No. 1-10-3514

FOURTH DIVISION
November 3, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ARGONAUT MIDWEST INSURANCE, COMPANY, Plaintiff-Appellee, v. VALET DESCARTES, INC., CHRISTOPHER WONG and PETER BRUCE, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division. No. 08 CH 32374 Honorable William Maki Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

ORDER

¶ 1 *HELD:* The circuit court properly granted summary judgment in favor of insurance company in declaratory judgment action for indemnification, where the defendants to the underlying negligence action failed to establish as a matter of law that they qualified as "insureds" under the policy.

¶ 2 This cause arises out of a declaratory judgment action (735 ILCS 5/2-701 (West 2006)) filed by plaintiff-appellee, Argonaut Midwest Insurance Company (hereinafter Argonaut), against the defendants-appellants, Valet Descartes, Inc. (hereinafter Valet), Christopher Wong (hereinafter Wong) and Peter Bruce (hereinafter Bruce), seeking a declaration that Argonaut was

not obligated to defend or indemnify Valet or Wong in an underlying negligence claim brought by Bruce. In that underlying negligence claim, Bruce alleged that he sustained personal injuries when a vehicle driven by Wong, a valet attendant employed by Valet, struck his motorcycle. The vehicle driven by Wong was allegedly owned by Autotrade Corporation (hereinafter Autotrade), which in turn had a garage insurance policy with Argonaut. When Valet and Wong tendered the defense and indemnification of the underlying negligence claim to Argonaut, Argonaut denied coverage and refused to defend or indemnify any action by Bruce.

¶ 3 After discovery, the parties filed cross-motions for summary judgment seeking a declaration regarding Argonaut's duty to defend Valet and Wong. In response to Valet and Wong's motion for summary judgment, Argonaut attached a copy of an affidavit of Egle Kulbokas, an employee of Autotrade. The circuit court granted Argonaut's motion for summary judgment, denying Valet and Wong's motion. After reviewing all the documents before it, the circuit court found that Argonaut owed no duty to either defend or indemnify Valet or Wong. Valet and Wong now appeal, contending that the circuit court erred in: (1) denying their motion to strike portions of Kulbokas' affidavit which failed to comply with the requirements of Illinois Supreme Court Rule 191(a) (Ill. S. Ct. R. 191(a) (eff. July 1, 2002)); (2) denying their motion to strike those portions of Argonaut's reply to their motion for summary judgment, that they allege raised new bases for summary judgment not argued in Argonaut's original motion; and (2) granting summary judgment in favor of Argonaut where the record established that at the time of the accident, the vehicle involved was used "in connection with" Autotrade's business, so as to be covered under the insurance policy. For the reasons that follow, we affirm the judgment of

the circuit court.

¶ 4 I. BACKGROUND

¶ 5 The record reveals the following undisputed facts and procedural history. The underlying negligence action arose as a result of a vehicle collision which occurred on October 17, 2006. On that date, Wong, a valet attendant employed by Valet, was driving a customer's vehicle when he collied with Bruce's motorcycle, injuring Bruce. On April 30, 2007, Bruce filed a complaint alleging negligence against Wong and Valet. In that original complaint, Bruce alleged that on October 17, 2006, Schote Lomtadze authorized Wong, a valet driver for Valet, to use, operate and park "his" Mercedes ML 320. The complaint further alleged that Bruce was traveling westbound on Randolph Street, which is a two-lane, westbound, one-way street, when, Wong, who was driving the Mercedes eastbound on a service road that bordered Randolph Street, made an illegal U-turn onto Randolph Street and struck Bruce's motorcycle. The complaint stated that Wong was operating the Mercedes in the scope of his employment as a driver for Valet, and that as a proximate result of both Wong's and Valet's violation of their duties to Bruce, Bruce suffered serious injuries. Accordingly, the complaint sought damages from Valet and Wong.

¶ 6 About a year after Bruce filed his initial complaint, by a letter, dated June 3, 2008, counsel for Valet and Wong tendered the defense and indemnification of the original complaint to Argonaut. According to the June 3, 2008, letter Valet and Wong qualified as insureds under Argonaut's garage liability policy to Autotrade. The letter stated that "it is believed that" Autotrade owned the Mercedes, which Wong drove at the time he struck Bruce's motorcycle.

