2012 IL App (1st) 120541-U

THIRD DIVISION
November 21, 2012

No. 1-12-0541

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

STATE FARM FIRE & CASUALTY CO.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 10 CH 49435
	)	
DARLINE ABESAMIS,	)	Honorable
	)	Sophia H. Hall,
Defendant-Appellant	)	Judge Presiding.
	)	
(Don Ko d/b/a 1Chiban, 1Chiban, Inc., and In Sun Hong,	)	
	)	
Defendants).	)	

JUSTICE STERBA delivered the judgment of the court.
Justices Neville and Steele concurred in the judgment.

ORDER

Held: The circuit court did not err in granting summary judgment in favor of plaintiff where the negligent supervision allegations in defendant's underlying complaint arose from the use and operation of an automobile so as to trigger the motor vehicle exclusion in the policy issued to Don Ko d/b/a 1Chiban.

¶ 1 Defendant-appellant Darline Abesamis appeals from an order of the circuit court granting

plaintiff-appellee State Farm Fire & Casualty Company's motion for summary judgment on its complaint for declaratory judgment. The complaint alleged that the insurance policy issued to defendant Don Ko d/b/a 1Chiban excluded coverage for a negligence claim arising out of an auto accident injuring Abesamis. On appeal, Abesamis maintains that State Farm has a duty to defend Ko d/b/a 1Chiban because the negligent supervision claim in her complaint does not implicate the exclusion for bodily injury arising out of the use of a motor vehicle. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 On April 21, 2010, Abesimas was injured in an automobile accident. She was a passenger in a van that was transporting goods to New Orleans when the driver, Rossano Tolentino, fell asleep at the wheel. The van veered off the highway and overturned, causing Abesamis to be ejected from her seat.

¶ 4 In a complaint filed on November 15, 2011, Abesamis alleged negligence and negligent supervision against Ko, 1Chiban, Inc., Ko d/b/a 1Chiban, and Tolentino. Specifically, Abesamis alleged that Ko had directed his employees, Tolentino and In Sun Hong, to transport merchandise from Chicago, Illinois to New Orleans, Louisiana. Ko knew that Abesamis would accompany his employees on this trip. Further, Abesamis alleged that Ko instructed his employees to make this 14-hour, non-stop journey at night, despite knowing that they had worked the previous day. With regard to the claim of negligent supervision specifically, Abesamis also alleged that Ko negligently packed and secured the merchandise in the cargo hold of the van, and negligently allowed three passengers to occupy the two-seat van.

¶ 5 State Farm had previously issued an automobile policy to Ko as well as a business policy to Ko d/b/a 1Chiban. State Farm tendered its automobile policy limits of $100,000 in an effort to settle the claim, but filed the instant declaratory judgment action alleging that its business policy did not cover the incident in light of the policy's motor vehicle exclusion. The exclusion at issue reads:

> "Under Coverage L, this insurance does not apply to:
>
> ***
>
> 7. to bodily injury or property damage arising out of the ownership, maintenance, use or entrustment to others of any aircraft, auto, or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and loading or unloading."

State Farm moved for summary judgment on the basis that it had no duty to defend or indemnify Ko d/b/a 1Chiban as a matter of law due to the operation of this exclusion. After hearing oral argument, the circuit court granted State Farm's motion for summary judgment in a written order. Abesamis timely filed this appeal.

¶ 6 ANALYSIS

¶ 7 Summary judgment is proper when the pleadings, depositions, and affidavits demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *State Farm Mutual Automobile Insurance Co. v. Coe*, 367 Ill. App. 3d 604, 607 (2006). In making this determination, the record materials must be viewed in the light most favorable to the non-movant. *Federal Insurance Co. v.*

Lexington Insurance Co., 406 Ill. App. 3d 895, 897 (2011). We review *de novo* an order granting summary judgment. *Hall v. Henn*, 208 Ill. 2d 325, 328 (2003).

¶ 8 In general, insurance contracts must be construed liberally in favor of the insured, with any ambiguities in the terms of the contract resolved against the insurer. *Mount Vernon Fire Insurance Co. v. Heaven's Little Hands*, 343 Ill. App. 3d 309, 314 (2003). When determining whether a contract gives rise to a duty to defend and indemnify, courts compare the allegations of the underlying complaint to the language of the policy. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 125 (1992). Where the allegations fall within, or potentially within, the coverage of the policy, the insurer has a duty to defend. *Id.*

¶ 9 Here, Abesamis contends that her allegations of negligent supervision do not implicate the motor vehicle exclusion in the business policy that State Farm issued to Ko d/b/a 1Chiban. We disagree. In order for a negligent supervision claim arising from a vehicle-related occurrence to withstand a motor vehicle exclusion, the injuries alleged must be "wholly independent of any negligent operation of the vehicle." *Northbrook Property & Casualty Co. v. Transportation Joint Agreement*, 194 Ill. 2d 96, 99 (2000); see also *Allstate Property and Casualty Insurance Co. v. Mahoney*, 2011 IL App (2d) 101279, ¶ 18. Stated differently, negligent supervision, and not negligent operation or use of the vehicle, must be the sole proximate cause of the injury. See *United States Fidelity & Guaranty Co. v. State Farm Mutual Automobile Insurance Co.*, 152 Ill. App. 3d 46, 48 (1987) (*USF & G II*).

¶ 10 We agree with State Farm that *Northbrook* and *State Farm Fire & Casualty Co. v. Perez*, 387 Ill. App. 3d 549 (2008), are instructive in their application of these overarching principles.

