FIRST DIVISION
March 31, 2011

No. 1-09-2722

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARCIE KARLIN, Individually and as the Administrator of the Estate of Brett Karlin; and ROBIN KARLIN, Individually and as the Administrator of the Estate of Michael Karlin,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants-Cross-Appellees,	)	No. 05 CH 3246
v.	)	
NATIONWIDE MUTUAL INSURANCE COMPANY,	)	The Honorable, Richard J. Billik, Jr.,
Defendant-Appellee-Cross-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hall and Justice Rochford concurred in the judgment.

O R D E R

HELD: The plaintiffs failed to elect uninsured motorist coverage under their personal umbrella insurance policy and defendant had no duty to secure an affirmative rejection to its coverage offer pursuant to the Illinois Insurance Code. Moreover, the deceased qualified as an insured under plaintiffs' automobile insurance policy, thus entitling plaintiffs to uninsured motorist coverage.

Plaintiffs, Marcie Karlin, individually and as administrator of the estate of Brett Karlin, and Robin Karlin, individually and as administrator of the estate of Michael Karlin, appeal the order of the trial court granting partial summary judgment in favor of defendant, Nationwide Mutual Insurance Company (Nationwide), as to the existence of uninsured motorist coverage on a personal umbrella insurance policy. Defendant cross-appeals the trial court's order granting partial summary judgment in favor of plaintiffs finding that Brett was insured as a relative under an automobile policy. The questions before us on appeal are whether plaintiffs were entitled to uninsured motorist coverage under the umbrella policy for a car accident that caused Brett's death and whether Brett was an insured under the auto policy such that plaintiffs were entitled to uninsured motorist coverage pursuant to that policy. Based on the following, we affirm.

FACTS

Brett[1] was killed in a car accident on July 30, 2004, while riding as a passenger in an uninsured vehicle. There is no dispute that, at the relevant time, Michael and Robin, Michael's

[1]Brett was the son of Marcie and Michael and the step-son of Robin. Brett was 19 years old at the time of his death. Michael died after the underlying suit was filed.

wife, were insured by defendant under an umbrella policy and an auto policy.

Michael initially contacted his Nationwide agent and requested an umbrella policy in February 2002. The personal umbrella application contained a section in which Michael was to designate acceptance or rejection of defendant's offer for uninsured/underinsured motorist coverage. When Michael returned the signed application, he failed to make the requested designation. Notwithstanding, Michael was issued an umbrella policy with a $1 million liability limit in excess of the familial homeowners' and auto policies. The umbrella policy contained an exclusion specifying that uninsured/underinsured motorist coverage was included only if provided for by endorsement. No such endorsement was included in the policy. The umbrella policy was renewed thereafter. In June 2004, the Nationwide agent contacted Michael and Robin by letter to reoffer uninsured/underinsured motorist coverage. On July 13, 2004, Robin rejected the offer in a letter stating:

> "I, as the named insured in the above Personal Umbrella policy, was offered the uninsured and underinsured motorist coverage and have elected to decline this coverage."

Pursuant to the familial auto policy, $300,000 in uninsured

motorist coverage was available to the insureds and any "relative" who "regularly resides" in the household and those who "temporarily live" outside of the household. Following an incident wherein Brett stole a safe from the familial home in November 2003,[2] Brett was arrested and entered a drug rehabilitation center. In November 2003, after a series of conversations, Robin informed the family's Nationwide agent that Brett was no longer living in the house. Robin sent a letter to defendant confirming that "Brett Karlin no longer resides at 880 Shambliss Lane, Buffalo Grove. Also, he has no access to the home." In addition, in November 2003, either Robin or Michael called their Nationwide agent to request that Brett be removed as a listed driver on the familial auto policy. The auto policy was renewed thereafter and Brett was not listed as a driver.