The letter further stated that the insurance card, which was in the Mercedes at the time of the accident, indicated that the vehicle was owned by Autotrade with insurance provided by Argonaut[1] as well as that the license plates on the Mercedes were owned by and issued to Autotrade.

¶ 7 On July 14, 2008, counsel for Argonaut responded by letter rejecting Wong and Valet's tender of defense and indemnification. Counsel specified that there were no allegations or any evidence that Bruce's injury resulted from Autotrade's "garage operations" or from the use of a covered "auto," so as to trigger the application of Autotrade's garage liability policy with Argonaut.

¶ 8 Soon thereafter, on August 7, 2008, Bruce filed an amended complaint in the underlying action against Wong and Valet. In that amended complaint, Bruce omitted the allegation that the Mercedes involved in the accident was owned by Schote Lomtadze. Rather, Bruce alleged that at the time of the accident, title to the vehicle was held by Classy Motors, Inc. (hereinafter Classy Motors),[2] and that Lomtadze was a "permitted driver" of the vehicle. Bruce further alleged that the Illinois license plate number on the Mercedes (DL7970) was a dealer license plate issued by the Illinois Secretary of State and registered to "Auto Trade Group, Inc." In addition, he reiterated that at the time of the accident the Mercedes contained an insurance card

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[1]The letter specifically referenced Argonaut's policy number GP3348071.

[2]The record contains a copy of a certificate of title and an assignment of title establishing that Classy Motors purchased the Mercedes from Premier Auto Auctions in Downers Grove on October 10, 2006.

for "Auto Trade Group," policy No. GP3348071, issued by Argonaut.

¶ 9 By letter dated August 8, 2008, counsel for Valet and Wong provided Argonaut with a copy of the amended underlying complaint and asked whether the new allegations altered Argonaut's coverage position. On August 18, 2008, by letter Argonaut repeated its rejection of the tender of defense. In addition, Argonaut requested that the tender be withdrawn before September 1, 2008, indicating that if a withdrawal was not received by that date, it would proceed with a declaratory judgment action against Valet and Wong in the circuit court. In September 2008, the underlying negligence action was settled and Valet and Wong assigned any rights available to them under the Argonaut policy to Bruce.

¶ 10 On September 2, 2008, Argonaut filed a complaint for declaratory judgment with the circuit court seeking a declaration that it was not required to either defend or indemnify Valet and Wong in the underlying action against Bruce. Argonaut argued that the original and amended underlying complaints did not allege any injury arising out of any covered "auto" under the Argonaut policy, and that Valet and Wong did not qualify as "insureds" under that policy. Specifically, Argonaut contended its policy to Autotrade provides liability coverage for "garage operations" which are defined as the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations and includes the ownership, maintenance or use of the "autos" indicated in the policy as covered "autos." According to Argonaut, covered "autos" include only those "autos" that the named insured (Autotrade) owns or that are used in connection with its garage business. Argonaut explained that neither the original or amended underlying complaints contained any allegations that Bruce's

injury resulted from Autotrade's garage operations or garage business or from a covered "auto." Argonaut further alleged that Autotrade never owned the Mercedes in question and never used it in connection with its "garage operations" or garage business. Accordingly, Argonaut contended that Valet and Wong did not qualify as "insureds" under the policy by virtue of being "permissive users" of a covered "auto."

¶ 11 In support of its declaratory judgment action, Argonaut attached a copy of the relevant garage liability policy. That policy identifies the "named insured" as "Autotrade Corporation, 8805 S. 78th Ave., Bridgeview, IL," and states that the policy is effective from December 31, 2005 to December 31, 2006. The policy describes the insured's (Autotrade's) business as "dealer" and "car dealer."

¶ 12 With respect to coverage, the policy contains a Garage Coverage Form, which states in relevant part:

> "**SECTION I - COVERED AUTOS**
>
> Item Two of the Declarations show the 'autos' that are covered 'autos' for each of your coverages. The following numerical symbols describe the 'autos' that may be covered 'autos.' The symbols entered next to a coverage on the Declarations designate the only 'autos' that are covered 'autos.' "

On the policy declarations under "Item Two-Schedule of Coverages and Covered Autos,"[3] the

[3]"Item Two-Schedule of Coverages and Covered Autos" specifically states that: "This policy provides only those coverages identified by entry of a premium and by entry of the applicable covered 'auto' designation symbol *** ([as] defined in Section 1 of the Garage

numerical symbols "22" and "29" are entered under the "Covered Auto" category of the liability coverage. Those symbols are described in the policy as follows:

Symbol	Description of Covered Auto Designation Symbols	
22	Owned "Autos" only	Only those "autos" you own *** This includes those "autos" you acquire ownership of after the policy begins.
29	Non-Owned "Autos" Used in Your Garage Business	Any "auto" you do not own, lease, hire, rent or borrow used in connection with your garage business described in the Declarations. This includes "autos" owned by your "employees" or partners (if you are a partnership) members (if you are a limited liability company), or members of their households while used in your garage business.

