2019 IL App (2d) 180728-U
No. 2-18-0728
Order filed August 12, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

COUNTRY PREFERRED INSURANCE COMPANY and COUNTRY MUTUAL INSURANCE COMPANY,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellees,	)	
v.	)	No. 14-MR-455
JOHN S. MIROBALLI, Independent Representative of the Estate of John F. Miroballi, Deceased; and WAYNE SIEVERS, Independent Representative of the Estate of Jeannie S. Miroballi, Deceased,	)	Honorable Bonnie M. Wheaton,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Jorgensen and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting summary judgment for plaintiffs rather than for defendants: because the vehicle at issue was not available for decedent's "regular use," it was covered as a "nonowned" vehicle at the time of the accident. We therefore reversed the trial court's grant of summary judgment in plaintiffs' favor and entered summary judgment in favor of defendants.

¶ 2 Defendants, the estates of John F. Miroballi and Jeannie S. Miroballi, appeal the trial court's grant of summary judgment to plaintiffs, Country Preferred Insurance Company and

Country Mutual Insurance Company (collectively "Country"), on Country's claim that there was no coverage under two insurance policies that Country issued. The estates contend that the court erroneously found that the car in which the Miroballis were riding was not a "nonowned vehicle." We reverse and enter summary judgment for defendants.

¶ 3 On December 3, 2010, the Miroballis were driving to Florida when their car veered into oncoming traffic and was struck by a tractor trailer. Both Miroballis died as a result of the collision.

¶ 4 The car the Miroballis were driving, a 2004 Chevrolet Cavalier, was owned by JFM Auto, Inc. (JFM), and covered by a commercial policy issued to JFM by Imperium Insurance Company. The Miroballis also had a standard automobile policy issued by Country Preferred Insurance Company, covering a 2011 Buick Terrain, and an umbrella policy issued by Country Mutual Insurance Company.

¶ 5 John Miroballi was a semiretired car broker who owned JFM. Jeannie was the secretary. The company had no other employees.

¶ 6 Shortly before the ill-fated trip, John talked to his Country agent, John Doherty, about increasing the limits on his car insurance. Doherty had known John since the age of five. According to Doherty, John mentioned that he was planning to retire to Florida. He planned on getting a car to drive there and, if he liked it, keeping it in Florida. John asked what he had to do to have the car insured by Country.

¶ 7 Doherty explained that Country did not do business in Florida but, as the Miroballis' existing policy was nearing its renewal date, he could add the car to that policy for 30 days at essentially no cost if John would forward him the relevant information about the car. Doherty would then forward the information to an insurance broker of John's choosing in Florida, who

could procure a new policy. John never got back to him with information on any car that he purchased.

¶ 8 The Miroballis' Country policies included coverage for any "nonowned vehicle." The policy defined "nonowned vehicle" as a "vehicle you or your relatives do not own and which is not available for regular use by you or a relative."

¶ 9 Jeannie's estate sued John's estate for her wrongful death resulting from the collision. Imperium filed a declaratory judgment action concerning its obligations, but settled with Jeannie's estate and dismissed the action.

¶ 10 John's estate tendered the defense of the underlying claim to Country, which declined. Country then filed this action, seeking a declaration that no defense or indemnity was required. Country asserted that, because the Cavalier was owned by JFM, it was available for John's regular use.

¶ 11 The parties filed cross-motions for summary judgment. The trial court granted Country's motion. The court noted that John was president of the company and was using the car for personal purposes when the accident occurred. Thus, the car was "available for his use at his sole discretion," bringing it within the exclusion for vehicles available for regular use. The estates timely appeal.

¶ 12 The estates contend that the trial court erroneously found that the Cavalier was available for John's regular use. They note that, as a summary-judgment movant, Country had the burden to prove that it was entitled to a judgment as a matter of law. Further, they point out that John bought the car only a few days before the accident, for the sole purpose of driving it to Florida to see if he liked it. If so, he would purchase it in his own name; if not, he would likely have sold it

as part of his auto broker business. There is no evidence that he drove the car for any other purpose.

¶ 13 Country responds as follows. The party making a claim under an insurance policy has the burden to prove that policy exclusions do not apply and, because the evidence is scant, the estate cannot meet this burden. Moreover, the policy exclusion here applies to cars that are *available* for regular use and it is thus irrelevant whether John actually used the car on a day-to-day basis. Consistent with this, Illinois cases have focused on whether a vehicle was available for use at the driver's sole discretion. Here, the evidence shows that the car was owned by JFM, a company of which John was the sole owner. Thus, the car was necessarily available for use at his sole discretion.

