highway *if* it was on a highway, it was less clear on whether or when a trailway was also a public road (whatever that was). In short, as the majority acknowledged, "the language of the highway exception [was] not altogether clear." *Id.*

¶ 15 The majority proceeded as follows. First, noting that sections 1401 and 1402 should be read *in pari materia* (*id.* at 404), the court reasoned that, for a duty to exist, the LM Trail had to be (1) a "highway" as defined in section 1401(e); and (2) not within the no-duty exclusion in section 1402(1). *Id.* at 404-05. In deciding whether the first prerequisite was met, the majority held that the LM Trail was not a "public road" per section 1402(1).

¶ 16 The majority began by noting that, to be a "highway," the LM Trail would have to be either a "[road]" or a "[trailway] *** on the highway." Id. at 404 (quoting Mich. Comp. Laws Ann. § 691.1401(e) (West ____))[1]. *Id.* at 404-05. It noted that, although the plaintiff had previously contended that the LM Trail was a "trailway[] *** on the highway" and the trial court (which held for her) and the appellate court (which held against her) had so found, she now argued as well that the LM Trail was a "road" per section 1401(e). *Id.* The majority rejected both characterizations.

[1] The court later clarified that it construed the term "on the highway" to modify all of "bridges *** culverts" (Mich. Comp. Laws Ann. § 691.1401(e) (West ____)) and not merely the last antecedent ("culverts"). *Duffy*, 895 N.W.2d at 409, 411-12.

¶ 17 First, the majority noted the following. The trial evidence showed that the LM Trail was on state-owned land and was maintained by the DNR; that it was open for ORV and motorcycle use throughout the year when it was passable; that it was a designated snowmobile trail from December 1 to March 31; and that it was used primarily for recreational vehicles, with use by other vehicles allowed but secondary. *Id.* The plaintiff's injury occurred on a "route," a part of the trail where licensed four-wheel conventional vehicles were permitted as a secondary use; but although this part of the LM Trail had signs governing these various uses, the area of the accident was an unpaved dirt path without a shoulder, directly abutting a forest, and apparently wide enough to accommodate one lane of traffic. *Id.* at 405-06.

¶ 18 The majority then turned to whether the LM Trail was a "trailway" as that term was used in section 1401.(e). The majority relied on the Michigan trailways statute (Mich. Comp. Laws Ann. § 324.72101 *et seq.* (West ____)), which explicitly created " 'trailways' " and preceded the adoption of the amendment that added that term to section 1401(e), as the touchstone to the legislative intent behind the amendment. *Duffy,* 805 N.W.2d at 406. The act defined "trailway" in part as "a 'land corridor that features a broad trail capable of accommodating a variety of public recreation uses.' " *Id.* (quoting Mich. Comp. Laws Ann. § 324.72101(k) (West ____)). Recapitulating the evidence, the majority held that the LM Trail fell squarely within this definition. *Id.* at 407.

¶ 19 The majority then turned to the plaintiff's argument that the LM Trail was (also) a "road" as that term was used in section 1401.(e). The majority rejected this contention, for two reasons. The first was definitional: the commonly understood meaning of the term "road" is " 'a leveled or paved surface, made for traveling by motor vehicle….' " *Id.* (quoting Random House Webster's College Dictionary __ (1997)). The LM Trail did not fit this definition; it was "not

" 'made for traveling by motor vehicle,' " as the evidence established that its primary purpose was for recreational vehicles and that use by motor vehicles was "highly limited." *Id.* at 408.

¶ 20 The majority's second reason for holding that the LM Trail was not a "road" was the structure of section 1401(e): by using both "trailway" and "road," the legislature clearly intended to give meaning to both terms. Thus, to argue that the LM Trail was a "road," regardless of whether it was a "trailway," would prefer the more general term to the more specifically applicable one. *Id.* at 408-09. Although a "trailway" *can* be a "road," concluding that the LM Trail and similar trails were "roads" would essentially render the term "trailway" surplusage. *Id.*

¶ 21 The majority concluded that, because the LM Trail was neither a "road" nor a " 'trailway []…on the highway' " (Mich. Comp. Laws Ann. § 691.1401(e) (West ____)), the tort-immunity statute's highway exception did not apply, and the defendants had owed the plaintiff no duty. *Duffy*, 805 N.W.2d at 413-14.