Brett was released from the rehabilitation center in December 2003, but spent limited time at the familial home in Buffalo Grove in compliance with a restraining order entered by the trial court related to his criminal case that resulted from his stealing the safe. According to Michael's deposition

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[2]Michael and Robin initially reported the safe stolen to the police and contacted defendant; however, when they later learned that Brett had taken the safe, defendant denied the theft loss claim and threatened to cancel the homeowners' policy.

testimony, Brett was never kicked out of the familial home. Rather, the intention was to have the restraining order modified in the future so that Brett could move back into the familial home once he reestablished trust and demonstrated responsibility. Michael characterized the decision as "tough love." The restraining order had not been modified before Brett died in the accident.

Following the July 30, 2004, accident, Michael and Robin submitted a claim for uninsured motorist benefits under both the umbrella and auto policies. Defendant denied coverage. Plaintiffs filed a claim for declaratory judgment against defendant and defendant filed a counterclaim for declaratory judgment. The parties filed cross-motions for summary judgment.

DECISION

Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2004). When cross motions for summary judgment have been filed, the parties agree that no genuine issue as to any material fact exists and only a question of law is at issue; therefore, the parties invite the trial court to decide the issues based on the record.

Greenwich Insurance Co. v. RPS Products Inc., 379 Ill. App. 3d 78, 84, 824 N.E.2d 1102 (2008). We review an order granting summary judgment *de novo*. *Morris v. Margulis*, 197 Ill. 2d 28, 35, 754 N.E.2d 314 (2001).

" 'When a court interprets an insurance policy, there are only two sources upon which it may base its analysis: the plain language of the policy and the plain language of the Insurance Code of 1937 as it existed at the time the policy was written.' " *Harrington v. American Family Insurance Co.*, 332 Ill. App. 3d 385, 389, 773 N.E.2d 98 (2002) (quoting *Cincinnati Insurance Co. v. Miller*, 190 Ill. App. 3d 240, 244, 546 N.E.2d 700 (1989)). A court should look to other materials only where an ambiguity exists. *Id.*

I. Umbrella Policy

Plaintiffs contend that, because defendant extended an offer to provide excess uninsured motorist coverage in the umbrella policy application, it had a duty to "meet the meaningful" requirements of sections 143a-2(2) and 143a-2(5) of the Illinois Insurance Code (Code) (215 ILCS 5/143a-2(2), 143a-2(5) (West 2004)), such that defendant was required to secure Michael's signature rejecting the uninsured motorist coverage prior to the date the policy was issued. Michael did not sign the requisite rejection, therefore, according to plaintiffs, defendant was

obligated to provide $1 million in uninsured motorist coverage. Consequently, plaintiffs contend the trial court erred in granting partial summary judgment in favor of defendant.

Plaintiffs' reliance on section 143a-2(2) of the Code is inherently flawed where the statute applies to auto insurance. Section 143a-2(2) provides:

> "After June 30 1991, every application *for motor vehicle coverage* must contain a space for indicating the rejection of additional uninsured motorist coverage. No rejection of that coverage may be effective unless the applicant signs or initials the indication of rejection." (Emphasis added.) 215 ILCS 5/143a-2(2) (West 2004).[3]

The legislature's recognition that auto insurance and umbrella insurance are distinct is demonstrated in section 143a-2(5) of the Code, which permits insurers to issue umbrella policies *excluding* uninsured motorist coverage. In contrast to section

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[3]The version of this statute effective prior to July 16, 2004, applies in this case because the umbrella policy, while issued in 2002, was renewed annually thereafter. *Cope v. State Farm Fire and Casualty Co.*, 326 Ill. App. 3d 468, 472, 760 N.E.2d 1020 (2001); see *Norris v. National Union Fire Insurance Co.*, 326 Ill. App. 3d 314, 320, 546 N.E.2d 700 (2001) ("statutes that are in force at the time a policy is issued are controlling").

143a-2(2), section 143a-2(5) provides:

> "Insurers providing liability coverage on an excess or umbrella basis are neither required to provide, nor are they prohibited from offering or making available coverages conforming to this Section on a supplemental basis." 215 ILCS 5/143a-2(5) (West 2004).

