2019 IL App (1st) 172653-U

Nos. 1-17-2653, 1-17-2716 & 1-17-2803 (cons.)

Order filed September 27, 2019

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

KADIN MAHMET, Plaintiff-Appellant, v. ILLINOIS NATIONAL INSURANCE COMPANY, CITY OF CALUMET CITY, and AMERICAN ACCESS INSURANCE COMPANY, Defendants, (Illinois National Insurance Company and City of Calumet City, Defendants-Appellees).	)	Appeal from the Circuit Court of Cook County. No. 16 CH 6884 Honorable Diane Joan Larsen, Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment properly granted in favor of Illinois National where: (1) the unambiguous exclusion of workers compensation liability from the municipality's Special Excess insurance policy did not violate public policy; (2) workers compensation benefits paid to plaintiff were properly excluded in determining municipality's retained limit responsibility under UIM endorsement of Special

Excess policy; (3) the holding of *Burcham v. West Bend Mutual Insurance Co.*, 2011 IL App (2d) 101035, applied where plaintiff had already received amounts beyond the statutorily mandated minimums and is able to recover additional amounts for categories of loss not covered by workers compensation.

¶ 2 Plaintiff, Kadin Mahmet, filed a declaratory judgment action against defendants, Illinois National Insurance Company (Illinois National), the City of Calumet City (Calumet City) and his personal insurer, American Access Insurance Company (American Access). Illinois National insured Calumet City (the insured) under a Special Excess Liability Policy for Public Entities (Special Excess Policy). Plaintiff sought a declaration to determine the obligations of defendants to provide him with uninsured motorist coverage (UIM) for injuries he sustained in an accident that occurred on August 12, 2009.

¶ 3 American Access filed a motion for summary judgment based on the terms of its policy with plaintiff, which was granted. Subsequently, Illinois National, Calumet City, and plaintiff all cross-moved for summary judgment. The circuit court granted Illinois National's motion for summary judgment and denied both plaintiff's and Calumet City's summary judgment motions.

¶ 4 Both plaintiff and Calumet City appealed in case numbers 17-2653 and 17-2716, respectively. This court allowed plaintiff to amend his notice of appeal to correct an error in the case caption, which resulted in a second case number for plaintiff's appeal, 17-2803. The three separate appeals were consolidated on February 20, 2018. On June 20, 2018, Calumet City's appeal (17-2716) was dismissed with prejudice for abandonment and failure to prosecute. Additionally, Calumet City was precluded from filing any appellee's brief attacking the circuit court's judgment.[1]

[1] This case was fully briefed on September 14, 2018, and assigned to the authoring justice on September 13, 2018. The disposition was circulated to the panel members on September 13, 2019.

¶ 5 On appeal, plaintiff contends that the circuit court erroneously granted Illinois National's motion for summary judgment and the judgment should be reversed. For the reasons that follow, we affirm.

¶ 6 BACKGROUND

¶ 7 The underlying facts are not in dispute.

¶ 8 Plaintiff filed his declaratory judgment complaint against Illinois National, Calumet City, and American Access on May 18, 2016. In his complaint, plaintiff alleged that he was employed by Calumet City as a police officer on August 12, 2009. On that date, while on duty in a squad car, he was involved in an accident with a stolen car driven by Charles Dailey. Because the car was stolen, there was no liability insurance available for the accident. Calumet City was self-insured for workers' compensation for its police officers, and plaintiff received $446,193.53 in workers' compensation benefits.

¶ 9 Plaintiff's personal vehicle was insured by American Access. He filed a claim for UIM coverage for the accident, but American Access denied plaintiff's claim because of a policy exclusion which applied when plaintiff occupied a vehicle furnished or available for his regular use that was not the vehicle described in the policy. As the Calumet City squad car was not the one described in the American Access policy and it was furnished for plaintiff's regular use, American Access denied coverage. American Access was granted summary judgment on this issue.

¶ 10 Calumet City maintained a Special Excess Policy with Illinois National which was in effect on August 12, 2009. That policy provided UIM coverage in the amount of $1 million, subject to a retained limit of $350,000 pursuant to an Uninsured/Underinsured Motorist Coverage Endorsement. When plaintiff sought UIM coverage under the policy as an employee of

Calumet City, Illinois National denied his claim based on a policy exclusion stating as follows, in pertinent part:

> "**SECTION V. EXCLUSIONS**
>
> We will not defend or pay under this Policy for claims or suits against you:
>
> * * *
>
> C. For which you or any carrier as your insurer, may be held liable under any workers' or unemployment compensation law, disability benefits law or any similar law * * *."