¶ 22 The *Duffy* dissent contended that the LM Trail was a "public road" regardless of whether it was also a "trailway" (Mich. Comp. Laws Ann. § 691.1401(e) (West ____)). The dissent reasoned that, whether or not the LM Trail qualified as a "trailway" under an unrelated statute, it fit the definition of "road" that the majority itself had employed: it had a " 'leveled' " surface, though not a " 'paved' " one, that was maintained so as to be suitable for vehicular traffic; and, because it was open for travel by the general public and any properly licensed motor vehicles, it was " 'made for traveling by motor vehicle.' " *Duffy,* 805 N.W.2d at 416-17 (quoting Random House Webster's College Dictionary __ (2001)) (Kelly, J., dissenting). According to the dissent, the majority's statement that the "primary" purpose of the LM Trail was for recreational vehicles was not only inaccurate but legally immaterial: there was no basis in the statute for distinguishing between primary and secondary uses in defining a road. *Id.* at 417. Thus, the

dissent concluded, the LM Trail was a "public road," and hence a highway, per section 1401(e) of the tort-immunity statute, and the defendants had owed the plaintiff a duty of due care. *Id.*

¶ 23 We return to the present case and plaintiff's motion for summary judgment. Plaintiff argued that, under *Duffy*'s holding, PT # 8 was not a "public road" under the Michigan statute and thus was not a "public road" under defendant's policy. Plaintiff emphasized that the two trails, which were part of the same system, had essentially indistinguishable characteristics.

¶ 24 Defendant moved for summary judgment (and opposed plaintiff's motion), arguing that the term "public road" was unambiguous and included PT # 8. She also argued that, at worst, the term was ambiguous and had to be construed against plaintiff as drafter.

¶ 25 Defendant reasoned as follows. First, because the trail was undoubtedly open to the general public (as its name implied) and was maintained at public expense and under public control, it was "public" per the dictionary definition in the stipulation. See http://www.kdictionaries_online.com/DictionaryPage.aspx?Application Code = 18# && Dictionary Entry = public & Search Mode = Entry (last visited Aug. 31, 2017).. Second, because the trail was an " 'open, generally public way for the passage of vehicles and people,' " it was also a "road" according to the stipulation's dictionary definition of that term, See https://ahdictionary.com/word/search.html?q.=road (last visited Aug. 31, 2017). At worst, defendant's construction of the term was one of two or more plausible ones, thus obligating the court to accept it in preference to whatever plaintiff, the drafter, proffered.

¶ 26 Defendant argued that, even aside from not binding Illinois courts, *Duffy* did not call for a different result. She reasoned that *Duffy* centered on the construction of complex and conflicting statutory language; this case involved straightforward language in an insurance policy. Defendant noted that the policy did not purport to define "public road" by reference to the

Michigan tort-immunity statute (or any other statute). She concluded that, in context, the term had a plain meaning that included PT # 8.

¶ 27 After hearing arguments, the trial court granted summary judgment to plaintiff. Defendant timely appealed.

¶ 28 On appeal, defendant first notes that, by stipulation, the sole issue before the trial court was whether, under the agreed facts, PT # 8 was a "public road" per the policy. If so, then Magnus's snowmobile was an uninsured motor vehicle and defendant was entitled to UIM payments from plaintiff; if not, then plaintiff had no obligation. Defendant next reiterates her argument in the trial court that the commonly understood meanings of "public" and "road" clearly apply to PT # 8. Alternatively, she maintains that, at the very least, her interpretation of "public road" is reasonable, thus creating an ambiguity to be construed against plaintiff. Defendant contends that *Duffy*, aside from not binding Illinois courts, is limited to the unique context of the Michigan tort-immunity statute, whose purposes and complex phraseology both differ crucially from the simpler language of the policy.