Before the enactment of section 143a-2(2), in *Hartbarger v. Country Mutual Insurance Co.*, 107 Ill. App. 3d 391, 437 N.E.2d 691 (1982), this court explained that auto insurance is distinct from umbrella policies. In holding that uninsured motorist coverage was excluded from the umbrella policy at issue, this court said:

> "[A]n umbrella policy is entirely different from an automobile policy. It is obvious that the present umbrella policy was intended by both parties to protect the insured against excess judgments, and the risks and premiums were calculated accordingly. To require that policy to furnish uninsured motorist coverage would work a substantial revision of that policy. Section 143a of the Insurance Code was enacted to insure a minimum amount of uninsured motorist protection. It does not give us the authority to rewrite the

> unambiguous provisions of the umbrella policy in order to expand the maximum coverage afforded to the plaintiff." *Id.* at 396.

See also *Cincinnati Insurance Co.*, 190 Ill. App. 3d at 246-47 (finding that, under the 1989 version of the Code which has since been rewritten, an insurer was under no duty to offer uninsured motorist coverage in conjunction with an umbrella policy).

Relying on *Harrington*, plaintiffs argue that section 143a-2(2) applies to umbrella policies because it requires uninsured motorist coverage for every policy "insuring against loss resulting from liability imposed by law for bodily injury or death suffered by *any person* arising out of the ownership, maintenance or use of a motor vehicle." Plaintiffs misconstrue the holding in *Harrington*.

In *Harrington*, this court considered whether the insurer issuing a commercial general liability policy was required to provide uninsured motorist coverage. To make its determination, this court interpreted the nature of the policy, namely, whether the policy ultimately provided a monetary benefit to an injured individual, not the insured, as in umbrella policies or provided a monetary benefit to the insured as with uninsured motorist coverage, and asked whether the commercial general liability policy at issue was "a motor vehicle policy or, perhaps, a policy

more similar to that of an umbrella policy." *Id.* at 390-91. Finding that the commercial general liability policy was ambiguous and that there was an attached endorsement thereto, which under those circumstances the endorsement controlled, this court concluded that the policy was transformed into a motor vehicle policy and, therefore, the insurer had a duty to offer uninsured motorist coverage under section 143a-2 of the Code. *Id.* at 391. This court explicitly distinguished the policy at issue there from an umbrella policy. *Id.* Only after determining that the commercial general liability policy was in essence a motor vehicle policy did this court address the language of section 143a-2(1) of the Code, which, similar to section 143a-2(2) at issue in the case before us, is limited to uninsured motorist coverage "in connection with any motor vehicle policy." *Id.* at 392. Overall, however, this court held that the insurer had a duty to offer uninsured motorist coverage because the policy at issue had been transformed into a motor vehicle policy and was *not* an umbrella policy.

In *Cope*, this court rejected an argument similar to the one advanced by plaintiffs here. In *Cope*, the plaintiffs had an auto policy with uninsured motorist coverage and an umbrella policy that did not include uninsured motorist coverage. *Id.* at 470. The insurer offered uninsured motorist coverage for the umbrella

policy, but the plaintiffs did not purchase the coverage. *Id.* The plaintiffs later sought reformation of the umbrella policy, arguing that once the insurer voluntarily chose to make uninsured motorist coverage available it had a duty to provide a meaningful offer of such coverage. *Id.* at 471. In holding that no such duty exists, this court recognized that the section 143a-2 requirements for uninsured motorist coverage did not apply to umbrella policies. *Id.* at 472. Moreover, this court found that, even assuming such a duty did exist, the legislature expressly amended section 143a-2 to no longer require a "meaningful offer" for uninsured motorist coverage, but rather to place the duty to reject an insurer's offer for additional coverage on the insured. *Id.* at 472. In addition, even assuming the voluntary undertaking doctrine was applicable to a case of economic loss, this court dismissed the plaintiffs' argument that the insured voluntarily undertook a duty to make a "meaningful offer" where the facts demonstrated the insurer merely voluntarily notified the plaintiffs that uninsured motorist coverage was an available option under its umbrella policy. *Id.* at 472-73.