¶ 11 Under the exclusion, Illinois National denied the claim on the grounds that the only damages for which coverage could exist under the policy's UIM coverage were damages sustained by plaintiff which were not compensable by workers' compensation, namely disfigurement and pain and suffering. Additionally, Illinois National asserted that Calumet City was responsible to pay the first $350,000 of plaintiff's damages that were not compensable by workers' compensation and that the Special Excess Policy was not implicated until Calumet City satisfied its retention. Illinois National further maintained that American Access provided primary UIM coverage to plaintiff.

¶ 12 Cross-motions for summary judgment were filed by plaintiff and the remaining defendants, Illinois National and Calumet City. The cross-motions were argued before the circuit court on June 12, 2017 (no transcript of the hearing was provided with the record filed on appeal).

¶ 13 On September 27, 2017, the circuit court entered summary judgment in favor of Illinois National and against Calumet City and plaintiff. The circuit court's order found: (1) coverage under the Special Excess Policy, including Calumet City's $350,000 UIM retained limit, applied only to categories of plaintiff's damages not compensable under workers' compensation or public employee disability compensation; (2) any payments that had been made or may be made to plaintiff under workers' compensation or disability did not exhaust Calumet City's $350,000 UIM retained limit under the Special Excess Policy; (3) any attorneys' fees or costs incurred by Calumet City in connection with plaintiff's claims under workers' compensation or disability did not exhaust Calumet City's $350,000 UIM retained limit under the Special Excess Policy; and (4) any attorneys' fees or costs incurred by Calumet City in connection with the current declaratory judgment action did not exhaust Calumet City's $350,000 UIM retained limit under the Special Excess Policy.

¶ 14 This timely appeal followed.

¶ 15 DISCUSSION

¶ 16 On appeal, plaintiff contends that the trial court erred in granting Illinois National's motion for summary judgment and should be reversed. He contends that Illinois National relies on a case from the second district of this court, *Burcham v. West Bend Mutual Insurance Co.*, 2011 IL App (2d) 101035, which is contrary to first district case law and interprets an exclusion that is worded materially different than the one in the Special Excess Policy. Plaintiff further contends that *Burcham* violates public policy because it would leave the injured employee in a less favorable position than he would have been if the tortfeasor were adequately insured, as articulated by our supreme court in *Ullman v. Wolverine Insurance Co.*, 48 Ill. 2d 1 (1970), and recognized by this district in *Harper v. City Mutual Insurance Co.*, 67 Ill. App. 3d 694 (1978).

Additionally, plaintiff contends that Illinois National refuses to recognize that the payments made by Calumet City for plaintiff's workers' compensation claim satisfies the retained limit requirements.

¶ 17 This matter is before us on the grant of summary judgment in favor of defendant Illinois National. Appellate review of an order granting summary judgment is *de novo*. *Barnard v. City of Chicago Heights*, 295 Ill. App. 3d 514, 519 (1998). A motion for summary judgment should only be granted if the pleadings, depositions and affidavits on file demonstrate that no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law. *Barnard*, 295 Ill. App. 3d at 519. In determining whether a genuine issue as to any material fact exists, a reviewing court must view the evidence in the light most favorable to the nonmoving party. *Barnard*, 295 Ill. App. 3d at 519.

¶ 18 With those principles in mind, we begin our discussion with an examination of *Burcham* in light of the cases cited by plaintiff (*Ullman* and *Harper*) to support his argument that the second district's holding in *Burcham* is contrary to those decisions, violates public policy and should not have been applied to this case.

¶ 19 In *Burcham*, the plaintiff sought a declaration that certain damages for which he sought UIM coverage under his employer's policy were not precluded under a policy limitation by payments he was entitled to receive under workers' compensation. *Burcham*, 2011 IL App (2d) 101035, ¶ 1. Plaintiff's employer had both a workers' compensation policy and a motor vehicle policy providing UIM coverage with the defendant insurance company. *Burcham*, 2011 IL App (2d) 101035, ¶ 3. Plaintiff received benefits under the workers' compensation policy and also

sought UIM coverage under the motor vehicle policy. *Burcham*, 2011 IL App (2d) 101035, ¶ 5. The motor vehicle policy contained a exclusionary provision:

> "No one will be entitled to receive duplicate payments or the same elements of 'loss' under this Coverage Form and any Liability Coverage Form, Medical Payments Coverage Endorsement or Underinsured Motorists Coverage Endorsement attached to this Coverage Part.
>
> * * *
>
> We will not pay for any element of 'loss' if a person is entitled to receive payment for the same element of 'loss' under any workers' compensation, disability benefits or similar law." *Burcham*, 2011 IL App (2d) 101035, ¶ 5.