¶ 29 Plaintiff reiterates its argument that PT # 8 was not a "public road," so that Magnus's vehicle was not an uninsured vehicle and defendant cannot recover UIM payments under the policy. Plaintiff relies heavily on *Duffy*.[2]

¶ 30 Plaintiff also raises a brand-new argument: that Magnus's vehicle was not an "underinsured motor vehicle," because it fit the policy's exception for "any motor vehicle which is *** operated on rails or crawler treads." (In the policy, this exception immediately precedes

[2] We note that neither party discusses the dissent in *Duffy*. At the trial level, the dissent was essentially unmentioned by the parties and the court. As we shall demonstrate, we see some value in discussing the dissent, as well as other authorities not heretofore noted in this litigation.

the one involving "public roads.") Apparently unconcerned that it never pleaded this claim in its complaint or argued it to the trial court, and that it stipulated that the sole dispute before the court was whether PT # 8 was a public road, plaintiff invokes the rules that this court may affirm a judgment on any basis appearing in the record, even if the trial court did not rely on that basis (*Kibort v. Westrom*, 371 Ill. App. 3d 247, 251 (2007)), and that the parties may not stipulate to propositions of law (*Domagalski v. Industrial Comm'n*, 97 Ill. 2d 228, 235 (1983)).

¶ 31 Defendant responds that plaintiff's new argument is not properly before this court, because plaintiff may not introduce a new count to its complaint or disregard its concession in the stipulation that the sole issue before the court, and thus the sole basis on which plaintiff sought a judgment, was the meaning of the "public road" exception in the UIM section of the policy and, by extension, whether that exception defeated defendant's demand for UIM benefits based on Magnus's role in causing Jeffrey's fatal accident. We agree with defendant.

¶ 32 "A party must recover, if at all, according to the case he has made for himself by his pleadings." *American Standard Insurance Co. v. Basbagill*, 333 Ill. App. 3d 11, 15 (2002). "Proof without pleadings is as defective as pleadings without proof." *Id.* Thus, plaintiff may not amend its complaint at this late stage. Further, plaintiff may not back out of its stipulation in the trial court that the only issue was whether PT # 8 was a "public road" as the policy used that term. Plaintiff mischaracterizes the stipulation as binding the parties to a proposition of law, but it did no such thing; it only removed all issues save one from the court's consideration. Parties routinely use stipulations for such purposes, and courts hold them to their decision. See, *e.g.*, *People v. Durgan*, 346 Ill. App. 3d 1121, 1131-32 (2004).

¶ 33 We therefore turn to the one issue on appeal: whether the trial court erred in granting summary judgment to plaintiff on the basis that, at the time of the accident, PT # 8 was not a "public road" within the meaning of the policy.

¶ 34 We start with basic principles. Summary judgment is appropriate when the pleadings, depositions, and other matters of record show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016). Our review is *de novo*. *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 228 (2007). The construction of an insurance policy is a question of law, and thus appropriate for resolution by summary judgment. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993). If policy language is unambiguous, we must give it its plain meaning. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992). If the language is ambiguous, we must construe the ambiguity in favor of the insured. *Hoglund v. State Farm Mutual Automobile Insurance Co.*, 148 Ill. 2d 272, 280 (1992). A term is ambiguous if it is susceptible to more than one reasonable interpretation. *Outboard Marine*, 158 Ill. 2d at 108-09. If the policy does not define a given term, we may use a dictionary to do so. See *Czapski v. Maher*, 2011 IL App (1st) 100948, ¶ 31.

¶ 35 We agree with defendant that, at the least, the term "public road" is ambiguous as applied to the facts of this case. The policy does not define "public road" or separately define either "public" or "road." Therefore, we must do so and apply the appropriate definitions to PT # 8, the characteristics of which were set out, at least in some respects, in the parties' stipulation.

¶ 36 We acknowledge that there is a dearth of judicial authority from Illinois, Michigan, and elsewhere on the definition of "public road." No authority speaks squarely or definitively to the

situation here.[3] Therefore, we start with common understandings as reflected in dictionary definitions, and we apply them to the facts of this case. Later, we shall explain why *Duffy* is far from controlling here, even under Michigan law, and why we cannot conclude that "public road" unambiguously excludes PT # 8.