¶ 14 Summary judgment is appropriate only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, 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 2018). Where the parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. Where a case is decided by summary judgment, our review is *de novo*. *Id.* ¶ 30.

¶ 15 The construction of an insurance policy is a question of law that is also subject to *de novo* review. *American Access Casualty Co. v. Griffin*, 2014 IL App (1st) 130665, ¶ 21. An insurance policy is a contract and thus its construction is governed by general contract law principles. *Id.* In construing a contract, courts seek to effectuate the parties' intent, primarily as expressed through the language itself. *Id.*

¶ 16 Here, the parties principally dispute the meaning of the term "regular use," a term that is "not subject to absolute definition." *State Farm Mutual Automobile Insurance Co. v. Differding*, 69 Ill. 2d 103, 107 (1977). The Country policies at issue covered a "nonowned vehicle," which they defined as a vehicle that was "not available for regular use" by the insured or a family member. Generally, a vehicle was available for regular use where the insured had the use of the vehicle "as he saw fit" or "for as long as he needed it." (Internal quotation marks omitted.) *Knack v. Phillips*, 134 Ill. App. 3d 117, 121 (1985). However, contrary to Country's suggestion, the discretion given to the driver is not the test, "although the restrictions or limitations placed upon the driver are to be given consideration." *Id.* at 123. Each case turns on its own facts. *Id.* at 121.

¶ 17 The parties cite several cases encompassing various factual situations, but we find this case most like *United States Fidelity & Guaranty Co. v. Crail*, 261 Ill. App. 3d 135 (1993). There, the vehicle at issue was owned by a used-car dealer, who made the vehicle available to the insured and his family only "for use for a short period to determine whether they wished to purchase it." *Id.* at 139. Thus, the court held that the vehicle was "nonowned"; "[t]he fact that it would be used regularly by the [insured's] family after sale would not make any presale possession 'regular use.' " *Id.*

¶ 18 Here, likewise, the car was owned by JFM, and John took possession of it only so that he could drive it to Florida and see if he wanted to keep it as his own. The sticking point here, of course, is that John owned JFM. However, Country does not sufficiently explain why this distinction makes a difference. Country cites the well-settled principle that "an act pertaining to the business of the corporation, not clearly foreign to the general power of the president, done through him, will, in the absence of proof to the contrary, be presumed to have been authorized

to be done by the corporate body." *Bank of Minneapolis v. Griffin*, 168 Ill. 314, 317 (1897). Country then flatly declares that, "[a]s the sole owner and President of [JFM], the vehicle in question was available for John Miroballi's regular use because it is presumed that the president and sole owner is authorized by the corporate body for which he is the only member."

¶ 19 Country's argument is a simple *non sequitur*. To be sure, we must presume that John was authorized to do what he *did*: take possession of the car only so that he could drive it to Florida. From this authorization, however, Country baselessly infers that John also must have been authorized to do what he *did not* do: make it available for his regular use. As the estates aptly put it: "The fact that John was the president of JFM and had the 'sole discretion' to give himself the right to the regular use of the Chevy does not rationally lead to a finding that he exercised that discretion. Indeed, the only evidence on this point was to the contrary." Country makes no argument that John, in his capacity as owner of JFM, could not restrict his use as an individual. According to the evidence, that is precisely what he did.

¶ 20 "Applying the plain and ordinary meaning of the regular use exclusion, it is clear that its purpose is to cover the insured's infrequent or merely casual use of an automobile [and to exclude only the insured's] use of other automobiles that are furnished for his regular use or that he has the opportunity to use on a regular basis." *Ryan v. State Farm Mutual Automobile Insurance Co.*, 397 Ill. App. 3d 48, 51 (2009). Here, John took possession of the car only for a limited use, and he never had the opportunity to use it on a regular basis. The fact that he might have gone on to use it regularly is immaterial. At the time of the accident, it was covered by the "nonowned vehicle" provision of the Country policies.

¶ 21 For the above reasons, we reverse the judgment of the circuit court of Du Page County. Pursuant to our authority under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1. 1994), we grant summary judgment for defendants.

¶ 22 Reversed; judgment entered.