¶ 13 The Garage Coverage Form further provides in relevant part:

"SECTION II - LIABILITY COVERAGE

A. Coverage

1. 'Garage Operations' - Other than Covered 'Autos'

a. We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies caused by an 'accident' and resulting from 'garage operations' other than the ownership, maintenance or use of covered 'autos.'

We have the right and duty to defend any 'insured' against a 'suit'

Coverage Form). Entry of a covered 'auto' symbol next to Liability provides coverage for 'garage operations.' "

asking for these damages. However, we have no duty to defend any 'insured' against a 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply.

* * *

2. 'Garage Operations' - Covered 'Autos'

We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from 'garage operations' involving the ownership, maintenance or use of covered 'autos.'

* * *

We have the right and duty to defend any 'insured' against a 'suit' asking for such damages ***. However, we have no duty to defend any 'insured' against a 'suit' seeking damages for 'bodily injury' or 'property damage' *** to which this insurance does not apply."

¶ 14 Section II--Liability Coverage of the Garage Coverage Form also includes a provision (as amended by an endorsement specific to Illinois) defining who is an insured under the policy. This provision provides in relevant part:

"**3. Who is an Insured**

a. The following are 'insureds' for covered 'autos':

(1) You for any covered 'auto.'

(2) Your customers, if your business is shown in the Declarations as

an 'auto' dealership.

(3) Anyone else while using with your permission a covered 'auto' you own, hire or borrow except:

(a) The owner or anyone else from whom you hire or borrow a covered 'auto.' ***

(b) Your 'employee' if the covered 'auto' is owned by that 'employee' or a member of his or her household.

(c) A partner (if you are a partnership), or a member (if you are a limited liability company), for a covered 'auto' owned by him or her or a member of his or her household.

(4) Anyone liable for the conduct of an 'insured' described above but only to the extent of that liability.

b. The following are 'insureds' for 'garage operations' other than covered 'autos':

(1) You.

(2) Your partners (if you are a partnership), members (if you are a limited liability company), 'employees,' directors, shareholders but only while acting within the scope of their duties."

¶ 15 The Argonaut policy provides several important definitions relevant to this appeal. First the policy defines the words "you" and "your" as "the "Named Insured shown in the

Declarations."[4] In addition, the policy defines "Garage operations" as follows:

> " 'Garage operations' means the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations. 'Garage operations' includes the ownership, maintenance or use of the 'autos' indicated in Section I of this Coverage Form as covered 'autos.' 'Garage operations' also include all operations necessary or incidental to a garage business."

¶ 16 On February 9, 2009, Valet and Wong filed an answer to Argonaut's declaratory judgment complaint. Following discovery, on June 10, 2010, Argonaut moved for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2010)), arguing that Valet and Wong were not "insureds" under the Argonaut policy and that the underlying complaints did not allege any bodily injury arising from Autotrade's "garage operations" or the use of a covered "auto." In support of its motion for summary judgment, Argonaut attached a copy of its garage insurance policy to Autotrade, as well as a copy of the November 2007 deposition of Schote Lomtadze taken for purposes of the underlying negligence claim.

¶ 17 In his deposition, Lomtadze testified that in October 2006 he owned a wholesale car dealership, which exported vehicles. Lomtadze explained that because he did not have a wholesaler dealer's license, another dealership, Classy Motors, owned by Tiberiu Robes, would buy vehicles for him in return for a fee. Drivers would then bring the vehicles Lomtadze

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[4]As already noted above, Autotrade is identified as the "Named Insured" in the declarations.

purchased to Atlantic Express Corporation (hereinafter Atlantic Express) a shipping lot at 78th Street in Bridgeview, where the vehicles would be loaded into containers and shipped overseas. According to Lomtadze, Atlantic Express had two lots on each side of the building.