¶ 37 To start, we agree with defendant that, as its name implies, "Public Trail #8" is "public." As applied to places such as parks, streets, and roads, this term commonly means "[o]pen or available for all to use, share, or enjoy" (Blacks Law Dictionary 1422 (10th ed. 2014)); or "accessible to or shared by all members of the community" (Webster's Third New International Dictionary 1836 (1993)). The parties stipulated that, on January 12, 2014, PT # 8 was open for travel by members of the public who had permits. Moreover, it was publicly owned, maintained

[3] The few reasonably pertinent judicial pronouncements include the following: *Country Mutual Insurance Co. v. Leffler*, 189 F. Supp. 3d 914, 918 (D. Alaska 2016) ("the phrase 'public roads' [in an insurance policy] is used to distinguish between public roads, on one hand, and terrain that is suitable only for specially designed vehicles, on the other"); *Arbella Mutual Insurance Co. v. Vynorious*, 607 N.E.2d 431, 434 (Mass. App. Ct. 1993) (in denying coverage, court assumed that snowmobile trail in Maine was not a "*public way*" (emphasis in original)); *Schumacher v. Heig*, 454 N.W.2d 446, 447 (Minn. Ct. App. 1990) (court noted in statement of facts that injured person "followed forest trails and never operated the ATV on public roads or ditches"); and *Bourgon v. Farm Bureau Mutual Insurance Co.*, 270 A.2d 151, 153 (Vt. 1970) (frozen surface of lake, over which insured had been driving his vehicle when he went through the ice and drowned, was " 'public road' " under policy and statute, as it was " 'open temporarily or permanently to public or general circulation of vehicles' " (quoting *State v. Hallock*, 44 A.2d 326, 328 (Vt. 1945)).

by public authorities, and part of a statewide system of public trails. Thus, we have no difficulty concluding that PT # 8 was "public." Plaintiff does not really contest this point.

¶ 38 The more difficult questions are (1) whether PT # 8 could be considered a "road" and (2) even if it was both "public" and a "road," is there reason to conclude that the linguistic whole is more (less?) than the sum of its parts, such that it was not a "public road." We agree with defendant that it is at least reasonable to conclude that the trail passed both of these tests.

¶ 39 Dictionary definitions of "road" include: (1) "[a]n open, generally public way for the passage of vehicles, people, and animals" (see https://ahdictionary.com/word/search.html?q=road (last visited Aug. 31, 2017)); and (2) "an open way for vehicles, persons, and animals [especially] one lying outside of an urban district: HIGHWAY" (Merriam-Webster's Collegiate Dictionary 1009 (10th ed. 2001)). As of January 12, 2014, PT # 8 was open (and public) and was a "way" for the passage of vehicles and people (at least people riding on or in vehicles). Moreover, the types of vehicles to which PT # 8 (including the "Route" portion) was open included both those intended primarily for off-road use and those routinely driven mostly on public highways and roads (however defined), such as trucks and motorcycles. Thus, we agree with defendant that it is not unreasonable to conclude that the term "road" encompasses PT # 8.

¶ 40 We agree with defendant that PT # 8 was "public" and that whether the term "road" applies to it is no worse than ambiguous. We see no linguistic obstacle to concluding that, if something is both "public" and a "road," it is thereby a "public road." Plaintiff does not contest this linguistic equation, but it argues that PT # 8 was not a "road." In doing so, plaintiff relies primarily on *Duffy*. For several reasons, however, we do not find *Duffy* persuasive.

¶ 41 First, as defendant argues, the Michigan court was construing the state's tort-immunity statute, not a private contract. Moreover, the statute's grants of immunity are "subject only to extremely limited and *strictly construed* exceptions." (Emphasis added.) *Genesee County Drain Commissioner v. Genesse County*, 869 N.W.2d 635, 641 (Mich Ct. App. 2015). In contrast, there is no rule that insurance policies must be strictly construed against recovery; indeed, as noted earlier, the rule is that ambiguities must be resolved in favor of coverage.