¶ 20 The policy also had an underinsured motorist endorsement with a limitation provision stating that the limit of insurance for such coverage shall be reduced by all sums paid or payable under workers' compensation. *Burcham*, 2011 IL App (2d) 101035, ¶ 6.

¶ 21 The circuit court entered an order granting plaintiff's motion for summary judgment, finding that plaintiff was entitled to make claims for the following elements of loss under the policy's UIM coverage: (1) disfigurement not awarded in his workers' compensation claim; (2) loss of a normal life; (3) increased risk of future harm; (4) pain and suffering; (5) the discounted amount of the medical expenses pursuant to *Wills v. Foster*, 229 Ill. 2d 393 (2008); and (6) loss of earnings in excess of the amount actually paid in his workers' compensation claim. *Burcham*, 2011 IL App (2d) 101035, ¶ 8. The second district noted that the policy made a distinction in the

exclusion that applied for uninsured and underinsured motorist coverage: the uninsured motorist coverage referred to a limitation for categories of loss, while the underinsured motorist coverage referred to a limitation on the dollar amount of loss. *Burcham*, 2011 IL App (2d) 101035, ¶ 32. The second district found that plaintiff was entitled to claim disfigurement not awarded in his workers' compensation claim, but was not entitled to make claims for loss of a normal life, medical expenses or loss of earnings because he was entitled to receive payment for those expenses under workers' compensation, and the category of loss exclusion under the UIM provision coverage in the policy applied regardless of the dollar amount paid.[2] *Burcham*, 2011 IL App (2d) 101035, ¶¶ 15-31. Additionally, the second district noted that the limitation provision excluding categories of loss did not violate public policy as plaintiff had already recovered amounts beyond the statutorily mandated minimum and was able to recover additional amounts for categories of loss not covered by workers' compensation. *Burcham*, 2011 IL App (2d) 101035, ¶ 32.

¶ 22 We find that the holding in *Burcham* is not contrary to the holdings of *Ullman* and *Harper*. In *Ullman* our supreme court found that the setoff provision for workers' compensation benefits from UIM coverage did not offend public policy because plaintiff had already received workers' compensation benefits of $14,000, which was in excess of the statutory minimum $10,000 required for UIM coverage, and such provision did not cause plaintiff to have less financial protection. *Ullman*, 48 Ill. 2d at 7-8. In *Harper*, this court found that the total exclusion of UIM coverage if any workers' compensation benefits were available violated public

[2] Plaintiff's right to claim increased risk of future harm and pain and suffering were not challenged on appeal and were affirmed by the second district. *Burcham*, 2011 IL App (2d) 101035, ¶ 34.

policy because it left a claimant with less financial protection. *Harper*, 67 Ill. App. 3d at 698. We find *Burcham* to be consistent with both *Ullman* and *Harper*.

¶ 23 We also note that contrary to plaintiff's assertions, neither *Ullman* or *Harper* are analogous or dispositive of the issues presented in the case at bar, namely: whether his employer's Special Excess Policy, which contains a specific general exclusion for liabilities incurred under workers' compensation violates public policy; whether workers' compensation benefits were properly excluded by the policy for purposes of calculating Calumet City's retained limit responsibility; and whether *Burcham* was properly applied to this case.

¶ 24 An insurance policy is a contract and the general rules governing the interpretation of contracts govern the interpretation of insurance policies. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 24. In construing an insurance policy, the court determines the intent of the parties to the contract by construing the policy as a whole, with due regard to the risk taken, the subject matter of the policy and the purposes of the entire contract. *Empire Indemnity Insurance Co. v. Chicago Province of Society of Jesus*, 2013 IL App (1st) 112346, ¶ 33. Where the words in the policy are clear and unambiguous, a court must give them their plain, ordinary and popular meaning. *Empire Indemnity*, 2013 IL App (1st) 112346, ¶ 33. However, if the words in the policy are susceptible to more than one reasonable interpretation, they will be considered ambiguous and will be strictly construed in favor of the insured. *Empire Indemnity*, 2013 IL App (1st) 112346, ¶ 33. This is especially true with respect to provisions that limit or exclude coverage. *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 371-72 (2007). A contract is not rendered ambiguous merely because the parties disagree on its meaning. *Rich*, 226 Ill. 2d at 372. The court will not strain to find an ambiguity where none exists. *Empire Indemnity*, 2013 IL App

(1st) 112346, ¶ 33. The construction of an insurance policy and a determination of the rights and obligations pursuant to it are questions of law (*Empire Indemnity*, 2013 IL App (1st) 112346, ¶ 33) and our review is *de novo* (*Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 445, 455 (2010)).