¶ 18 When questioned about the Mercedes involved in the accident that injured Bruce, Lomtadze averred that he first drove the Mercedes on the date of the accident. Lomtadze explained that although he had purchased the Mercedes, the title of the Mercedes was in the name of Classy Motors because he had used that dealership's license to purchase the vehicle at wholesale prices. Lomtadze explained that on the date of the accident, he came to Atlantic Express to pay for some of the vehicles he had purchased through Classy Motors. Lomtadze stated that he then drove the Mercedes from the Atlantic Express lot to the Red Light restaurant on Randolph Street in Chicago to meet a friend. He parked the Mercedes in front of the restaurant and gave his keys to the valet (Wong). While he was inside the restaurant, he learned that the Mercedes was in an accident.

¶ 19 Lomtadze testified that at the time of the accident, the Mercedes contained an insurance card in the glove compartment, that had been provided by Classy Motors. Lomtadze stated that he was not familiar with the name "Auto Trade Corp." that appeared on that insurance card. He did not know how the insurance card got into the glove compartment and testified that the transportation company that moved the vehicles from the point of purchase to the shipping dock had its own insurance. He further stated that an insurance company wrote a check to Classy Motors for the repairs to the Mercedes.

¶ 20 On August 4, 2010, Valet and Wong filed their response as well as a cross-motion for

summary judgement. Therein they contended that because Autotrade provided the license plates and the insurance card to Lomtadze, and those items were inside or on the Mercedes at the time of the accident, the Mercedes was "used in connection with" Autotrade's garage business, so as to trigger coverage under Argonaut's policy. In support, Valet and Wong attached numerous documents, including; (1) Argonaut's admission that an insurance card for Autotrade's policy was inside the Mercedes, and that the dealer license plates obtained by Autotrade were on the vehicle. Valet and Wong also provided the circuit court with photographs of Atlantic Express' shipping lot, showing that Atlantic Express is located adjacent to Autotrade and that they share the same parking lot.

¶ 21 On September 30, 2010, Argonaut filed a response to Wong and Valet's cross-motion for summary judgment and a reply in further support of its own summary judgment motion. To those pleadings, for the first time, Argonaut attached a copy of an affidavit by Egle Kulbokas (hereinafter Kulbokas), an employee of Autotrade.[5] In that affidavit, Kulbokas testified that since 2006 she has been an employee of both Autotrade and Atlantic Express. She stated that these were separate, but commonly owned corporations. While Autotrade is a used vehicle dealership and auto body repair shop located at 8805 South 78th Avenue in Bridgeview, Illinois, Atlantic Express is an international logistics company, located adjacent to Autotrade at 8801 South 78th Avenue, Bridgeview. According to Kulbokas, the Mercedes driven by Lomtadze and Wong during the October 17, 2006, accident was never owned by Autotrade. Kulbokas further testified that the Mercedes was never used in connection with Autotrade's business, and

[5]This affidavit is dated September 24, 2010.

specifically, that it was not used in connection with its business or with Atlantic Express' business on the date of the accident. Kulbokas stated that Lomtadze was never an employee or a customer of Autotrade; rather he was a customer of Atlantic Express. According to Kulbokas, in 2006, Lomtadze paid Atlantic Express to ship 50 to 60 vehicles internationally. Atlantic Express made available to Lomtadze an Autotrade dealer license plate and insurance cards with explicit instructions that they be used only when he was transporting vehicles directly from the purchase location to Atlantic Express, and only when he paid Atlantic express to ship the vehicles. Kulbokas stated that on the day of the accident, Lomtadze did not transport the Mercedes directly from the purchase location to Atlantic Express, and he was not using the Mercedes in connection with either Autotrade or Atlantic Express businesses. Kulbokas explained that on the day of the accident, Lomtadze did not have the authority to use Autotrade's license plates or insurance card for the Mercedes. Atlantic Express shipped the Mercedes overseas for Lomtadze on November 13, 2006.

¶ 22 In response to Argonaut's reply containing Kulbokas' affidavit, Valet and Wong issued subpoenas to Atlantic Express and Autotrade for documents, as well as a subpoena for the deposition of Kulbokas. Valet and Wong also filed a motion to extend the time to file a reply in support of their cross-motion for summary judgment. On October 18, 2010, the circuit court heard and denied Valet and Wong's motion for an extension of time. The court further stayed the previously issued discovery pending the hearing on the motions for summary judgment.