In *Northbrook*, our supreme court held that a motor vehicle exclusion similar to the one in the instant case barred coverage for a negligent supervision claim arising out of a bus accident. *Northbrook*, 194 Ill. 2d at 98. The allegations of negligent supervision included the improper planning and inspection of the bus routes. *Id.* at 99. The court found that these allegations were mere rephrasings of the fact that the passengers' injuries arose from the operation of the motor vehicle. *Id.* In other words, "no matter how poorly planned, a bus route could not, on its own, proximately cause injuries to the students without the actual operation of the bus." *Perez*, 387 Ill. App. 3d at 559 (discussing *Northbrook*).

¶ 11 Likewise, in *Perez*, we held that a negligent modification claim implicated the motor vehicle exclusion so as to preclude coverage. *Perez*, 387 Ill. App. 3d at 560. There, Perez alleged that she was injured in a car crash resulting from (1) the driver's negligent operation of the vehicle; and (2) the driver's negligent modifications to the seatbelts, which were inadequate to restrain passengers. *Id.* at 550. We explained that because "the modifications could not, on their own, proximately cause injuries to Perez without the actual operation of the car," the allegation of negligent modification was necessarily premised on the negligent operation of the car. *Id.* at 560.

¶ 12 In the case *sub judice*, plaintiff alleges Ko d/b/a 1Chiban negligently supervised his employees when he: (1) allowed Tolentino to drive despite knowing he was not trained or qualified; (2) directed Tolentino and Hong to make a 14-hour, non-stop, overnight journey despite knowing that both employees had been awake for a full day; (3) failed to book lodging for his employees en route to New Orleans; (4) allowed three passengers to occupy a two-seat

vehicle; and (5) overpacked and failed to secure merchandise in the rear cargo area of the vehicle. Just as in *Northbrook* and *Perez*, none of these allegations, standing alone, could have proximately caused Abesamis' injuries without the actual negligent operation of the van. Regardless of how negligently Ko timed and coordinated the trip, how the vehicle was packed, or the number of passengers, Abesamis could not have been ejected from a rolling vehicle as she alleges absent Tolentino's own negligence in operating the van.

¶ 13 This is not a case where the injury could have occurred in the absence of the use of a vehicle, as in *Louis Marsch, Inc. v. Pekin Insurance Co.*, 140 Ill. App. 3d 1079 (1985), relied on by Abesamis. In *Louis Marsch*, the underlying plaintiff, a driver of a motorbike who was injured by a dump truck operated by a Marsch employee, alleged that Marsch failed to staff the construction site where the accident occurred with an adequate number of flagmen and failed to erect sufficient warning signs to mark off the closed portion of the road. *Louis Marsch*, 140 Ill. App. 3d at 1081, 1086. We reasoned that because the underlying plaintiff could just as easily have been injured if he had struck an unmarked excavation or construction debris, the negligent staffing and failure to erect warning signs, standing alone, could have caused the plaintiff's injury. *Id.* at 1086. Thus, we held that the motor vehicle exclusion did not bar coverage. *Id.*

¶ 14 For similar reasons, *US Fidelity & Guaranty Co. v. State Farm Mutual Automobile Insurance Co.*, 107 Ill. App. 3d 190 (1982) (*USF & G I*), and *West American Insurance Co. v. Hinze*, 843 F.2d 263 (1988), are also distinguishable from the case at bar. Both *USF & G I* and *West American* involved allegations of negligent supervision of a minor arising out of accidents where minors were thrown from vehicles, one of which was in motion (*USF & G I*, 107 Ill. App.

3d at 191), and one of which was left unattended (*West American*, 843 F.2d at 264). In each case, the court suggested the children's injuries could have occurred even if the vehicles had not been used or operated negligently at the time. *USF & G II*, 152 Ill. App. 3d at 49; *West American*, 843 F.2d at 268; see also *West American Insurance Co. v. Tovar*, No. 01 C 2747, 2002 WL 256803 at *6 (analyzing *USF & G I & II* and hypothesizing that the child's injury could have occurred if the driver, for example, failed to prevent another child passenger from pushing the child from the car).

¶ 15 In the instant case, however, Abesamis has failed to identify any act of negligent supervision by Ko d/b/a 1Chiban that does not depend on some form of vehicle negligence, whether it be the circumstances under which the vehicle was driven, the way in which the cargo was loaded, or the number of passengers allowed to occupy the vehicle. Because the success of Abesamis's negligent supervision claim against Ko d/b/a 1Chiban is thus premised on the negligent usage and operation of the vehicle, coverage is necessarily precluded by the motor vehicle exclusion in State Farm's policy. See *Allstate Insurance Co. v. Pruitt*, 177 Ill. App. 3d 407, 413 (1988) (in accident arising out of minor's use of motorbike, motor vehicle exclusion barred coverage for negligent supervision claim against father because father's liability was contingent on minor's negligent operation of the bike).

¶ 16 Finally, we address Abesamis's reliance on *Tuell v. State Farm Fire & Casualty Co.*, 132 Ill. App. 3d 449 (1985). The *Tuell* court stated generally that a motor vehicle exclusion may not necessarily bar coverage for an occurrence that is vehicle-related where there is a claim of negligent supervision in addition to negligent operation. *Tuell*, 132 Ill. App. 3d at 453.

However, the decision in favor of the insured in that case was based not on this determination, but on the fact that the insurer had not properly contested coverage through a declaratory judgment suit, thus estopping it from denying coverage. *Id.* at 454. Therefore, the analysis in *Tuell* does not compel a finding of coverage in the case at bar. See *State Farm Fire & Casualty Co. v. Mann*, 172 Ill. App. 3d 86, 91-92 (1988) (distinguishing *Tuell* on similar grounds).

¶ 17 For the reasons stated, we affirm the circuit court's order granting summary judgment in favor of State Farm.

¶ 18 Affirmed.