¶ 25 The plaintiff in a declaratory judgment action bears the burden of proof. *Empire Indemnity*, 2013 IL App (1st) 112346, ¶ 34.

¶ 26 The Special Excess Policy at issue here is not primarily a motor vehicle insurance policy; according to Section I(A)(1) of the policy, it covers "the ultimate net loss, in excess of the retained limit, that the insured becomes legally obligated to pay by reason of liability imposed by law or assumed under an insured contract because of the bodily injury or property damage arising out of an occurrence during the Policy Period."

¶ 27 Further, the policy states in Section III(C) that its "duty to pay any sums that [the insured] become[s] legally obligated to pay arises only after there has been a complete expenditure of your retained limit by means of payments for judgments, settlements or defense costs. Your retained limit shall not be exhausted by your office expenses, employee's salaries, or expenses of any claims servicing organization that you have engaged. We will then be liable only for that portion of damage in excess of your retained limit up to our Limits of Insurance."

¶ 28 Section V of the policy covers exclusions, and states that Illinois National will not defend or pay under the policy for claims or suits against the insured for liability under any workers' or unemployment compensation law.

¶ 29 Finally, Endorsement 20 of the Special Excess Policy provides UIM coverage and indicates the insured's retained limit endorsement. That endorsement amended the policy to provide $1 million for any one claim seeking damages for any liability arising from an uninsured/underinsured motorist. The endorsement also included a $350,000 retained limit for

the insured, and indicated that defense expenses shall erode the retained limit. Further, the retained limit applied whether or not there were any applicable underlying policies but if there was applicable underlying insurance, the amounts received through such underlying insurance may be applied to reduce or exhaust the retained amount.

¶ 30 We first determine whether the Special Excess Policy's exclusion of coverage for workers' compensation liability violates public policy.

¶ 31 Unless a statute or rule of law or public policy mandates or prohibits certain terms or provisions, insurers may include in their policies whatever terms they deem appropriate and may choose to cover some risks while excluding others. *Village of Crestwood v. Ironshore Specialty Insurance Co.*, 2013 IL App (1st) 120112 (2013). Exclusion provisions that limit or exclude coverage must be construed liberally in favor of the insured and against the insurer. *Metropolitan Property and Casualty Insurance Co. v. Stranczek*, 2012 IL App (1st) 103760, ¶ 14. Insurance policies are considered as a whole, and we must consider the type of insurance for which the parties contracted and the purpose of the contract. *Stranczek*, 2012 IL App (1st) 103760, ¶ 20.

¶ 32 Our supreme court noted in *Kajima Construction Services, Inc. v. St. Paul Fire and Marine Insurance Co.*, 227 Ill. 2d 102, 114 (2007) that excess insurance coverage protects an insured where a judgment or settlement exceeds the primary policy's limits of liability. It is undisputed that Calumet City was self-insured for workers' compensation claims; Calumet City self-insures its losses to a certain extent and then has excess insurance to apply to claims above the selected loss retention amount. See *Village of Crestwood v. Ironshore Specialty Insurance Co.*, 2013 IL App (1st) 120112 ¶ 7; *https://www.schinnerer.com/industries/public-entities/Pages/PE-ExcessLiability.aspx*.

¶ 33 Here, the Special Excess Policy excluded, among other things, any coverage for workers' compensation liability. Plaintiff has not cited, nor have we found, any case that states that the exclusion of workers' compensation claims from an excess liability policy violates public policy. Based on the type of policy, it is evident that it was not intended to insure against all risks to Calumet City and its employees, and the various risks excluded are clearly delineated in the policy. We conclude that the unambiguous exclusion of workers' compensation liability from the Special Excess Policy does not violate public policy.

¶ 34 Our next determination is whether workers' compensation benefits paid to plaintiff were properly excluded by the policy for purposes of determining Calumet City's retained limit responsibility in the UIM endorsement. We find that they were.

¶ 35 Where the words in the policy are clear and unambiguous, a court must give them their plain, ordinary and popular meaning. *Empire Indemnity*, 2013 IL App (1st) 112346, ¶ 33.

¶ 36 As noted above, the UIM endorsement included a retained limit responsibility of $350,000 and indicated that defense expenses shall erode the retained limit. Further, that retained limit responsibility applied whether or not there were any applicable underlying policies. However, if there was applicable underlying insurance, the amounts received through such underlying insurance may be applied to reduce or exhaust the retained limit responsibility.