¶ 23 On October 21, 2010, Valet and Wong filed a reply in support of their cross-motion for summary judgment. They also filed: (1) a motion to strike portions of Kulbokas' affidavit, on

the basis that it lacked sufficient foundation and made conclusory statements in violation of Illinois Supreme Court Rule 191(a) (Ill. S. Ct. R. 191(a) (eff. July 1, 2002)); (2) a motion to strike certain arguments in Argonaut's reply in support of its motion for summary judgment as it raised arguments for the first time that Argonaut had failed to raise in its original declaratory judgment complaint and its motion for summary judgment; and (3) a renewed motion for discovery, including an opportunity to depose Kulbokas.

¶ 24 On October 27, 2010, the circuit court held a hearing on the cross-motions for summary judgment. After hearing arguments by both parties, the circuit court first denied Valet and Wong's motions to strike portions of Kulbokas' affidavit, and to strike Argonaut's reply. The circuit court also denied Valet and Wong's request for further discovery. The circuit court then granted Argonaut's motion for summary judgment, and denied Valet and Wong's cross-motion for summary judgment. In doing so, the court specifically found that because the original and amended underlying complaints did not allege any injury arising from Autotrade's "garage operations" or out of any covered "auto," Valet and Wong did not qualify as "insureds" under Argonaut's policy. Accordingly, the circuit court concluded that Argonaut had no obligation to defend, reimburse or indemnify Valet and Wong in connection with the underlying lawsuit. Valet and Wong now appeal.

¶ 25 II. ANALYSIS

¶ 26 On appeal, Valet and Wong make three contentions. They argue that the circuit court erred in denying their motion to strike portions of Kulbokas' affidavit because that affidavit did not comply with the requirements of Illinois Supreme Court Rule 191(a) (Ill. S. Ct. R. 191(a)

(eff. July 1, 2002)). Next, Valet and Wong argue that the circuit court should have stricken Argonaut's reply in support of its motion for summary judgment as that reply raised a new basis, not previously argued in their initial brief in support of summary judgment. Finally, Valet and Wong contend that the circuit court erred in granting Argonaut's motion for summary judgment because the record establishes that Lomtadze used the Mercedes "in connection with" Autotrade's business. We will address each of these contentions in turn.

¶ 27 We begin by noting the well-established principles regarding our review of summary judgment proceedings. It is axiomatic that "the construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court and appropriate subjects for disposition by summary judgment." *Konami (America), Inc. v. Hartford Insurance Co. of Illinois*, 326 Ill. App. 3d 874, 877 (2002). Summary judgment is appropriate "if 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 (West 2004); see also *Fidelity National Title Insurance Company of New York v. West Haven Properties Partnership*, 386 Ill. App. 3d 201, 212 (2007) (citing *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004)); see also *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007). Where, as here, cross-motions for summary judgment are filed in an insurance coverage case, the parties acknowledge that no material questions of fact exist and only the issue of law regarding the construction of an insurance policy is present. *American Family Mut. Ins. Co. v. Fisher Development, Inc.*, 391 Ill. App. 3d 521, 525 (2009), citing *Liberty Mutual Fire*

Insurance Co. v. St. Paul Fire & Marine Insurance Co., 363 Ill. App. 3d 335, 338-39 (2005). We review the circuit court's decision to grant or deny such a motion for summary judgment *de novo*. *Virginia Surety Co.*, 224 Ill. 2d at 556. In doing so, we may affirm on any basis found in the record regardless of whether the trial court relied on those grounds or whether its reasoning was correct. *Illinois State Bar Association Mutual v. Coregis Insurance Co.*, 355 Ill. App. 3d 156, 163 (2004); see also *Pepper Construction Co. v. Transcontinental Insurance Co.*, 285 Ill. App.3d 573, 576 (1996).

¶ 28 On appeal, Valet and Wong argue that as a matter of law under Argonaut's policy to Autotrade, Argonaut had a duty to defend and indemnify them in the underlying negligence action because the Mercedes involved in the accident was an "auto" used "in connection with" Autotrade's business, and thereby qualified as a covered "auto" under Argonaut's policy. Argonaut, on the other hand, contends that summary judgement in its favor was proper because Valet and Wong failed to establish that they qualified as "insureds" under the plain language of section II, 3 in the Garage Liability Form of the policy. For the reasons that follow, we agree with Argonaut.