¶ 42 Second, in holding that the LM Trail was not a "public road" per the tort-immunity statute, the *Duffy* majority relied on a characteristic of the statutory language that has no parallel in the policy at issue here. The majority emphasized that the definition of "highway" used both the term "road" *and* the term "trailway." Based on this feature, the majority reasoned that, although a trailway *could* be a road, the legislature had intended to make this the exceptional case, because to do otherwise would risk reading the term "trailway" out of the definition. In the policy language here, by contrast, "trailway" does not appear and thus in no way constricts the possible construction of "road."

¶ 43 Third, that "public road" is ambiguous as applied to PT # 8 gains credence from the sharp disagreement in *Duffy* between the four majority justices and the three dissenters over whether the LM Trail was a "public road." While it is the rule that a term is not ambiguous merely because the parties disagree on its meaning (*Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010)), it is *also* the rule that a term is ambiguous if reasonable minds can differ over its meaning (*Outboard Marine*, 154 Ill. 2d at 108). That experienced jurists on the state's highest court of review were sharply divided on whether the LM Trail, which is indistinguishable for our purposes from PT # 8, was a "public road" makes us chary of concluding that the term can have

only one reasonable meaning in a context that is no more favorable to the party arguing in favor of a fixed and narrow definition of the term.

¶ 44 Fourth, we see merit in the *Duffy* dissent's contention that the majority misapplied the dictionary definition of "road." The majority asserted that the LM Trail did not fit the "common definition of 'road' because it [was] not 'made for traveling by motor vehicle.' " *Duffy*, 805 N.W.2d at 407-08 (quoting Random House Webster's College Dictionary ___ (1997)). The majority reasoned that this was because the LM Trail was made "primarily for recreational vehicles, and this purpose eclipse[d]" its "highly limited use" by "motor vehicles." *Id.* at 408. We are inclined to agree with the dissent that neither the tort-immunity statute nor the cited dictionary definition supports the conclusion that the LM Trail could not have been "made for traveling by motor vehicle" merely because it was *also* made for traveling by "recreational vehicles," even assuming that a recreational vehicle can never be a motor vehicle. Neither the statute nor the definition makes a crucial distinction between "primary" and "secondary" uses. At the very least, the dissent's argument is a reasonable one, supporting a conclusion that the term "public road" is ambiguous even in the context in which *Duffy* discussed it.

¶ 45 Finally, and perhaps most important, even were we bound by Michigan law, we could not say that, because *Duffy* held that the LM Trail did not come within the definition of "public road" in the Michigan tort-immunity statute, Michigan law would require us to hold that the LM Trail and PT # 8 do not come within any legal definition of "public road" *outside the tort-immunity statute*. Indeed, there is at least persuasive case law holding the other way—including, ironically, a case that arose out of the same incident and involved the same plaintiff as in *Duffy*.

¶ 46 In *Morris v. Allstate Insurance, Co.*, 584 N.W.2d 340 (Mich. Ct. App. 1998), an injured passenger sued her insurer for benefits arising out of a collision between two ORVs. *Id.* at 341.

The issue on the insurer's appeal from a grant of partial summary judgment for the insured was whether the collision had occurred on a "public highway" as that term was defined by the Michigan no-fault automobile-insurance statute (no-fault statute). *Id.* at 342. Under the statute, the ORVs were not "motor vehicles" unless they were " '*operated* or designed for operation *upon a public highway*.' " (Emphases in original.) *Id.* at 342, *quoting* Mich. Comp. Laws Ann. § 500.3101(2)(e) (West ____). The insurer argued that there was at least a question of fact as to whether the site of the accident had been a "public highway" as defined by the no-fault statute. The appellate court held that there was such a question of fact, and it remanded the cause.