Similarly here, even assuming the voluntary undertaking doctrine could be applied to a case involving alleged economic loss, defendant simply notified Michael on two occasions, when first applying for the policy and one and one half years later,

that uninsured motorist coverage was available under the umbrella policy. Michael did not indicate an acceptance of coverage on the application and Robin expressly rejected coverage in the second instance. The uncontested facts demonstrate that defendant merely voluntarily undertook to notify plaintiffs of the option for uninsured motorist coverage. *Id.* at 472 ("it is well-established that the duty of care imposed upon a defendant is limited to the extent of its undertaking").

Accordingly, we conclude that defendant did not have a duty to secure an acceptance or rejection from Michael to its offer to provide uninsured motorist coverage for the umbrella policy. The trial court, therefore, did not err in granting summary judgment in favor of defendant such that plaintiffs were not entitled to uninsured motorist coverage under the umbrella policy

II. Auto Policy

Defendant contends the trial court erred in granting partial summary judgment in favor of plaintiffs where, based on the evidence presented to the court, Brett was not a resident of the familial home and plaintiffs should have been estopped from asserting that Brett was covered under the auto policy.

Plaintiffs' auto policy provided that defendant would "pay compensatory damages, including derivative claims, which are due by law to you or a *relative* from the owner or driver of an

uninsured motor vehicle because of bodily injury suffered by you or a *relative*." (Emphasis added.) Relative was defined in the policy as "one who regularly resides in your household and who is related to you by blood, marriage, or adoption (including a ward or foster child). A relative may live temporarily outside your household." The policy did not further define "regularly resides" or "temporarily outside your household."

Construction of an insurance policy is a question of law requiring a court to determine the intent of the parties. *Murphy v. State Farm Mutual Insurance Co.*, 234 Ill. App. 3d 222, 225, 599 N.E.2d 446 (1992). Clear and unambiguous policy terms are given their plain meaning, while ambiguous language should be construed against the insurer, in favor of the insured. *Id.* Language is considered ambiguous where a provision is subject to more than one reasonable interpretation. *Id.* Where an insurer seeks to limit its liability as a result of ambiguous language, any ambiguity is construed most strongly against the insurer because an insured's intent in obtaining insurance is to have coverage and the insurer drafted the policy without clarity and specificity. *Id.* at 226.

We are reminded that, because the parties asserted cross motions for summary judgment, they agree there are no genuine issues of material fact. *Greenwich Insurance Co.*, 379 Ill. App.

3d at 84. The record demonstrates that on November 5, 2003, Brett was arrested after admitting he stole a safe from the familial home in Buffalo Grove. A criminal case ensued. Brett was placed on probation and ordered to have restricted access to Michael. After being released from jail, Brett entered a 30-day in-patient rehabilitation program. Upon his release in mid-December 2003, Brett did not return to the familial home to sleep, but rather stayed with other family members and friends. Brett never stayed overnight in the familial home again. Defendant threatened to withdraw the familial homeowners' policy after having denied coverage for the theft of the safe because the incident was caused by a relative. As a result, in November 2003, Robin sent a letter at the urging of their Nationwide agent indicating that "Brett Karlin no longer resides at [the familial home]. Also, he has no access to the home." In addition, in November 2003, Michael or Robin contacted the Nationwide agent to request that Brett be removed as a driver on the auto policy in order to save money while Brett was staying outside the familial home.

Although Brett never returned to living in the familial home, he maintained his bedroom and kept personal belongings there such as clothes. From time to time, Brett retrieved necessary items from the familial home and had "short visits"

with Michael. Brett continuously used the familial home address on his driver's license, Selective Service System records, 2003 tax returns filed in May 2004, health insurance, medical records, and school forms. On June 23, 2004, Michael and Robin claimed Brett as a dependent on their tax returns. On December 5, 2005, Michael and Robin again claimed Brett as a dependent on their tax returns.