¶ 29 We preliminarily note that Valet and Wong attempt to argue that Argonaut has waived this issue for purposes of appeal because it never raised it before the circuit court. Valet and Wong specifically point out that its initial declaratory judgment complaint Argonaut incorrectly referenced a different section of Argonaut's policy to define "who is an insured."[6]

[6]That definition of an "insured" is from the Illinois Uninsured Motorist Coverage endorsement to Argonaut's garage liability policy and defines an "insured" as "anyone

¶ 30 Although we acknowledge that generally "issues not raised in the trial court may not be raised for the first time on appeal," (see *Eagan v. Chicago Transit Authority*, 158 Ill. 2d 527, 534 (1994)), contrary to Valet and Wong's contention, the record reveals that although Argonaut cited to a different section of the policy in its initial declaratory judgment complaint, it cited and argued section II, 3 of the Garage Coverage Form in its motion for summary judgment, as well as its reply to Valet and Wong's cross-motion for summary judgment. Moreover, from the start Argonaut argued that Valet and Wong did not qualify as "insureds" under the garage liability policy, and in support of that contention attached the entire insurance policy to its declaratory judgment complaint. Accordingly, we cannot agree with Valet and Wong that issue was not presented or argued before the circuit court.

¶ 31 What is more, even if we were to find that this issue was raised for the first time on appeal (see *Eagan v. Chicago Transit Authority*, 158 Ill. 2d 527, 534 (1994)), we would nevertheless choose to address its merits here. See *Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1, 11 (1996) (The waiver rule "is a limitation on the parties and not the jurisdiction of the courts"); see also *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 518-19 (2000) (same) (citing *Chicago Patrolmen's Ass'n v. Department of Revenue*, 171 Ill. 2d 263, 278

'occupying a covered 'auto' " or "anyone else occupying a covered 'auto' you do not own that is a covered 'auto' under this Coverage Form for Liability insurance." Because this definition is different from the definition of an "insured" found in section II, 3 in the Garage Coverage Form now referenced by Argonaut on appeal, Valet and Wong contend that Argonaut failed to properly preserve the issue by not raising it before the circuit court.

(1996); *Wagner v. City of Chicago*, 166 Ill. 2d 144, 148 (1995); *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 251 (1994) and *Hux v. Raben*, 38 Ill.2d 223, 225 (1967)); see also *People v. Hoskins*, 101 Ill. 2d 209, 219 (1984).

¶ 32 Turning to the merits of Argonaut's claim, we begin by noting that to determine whether an insurer has a duty to defend an action against the insured, a reviewing court must compare the allegations of the underlying complaint to the relevant portions of the insurance policy. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992); see also *Dixon Distributing Co. v. Hanover Insurance Co.*, 161 Ill. 2d 433, 438 (1994); *Viking Construction Management v. Liberty Mutual Insurance Co.*, 358 Ill. App. 3d 34, 41 (2005) ("The duty of an insurer to defend an insured is determined by the allegations of the underlying complaint") (citing *Lyons v. State Farm Fire & Casualty Co.*, 349 Ill. App. 3d 404, 406 (2004)). If the underlying complaint alleges facts that fall "within or *potentially* within" the coverage of the policy, the insurer is obligated to defend its insured even if the allegations are "groundless, false, or fraudulent." *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991) (Emphasis in original.). In other words, an insurer may not justifiably refuse to defend an action against the insured "unless it is *clear* from the face of the underlying complaint[] that the allegations fail to state facts which bring the case within, or potentially within the policy's coverage." *Wilkin Insulation Co.*, 144 Ill. 2d at 73 (Emphasis in original.). An insurer, however, may refuse to defend when the complaint considered in light of the insurance policy, precludes the possibility of coverage. *Illinois Emcasco Insurance Co. v. Northwestern National Casualty Co.*, 337 Ill. App. 3d 356, 359-60 (2003). A court may look

beyond the allegations of a complaint if the coverage issue involves the question of whether the party asserting coverage is a proper insured under the policy. *Transcontinental Insurance Co. v. National Union Fire Insurance Company of Pittsburgh*, 278 Ill. App 3d 357, 368 (1996); see also *State Farm Fire & Casualty Co. v. Shelton*, 176 Ill. App. 3d 858, 867 (1988); see also *Pekin Insurance Co. V. Wilson*, 237 Ill. 2d 466, 460 (2010) (holding that the trial court may look beyond the underlying complaint in determining the duty to defend) (citing *American Economy Insurance Co. v. Holabird & Root*, 382 Ill. App. 3d 1017, 1024, 1031-32 (2008) and *Fidelity & Casualty Co. of New York v. Envirodyne Engineers, Inc.*, 122 Ill. App. 3d 301, 304-05 (1983))