¶ 47 For our purposes, the crucial consideration in *Morris* is the definition of "public highway." The court noted that the no-fault statute did not define "public highway" but did adopt the definition of "highway" in section 20 of the Michigan Vehicle Code (Mich. Comp. Laws Ann. § 257.20 (West ____)). *Morris*, 584 N.W.2d at 342; see Mich. Comp. Laws Ann. § 500.3101(2)(b) (West ____). Section 20 defined "highway" or "street" as " 'the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.' " *Morris*, 584 N.W.2d at 342 (quoting Mich. Comp. Laws Ann. § 257.20 (West ____)).

¶ 48 The court then considered whether the road on which the accident had occurred met this definition of "highway." The court concluded that the trial evidence was inconclusive. In granting the plaintiff partial summary judgment, the trial court had stressed that the county had maintained the road, at least by occasionally plowing snow and making repairs, and that the general public had had unimpeded vehicular access to the road. *Id.* at 343. But the appellate court noted the apparent infrequency of the county's maintenance efforts; the uncertainty left by the evidence as to whether vehicles had unimpeded access to the road; and the absence of

evidence of whether the road had even been dedicated to the public and who actually owned it. *Id.* Thus, genuine issues of fact remained on whether the road had been a "public highway" as defined by the Michigan Vehicle Code (and thus by the no-fault statute).

¶ 49 For our purposes, the first important aspect of *Morris* is its recognition that the terms "highway" and "road" appear in Michigan statutes other than the tort-immunity statute at issue in *Duffy* and that the corresponding definitions of these terms differ significantly from the ones in that law. Thus, the parties' focus here on the definitions of "public road," "highway," and "road" under the tort-immunity statute, at issue in *Duffy*, should not limit *our* focus in considering whether other statutory definitions of these terms are equally worth consulting in deciding whether PT # 8 was a "public road" under the parties' insurance policy. After all, the no-fault statute at issue in *Morris* is far closer in subject matter to the policy here than was the tort-immunity statute in *Duffy*. On the other hand, of course, *Morris* did not involve applying the no-fault statute's definitions to a Michigan trail such as the ones here and in *Duffy*. But another case *has* applied the no-fault statute (and *Morris*'s reasoning) to such a trail. Indeed, not only did this case involve the same trail as in *Duffy*—it involved the same plaintiff and the same underlying facts.

¶ 50 In *Duffy v. Grange Insurance Co. of Michigan*, No. 308789 (Mich. Ct. App. 2013) (unpublished opinion) (*Duffy II*), the plaintiff filed an action to recover no-fault benefits under her policy with the defendant. Initially, the trial court granted the insurer summary judgment, on the basis that a 2008 amendment to the no-fault statute had explicitly excluded ORVs from the definition of "motor vehicle." *Id.* at 2. On the first appeal, the appellate court held that the amendment did not apply retroactively to the plaintiff's 2007 accident. *Id.* On remand, both parties moved for summary judgment, arguing that there was no genuine issue of material fact as

to whether the LM Trail had been "publicly maintained" at the time of the accident. *Id.* The trial court denied both motions. After a jury trial, the jury returned a special verdict finding that the LM Trail had been "publicly maintained" and that the plaintiff could therefore recover against the defendant. *Id.* The trial court entered judgment for the plaintiff, and the defendant appealed. *Id.*

¶ 51 On appeal, the court framed the issue as whether the jury erred in deciding (or should even have been allowed to decide) that the LM Trail had been a "public highway" at the time of the accident. *Id.* If so, then the plaintiff's ORV had been a "motor vehicle" as the no-fault statute defined that term, and she was entitled to recover. *Id.* at 2.

¶ 52 To answer the question, the court turned to *Morris*, recognizing that, at the time of both the accident there and the plaintiff's accident, the no-fault statute had employed the definition of "highway" in section 20 of the Michigan Vehicle Code. *Id.* at 4. The court held that the jury had properly found that, at the time of the accident, the LM Trail had been a "public highway," as there was substantial evidence that, contrary to the defendant's theory of the case, the trail had been publicly maintained. This evidence included testimony that the trail was owned by the State of Michigan and under the jurisdiction of the DNR; that the DNR had provided the local tourist association with public money, signage, and the use of state-owned tractors to maintain the trail; and that state employees performed physical maintenance and repairs on the trail. *Id.* at 5-6.