Courts have determined that the term "resident of a household" is ambiguous with no fixed meaning. *State Farm & Casualty Co. v. Martinez*, 384 Ill. App. 3d 494, 499, 893 N.E.2d 975 (2008) (citing *Farmers Automotive Insurance Association v. Gitelson*, 344 Ill. App. 3d 888, 893-84, 801 N.E.2d 1064 (2003)); see *Cincinnati Insurance Co. v. Argubright*, 151 Ill. App. 3d 324, 330, 502 N.E.2d 868 (1986). "Interpretation of the phrase requires case-specific analysis of intent, physical presence, and permanency of abode. [Citation.] The controlling factor, however, is the intent of the party whose residency is in question as evinced by the party's actions. [Citation.]"

In this case, we find the auto policy term "relative" as defined as one who "regularly resides in your household" or who "may live temporarily outside your household" is ambiguous. Although case law provides that coverage under a policy is determined at the time of an accident, the policy at issue here

did not provide a temporal element to define "regularly resides" or "temporarily outside." See *Murphy*, 234 Ill. App. 3d at 226. "It would have been a simple matter for the defendant to include language in the policies as to when a person must be living with the named insured in order to have coverage under the policy." *Id.* Accordingly, we must construe the ambiguity in favor of plaintiffs. *Id.* at 225. In order to determine whether Brett was a relative entitled to uninsured motorist coverage, we must look at the parties' intent. *Id.* "Once a residence is established, it is presumed to continue, and the burden of proof in such cases rests on the party who attempts to establish that a change in residence occurred. [Citation.] To establish a new residence, the person must physically move to a new home and live there with the intention of making it his permanent home, and only when abandonment has been proved does the person lose residence. [Citation.]" *Webb v. Morgan*, 176 Ill. App. 3d 378, 386, 531 N.E.2d 36 (1988).

The fact that Michael and Robin had Brett removed as a covered driver only demonstrates that Michael and Robin no longer wished to pay for Brett as a driver on their auto insurance plan. It does not, by extension, insinuate that Michael and Robin no longer considered Brett a relative for purposes of uninsured motorist coverage. Rather, the facts demonstrated that Brett

lived in the familial home until his arrest in November 2003, at which time he entered a residential rehabilitation center and then stayed with various family members and friends after his release in mid-December 2003. Brett never paid rent to stay outside the familial home and never signed a lease on a property. Brett's bedroom in the familial home remained intact with various possessions, including his clothing. Brett retained the familial home address on important legal documents and retrieved his mail on visits to the home with Michael. Moreover, Michael and Robin considered Brett a dependent for tax purposes through December 2005. The letter Robin sent to defendant's agent indicating that Brett no longer lived in nor had access to the familial home was in direct response to defendant's threat to withdraw homeowners' coverage as a result of Brett's theft of the safe. The letter did not foreclose Brett's ability to return to living in the familial home. On the contrary, Michael's and Robin's deposition testimony demonstrate that they had every intention of welcoming Brett back into the familial home once he proved to be trustworthy.

Accordingly, after construing the ambiguous language in favor of plaintiffs, we find that the facts supported a finding that Brett regularly resided in the familial home or, at most, temporarily lived outside the familial home from November 2003

until his death in July 2004. There is no evidence that Brett intended to abandon the familial home. Brett, therefore, was eligible for uninsured motorist coverage under the auto policy.

Defendant's equitable estoppel argument is waived for purposes of appeal where it failed to obtain a ruling by the trial court for the argument on summary judgment. See *People v. Flynn*, 341 Ill. App. 3d 813, 821-22, 792 N.E.2d 527 (2003) (failure to obtain a ruling on a motion results in the abandonment of the motion); *Ralston v. Plogger*, 132 Ill. App. 3d 90, 100, 476 N.E.2d 1378 (1985) (failure to obtain a ruling on a motion for judgment notwithstanding the verdict could be considered waiver).

We conclude the trial court did not err in granting summary judgment in favor of plaintiffs and against defendant such that plaintiffs were entitled to uninsured motorist coverage under the auto policy.

CONCLUSION

We affirm the judgment of the trial court granting partial summary judgment in favor of defendant on the issue of uninsured motorist coverage under the umbrella policy and granting partial summary judgment in favor of plaintiffs on the issue of uninsured motorist coverage under the auto policy.

Affirmed.