¶ 33 In interpreting an insurance policy it is important to keep in mind that an insurance policy is a contract and that, therefore, the general rules governing the interpretation of other types of contracts similarly govern. *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005); see also *Maremont Corp. v. Continental Casualty Co.*, 326 Ill. App.3d 272, 276 (2001). A reviewing court's primary objective when construing an insurance policy is to ascertain and give effect to the intention of the parties, as expressed in the policy language. *Hobbs*, 214 Ill. 2d at 17. To ascertain the meaning of a policy, the court must construe it as a whole, taking into account the risk undertaken, the subject matter that is insured and the purposes of the entire contract. *Outboard Marine Corp.*, 154 Ill.2d at 108. Where the words in the policy are clear and unambiguous, "a court must afford them their *plain, ordinary, and popular meaning*." *Outboard Marine Corp.*, 154 Ill. 2d at 108 (Emphasis in original.); see also *Traveler's Insurance Co., v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 292-93 (2001). However, if the words in the policy are ambiguous, they must be liberally construed in favor of

the insured and against the insurer who drafted the policy. *Outboard Marine Corp.*, 154 Ill. 2d at 108; see also *Traveler's Insurance Co.*, 197 Ill. 2d at 293; see also *Wilkin Insulation Co.*, 144 Ill. 2d at 73 ("All doubts and ambiguities must be resolved in favor of the insured."). Whether an ambiguity exists turns on whether the policy language is subject to more than one reasonable interpretation. *Hobbs*, 214 Ill. 2d at 17. As our supreme court in *Hobbs* explained:

> "Although 'creative possibilities' may be suggested, only reasonable interpretations will be considered. [Citation.] Thus, we will not strain to find an ambiguity where none exists. [Citation.] Although policy terms that limit an insurer's liability will be liberally construed in favor of coverage, this rule of construction only comes into play when the policy is ambiguous. [Citation.]" *Hobbs*, 214 Ill. 2d at 17.

¶ 34 In the present case, a comparison of the allegations in the underlying complaint to the terms of the insurance policy demonstrates that Argonaut is not obligated to defend or indemnify Valet or Wong.

¶ 35 The original underlying negligence complaint alleged that Lomtadze authorized Wong to operate and park "his" Mercedes, and that while doing so in the scope of his employment for Valet, Wong injured Bruce. The amended underlying negligence complaint omitted the allegation that the Mercedes involved in the accident belonged to Lomtadze, and instead alleged that the title to the vehicle was held by Classy Motors, with Lomtadze as "a permitted driver" of that vehicle. The amended complaint also alleged that at the time of the accident the Mercedes had a dealer license plate No. DL7970 registered to Autotrade, as well as an insurance card issued (by Argonaut) to Autotrade.

¶ 36 As already elaborated in the statement of facts, section II of Argonaut's garage insurance policy delineating Argonaut's liability coverage, provides that Argonaut is responsible for all sums that an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which the insurance applies, caused by an "accident" and either: (1) resulting from "garage operations" other than the ownership, maintenance or use of covered "autos;" or (2) resulting from "garage operations" involving the ownership, maintenance or use of covered "autos." The duty to defend under Argonaut's policy therefore extends only to an "insured." Accordingly, Valet and Wong bear the burden of establishing that they are "insureds" under that policy. See *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453 (2009) ("This court has long established that the burden is on the insured to prove that its claim falls within the coverage of an insurance policy.")

¶ 37 A review of the plain language of Argonaut's policy establishes that Valet and Wong do not qualify as "insureds." In defining an "insured" the garage liability policy (as modified by endorsement) expressly states:

> "**3. Who is an Insured**
>
> a. The following are 'insureds' for covered 'autos':
>
> (1) You for any covered 'auto.'
>
> (2) Your customers, if your business is shown in the Declarations as an 'auto' dealership.
>
> (3) Anyone else while using with your permission a covered 'auto' you own, hire or borrow except:

(a) The owner or anyone else from whom you hire or borrow a covered 'auto.' ***

(b) Your 'employee' if the covered 'auto' is owned by that 'employee' or a member of his or her household.