¶ 53 On appeal, the defendant cited *Duffy* to argue that the LM Trail was not "publicly maintained" and thus was not a "public highway," as that term was used in the no-fault statute, because the DNR had had no duty to maintain or repair it. The court rejected this argument, for two reasons. First, the *Duffy* court had explicitly found that, by statute, the DNR *was* obligated

to maintain and manage the LM Trail—and all of the trails in the system of recreational trailways. *Id.* at 6; see *Duffy*, 805 N.W.2d at 402.

¶ 54 Second, *Duffy* was distinguishable, because it had addressed only the question of whether the LM Trail was " 'not a "highway" *for purposes of the highway exception to governmental immunity*.' " (Emphasis added by *Duffy II*.) *Duffy II*, No. 308789, at 6-7 (quoting *Duffy*, 805 N.W.2d at 411). This case, however, concerned whether the LM Trail was "a 'highway' *for purposes of the no-fault act*. *Duffy* did not address this issue." (Emphasis in original.) *Id.* at 7. The two statutes defined "highway" differently, and that the LM Trail was not a "highway" under the tort-immunity law did not prevent it from being one under the no-fault law. Because the LM Trail had been publicly maintained (a criterion absent from the definition of "highway" in the former statute but central to the definition of "highway" in the latter), the LM Trail "was a public highway for purposes of the no-fault act." *Id.* Thus, at the time of her accident, the plaintiff had been riding on a public highway, and the defendant's argument otherwise was rejected.

¶ 55 We recognize that *Duffy II* is not merely foreign authority but also an "unpublished opinion," and thus not binding on this court. We do not see this as a crucial obstacle. Aside from the fact that plaintiff's reliance on another nonbinding opinion, *Duffy*, makes it ill-positioned to object to our use of nonbinding foreign opinions (published or not), we are free to adopt the reasoning of *Duffy II* as persuasive in itself *and* as evidence that the term "public road" in the policy is ambiguous at best (from plaintiff's perspective). Plaintiff cannot very well urge us to rely on the tort-immunity statute that applied to the state's liability for Duffy's injury and expenses, then protest that we may not also consult the no-fault insurance statute that applied to her claim for benefits based on the same injury and expenses.

¶ 56 We see little distinction between the situation of the plaintiff in *Duffy II* and that of defendant here. The trial court here did not rely on a jury to find facts, relying instead on a stipulation, but it is clear that the crucial evidence is very similar in both cases. This is almost inevitable, given that the LM Trail and PT # 8 are part of the same trail system and overseen by the same governmental authorities. Thus, we can safely infer that PT # 8, as much as the LM Trail, is owned by the state and under the jurisdiction of the DNR. (In any event, the quotations from the Plan, and the fact that DNR-issued permits are required for snowmobiles on PT # 8, imply as much.) PT # 8 was located approximately 0.4 miles west of a national forest road; the LM Trail "directly abut[ted] a dense forest" (*Duffy*, 805 N.W.2d at 407). PT # 8 was approximately 11.5 feet wide; the LM Trail "appear[ed] wide enough to allow one lane of conventional traffic." *Id.* Certainly, if there is a meaningful difference between the two trails, it was up to plaintiff to give us some reason to distinguish them.

¶ 57 We also see no distinction between the legal issues in the two cases. If the LM Trail could be considered a "public highway" under the no-fault statute, which does not require construction of any ambiguities in favor of the insured, then PT # 8 can reasonably be considered a "public road" under the policy that plaintiff drafted. Whatever plaintiff gains by resorting to the definitions in the tort-immunity statute at issue in *Duffy* is counterbalanced, or more, by resorting to the equally pertinent definitions in the no-fault statute. If PT # 8 is not a "public road" for purposes of the former, it *is* one for purposes of the latter. And there is no reason to prefer the former to the exclusion of the latter.

¶ 58 Therefore, we conclude that the term "public road" in the policy is capable of a reasonable interpretation that includes PT # 8. We need not decide whether this is the *only* reasonable interpretation, as the ambiguity must be construed against plaintiff. Either way,

Magnus's snowmobile was an underinsured motor vehicle, triggering UIM coverage, and defendant prevails.