¶ 37 The definitions section of the policy in Section II(CC) defines the retained limit as the amount stated in the declarations and may consist of a self-insured retention, underlying insurance, or a combination thereof. Additionally, that section provides that this amount applies to bodily injury arising out of each such occurrence and shall include defense costs with respect to a self-insured retention. The UIM endorsement amended the definitions section of the policy and defines defense expenses as any payment allocated to a specific loss, claim or suit for its

investigation, settlement or defense, including but not limited to: attorneys' fees and all other investigation, loss adjustment and litigation expenses; premiums on bonds to release attachments; premiums on appeal bonds required by law; costs taxed against the insured in any claim or suit; pre-judgment interest awarded against the insured or interest that accrues after entry of judgment.

¶ 38 Given the clear and unambiguous language of the policy, it is clear that workers' compensation liability benefits paid by Calumet City were not to be included in the calculation of retained limit for coverage under the UIM endorsement or the Special Excess Policy in general. The policy clearly states that only payments for judgments, settlements or defense costs count towards the retained limit, and what constitutes defense costs are also clearly defined in the policy and endorsement. We conclude that workers' compensation benefits paid by Calumet City to plaintiff were properly excluded from the retained limit expenditure calculation.

¶ 39 We next review whether *Burcham* was properly applied by the circuit court.

¶ 40 As a preliminary matter, we note that *stare decisis* requires courts to follow the decisions of higher courts, but does not bind courts to follow decisions of equal or inferior courts. *O'Casek v. Children's Home and Aid Society of Illinois*, 229 Ill. 2d 421, 440 (2008). Thus, the opinion of one district, division or panel of the appellate court is not binding on other districts, divisions or panels. *O'Casek*, 229 Ill. 2d at 440. While a decision of the appellate court is not binding on other appellate districts, it is binding on the circuit courts throughout the State. *State Farm Fire and Casualty Co. v. Yapejian*, 152 Ill. 2d 533, 539 (1992).

¶ 41 The second district in *Burcham* found that the policy's limitation provision excluding categories of loss from UIM coverage did not violate public policy as plaintiff had already

recovered amounts beyond the statutorily mandated minimum and was able to recover additional amounts for categories of loss not covered by workers' compensation. *Burcham,* 2011 IL App (2d) 101035, ¶ 32.

¶ 42 We have already concluded that the exclusion from coverage of any liability by Calumet City for workers' compensation does not violate public policy and that workers' compensation benefits paid by Calumet City do not count for purposes of the retained limit before the Special Excess Policy applies. We note again that the Special Excess Policy was not an automobile policy, although it did provide for UIM coverage up to a policy limit of $1 million. Our reading of the policy does not preclude plaintiff from additional recovery under the UIM endorsement; it simply indicates that such coverage is triggered after the retained limit is satisfied.

¶ 43 As our supreme court noted in *State Farm Mutual Automobile Insurance Co. v. Villicana*, 181 Ill. 2d 436, 449 (1998), the purpose of the UIM statute is to place the insured claimant in substantially the same position he or she would occupy if the uninsured driver had been insured at the statutorily mandated minimum. At the time of plaintiff's accident, the statutorily mandated minimum required was $20,000 per person and $40,000 per occurrence. 625 ILCS 5/7-203 (West 2008). Here, plaintiff has received workers' compensation benefits in excess of $446,000, which is well beyond the statutory minimum required under the UIM statute. Additionally, plaintiff can recover additional amounts under the UIM endorsement once Calumet City satisfies the retained limit provision.

¶ 44 To the extent that *Burcham* found that excluding categories of loss from UIM coverage did not violate public policy as plaintiff had already recovered amounts beyond the statutorily mandated minimum and was able to recover additional amounts for categories of loss not covered by workers' compensation, we find that its holding applies to the case at bar as we are

faced with a similar factual situation, and we have no decisions to the contrary. See *Whitledge v. Klein*, 348 Ill. App. 3d 1059, 1062-63 (2004) (While this court is not bound to follow the decisions of other districts, when dealing with similar facts and circumstances, a compelling reason exists to do so.).

¶ 45 We conclude that plaintiff was not less financially protected by the exclusionary terms of the Special Excess Policy than he would have been if the wrongful driver had carried the minimum amount of insurance. Accordingly, we find that the trial court properly granted summary judgment in favor of Illinois National.

¶ 46 CONCLUSION

¶ 47 For the foregoing reason, we affirm the judgment of the circuit court of Cook County.

¶ 48 Affirmed.