(c) A partner (if you are a partnership), or a member (if you are a limited liability company), for a covered 'auto' owned by him or her or a member of his or her household.

(4) Anyone liable for the conduct of an 'insured' described above but only to the extent of that liability.

b. The following are 'insureds' for 'garage operations' other than covered 'autos':

(1) You.

(2) Your partners (if you are a partnership), members (if you are a limited liability company), 'employees,' directors, shareholders but only while acting within the scope of their duties."

The insurance policy defines "you" as the "named insured," in this case Autotrade. Under this express language of the policy, Valet and Wong do not qualify as "insureds" for either covered "autos" under section 3(a) or for "garage operations" other than covered "autos" under section 3(b).

¶ 38 First, under section 3(a)(1), neither Valet or Wong is "you," the "named insured" (*i.e.*, Autotrade). In addition, nothing in the record, or the underlying negligence complaint suggests

that either Valet or Wong were customers of Autotrade (the "named insured") as required under section 3(a)(2). Although there is some controversy as to whether Lomtadze was a customer of Autotrade because Autotrade provided Lomtadze with the dealer license plate and insurance cards for transporting vehicles from the purchase location to Atlantic Express (a corporation separate from Autotrade but located next to Autotrade and sharing a joint parking lot), nothing in the record suggests that Valet and Wong were customers of Autotrade. Valet and Wong themselves fail to explain how by virtue of Lomtadze's alleged status as a customer they too would qualify as customers and thereby "insureds."

¶ 39 Under section 3(a)(3) for permissive users, Valet and Wong could potentially qualify as insureds only if they were using a covered "auto," that the "named insured" (*i.e.*, Autotrade) "own[ed], hire[d], or borrow[ed]." The policy explicitly does not permit coverage for permissive users of covered "autos," which are not owned, hired or borrowed by the "named insured." There is nothing in the record to suggest that the Mercedes, which was admittedly used by Wong with Lomtadze's permission, was either owned, hired or borrowed by Autotrade, "the named insured." Although the Mercedes was registered to Autotrade and contained an insurance card for Autotrade in the glove compartment, it is undisputed by the parties that the Mercedes was purchased by Classy Motors on October 10, 2006, from Premier Auto Auctions, in Downers Grove, one week prior to the accident, and that at the time of the accident Classy Motors held title to the vehicle. While there may be an issue of fact as to who actually owned the vehicle, Classy Motors, which held title to the Mercedes, or Lomtadze, who provided the funds for its purchase, there is absolutely nothing in the record to suggest that the Mercedes was owned, hired

or borrowed by Autotrade.

¶ 40 Finally, section 3(a)(4) is inapplicable as it only applies to a party liable for the conduct of an "insured" described in sections 3(a)(1) through 3(a)(3). Although Valet would be liable for the conduct of Wong, since, during the accident, Wong was acting in the scope of his employment as a valet, as elaborated above, nothing in the record suggests that Wong qualifies as an "insured" under sections 3(a)(1), 3(a)(2) or 3(a)(3) of the garage liability policy so as to qualify Valet for coverage.

¶ 41 Similarly, Valet and Wong do not qualify as "insureds" for "garage operations" other than covered "autos" under section 3(b). Pursuant to that section, an insured is either the "named insured" (*i.e.*, Autotrade) or the "named insured's" (Autotrade's) partners, members, employees or shareholders. As there is nothing in the record to suggest that Wong or Valet were partners, employees, directors or shareholders of Autotrade, they cannot qualify as insureds under this section of the policy.

¶ 42 Since the record directly rebuts any contention that Valet and Wong could be "insureds" under the Argonaut policy, as a matter of law, Argonaut had no duty to defend them. See *Illinois Emcasco Insurance Co.*, 337 Ill. App. 3d at 359-60 (holding that an insurer has no duty to defend when the underlying complaint considered in light of the insurance policy precludes the possibility of coverage). Where there is no duty to defend, correspondingly there will be no duty to indemnify. *Crum & Forster Managers Corp v. Resolution Trust Corp*., 156 Ill. 2d 384, 398 (1993). Accordingly, we conclude that summary judgment in favor of Argonaut was appropriate.

¶ 43 Because we affirm on this ground, we need not address the other issues raised by Valet and Wong on appeal, as they have no bearing on the outcome of this case.

¶ 44 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 45 Affirmed.