¶ 59 We hold that the trial court erred in granting plaintiff summary judgment and in denying defendant summary judgment on plaintiff's complaint. Therefore, we reverse the judgment of the circuit court and enter judgment for defendant.

¶ 60 Reversed; judgment entered for defendant.

¶ 61 JUSTICE HUTCHINSON, specially concurring:

¶ 62 I write separately because, although I agree with the outcome, I disagree with the majority's discussion of cases having nothing to do with the interpretation of an insurance policy. *Duffy* has been a red herring from the moment that plaintiff made it the focal point of its cross-motion for summary judgment. Defendant repeatedly noted as much in the trial court and has continued to do so in this appeal. Despite these efforts, *Duffy* has now distracted the majority much the same way that it distracted the trial court.

¶ 63 This case turns on the application of well-known principles. "An insurance policy is a contract, and the general rules governing the interpretation of other types of contracts also govern the interpretation of insurance policies. [Citations.] Accordingly, our primary objective is to ascertain and give effect *to the intention of the parties*, as expressed in the policy language." (Emphasis added.) *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005). A term is ambiguous if the policy language is susceptible to more than one reasonable interpretation. *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010). Ambiguities are construed strictly against the insurer who drafted the policy and liberally in favor of coverage for the insured. *Nicor, Inc. v. Associated Electric & Gas Insurance Services Ltd.*, 223 Ill. 2d 407, 417 (2006).

¶ 64 Here, the term "public road" is susceptible to more than one reasonable interpretation. Plaintiff argues that we should employ the "usual and ordinary" meaning of the term, which, according to plaintiff, does not include an "off-road trailway" like PT #8. Defendant, on the other hand, relies on the plain and ordinary dictionary definitions of the terms "public" and "road." Thus, I agree with the majority's conclusion that the term "public road" is ambiguous, and that the ambiguity must be construed in favor of defendant. I believe that the majority's reasoning is sufficient as set forth in paragraphs 37-40.

¶ 65 However, by going on to analyze *Duffy*, *Morris*, and *Duffy II*, the majority has muddled an otherwise sound decision. Regarding *Duffy*, the Michigan legislature's use of a term in that State's tort immunity statute reveals nothing about the intent of two parties using that same term in an Illinois automobile insurance policy. The majority acknowledges as much in paragraph 41, but nonetheless proceeds with a detailed discussion of the case, and then, in the most confusing of turns, sides with the dissent. Adding to the confusion, this is followed by a discussion of *Morris* and *Duffy II* (an unpublished decision), both of which involved an interpretation of Michigan's no-fault insurance statute. I understand that this discussion is meant to bolster the majority's reasoning. Respectfully, I believe it has had the opposite effect.

¶ 66 Before I conclude, I am also writing separately to express my disapproval of plaintiff's tactics with regard to the policy's exception for motor vehicles that are "operated on rails or crawler treads." In my mind, the majority did not go far enough in paragraph 32 to admonish plaintiff that its new theory has no place in this appeal.

¶ 67 Plaintiff's complaint for declaratory judgment focused exclusively on the policy's exception for motor vehicles that are "designed mainly for use off public roads while not upon public roads." Plaintiff then stipulated that "the only dispute" under the policy and in the

declaratory judgment action was whether the term "public road" was ambiguous as used in the policy. It is baffling that plaintiff would now ask this court to hold that there is no uninsured motorists coverage on the basis a different exception. See *Daniels v. Anderson*, 162 Ill. 2d 47, 58 (1994) ("It has frequently been held that the theory upon which a case is tried in the lower court cannot be changed on review, and that an issue not presented to or considered by the trial court cannot be raised for the first time on review.") (quoting *Kravis v. Smith Marine, Inc.*, 60 Ill. 2d 141, 147 (1975)).

¶ 68 Further baffling is the fact that plaintiff did not raise the exception for motor vehicles that are "operated on rails or crawler treads" in its original complaint for declaratory judgment. I expect that the trial court will be presented with a creative explanation at some point in the near future.