2013 IL App (1st) 122304-U

FOURTH DIVISION
September 19, 2013

No. 1-12-2304

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ILLINOIS FARMERS INSURANCE COMPANY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 11 CH 14696
	)	
ERIN SCHNEIDER,	)	Honorable
	)	Franklin U. Valderrama,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court. Justices Lavin and Epstein concurred in the judgment.

ORDER

¶ *1* *HELD*: The trial court's order granting defendant's motion for summary judgment on the issue of coverage under the hit-and-run provision of an uninsured motorist policy is reversed with directions granting summary judgment in favor of plaintiff.

¶ 2 Plaintiff-appellant Illinois Farmers Insurance Company (Farmers) bought a declaratory judgment action against defendant-

appellee Erin Schneider seeking a declaration by the court that (1) Schneider's April 11, 2006 motor vehicle accident did not involve a hit-and-run uninsured motor vehicle as defined by the policy, and (2) Farmers had no obligation to provide uninsured motorist coverage to Schneider. The parties filed cross motions for summary judgment and on July 3, 2012, the trial court denied Farmers' motion for summary judgment, granted Schneider's motion for summary judgment and dismissed the lawsuit in its entirety with prejudice. Farmers now appeals the trial court's July 3, 2012 order granting summary judgment in favor of Schneider.

¶ 3 BACKGROUND

¶ 4 On April 11, 2006, Schneider was involved in an automobile accident while driving on Interstate 90 in Chicago, Illinois. Schneider was operating her 2002 Pontiac Grand Am GT Coupe and was on the phone with her boyfriend, Michael Gargano, who she was following, just prior to the accident. While speaking with Gargano, he advised Schneider that there was a bumper in the roadway up ahead. Although Gargano was able to avoid colliding with the bumper, Schneider did not have enough time to change lanes, she struck the bumper, causing her automobile to fishtail and become temporarily stuck under a semi-truck in front of her, and then hit the concrete median.

¶ 5 Preston Parnell, the driver of the semi-truck that

Schneider's automobile became temporarily lodged underneath, saw the bumper in the road more than one hundred feet before he approached it. The bumper had been in the roadway when he initially spotted it. While both Schneider and Gargano stated that they saw the bumper, with an Illinois license plate still attached, neither saw the bumper fall off a vehicle. Schneider and Gargano saw Schneider's automobile come into contact with the bumper in the road; Parnell saw the bumper in the road and heard Schneider's automobile come into contact with it.

¶ 6 Following the accident, Schneider was taken to the hospital for several bone fractures and lacerations. Schneider subsequently made a demand under her Farmers' insurance policy that covered her 2002 Pontiac Grand Am GT Coupe for a hit and run uninsured motorist claim. The policy provides for uninsured motorist (UM) coverage as follows:

> "PART II - UNINSURED MOTORIST
>
> COVERAGE C - UNINSURED MOTORIST COVERAGE
>
> We will pay all sums which an insured person is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained to the injured person. The bodily injury must be caused by an accident and

arise out of the ownership, maintenance or use of the uninsured motor vehicle."

The policy further provides the following definitions:

"ADDITIONAL DEFINITIONS USED IN THIS PART ONLY

* * *

As used in this part:

2. **Motor vehicle** means a land motor vehicle or trailer but does not mean a vehicle:

a. Operated on rails or crawler-treads.

b. incapable of being licensed for use on the public roads of Illinois.

c. Used as a residence or office.

3. **Uninsured motor vehicle** means a motor vehicle which is:

a. Not insured by a bodily injury liability bond or policy at the time of the accident.

b. A hit-and-run vehicle whose operator or owner had not been identified that makes **physical contact** with:

i. You or any family member;

ii. A vehicle occupied by an insured person.

The physical contact requirement is met if the hit-and-run vehicle makes contact with another vehicle and this contact carries through to your insured vehicle by a continuous and contemporaneously transmitted force."

Following Schneider's demand under these policy provisions, Farmers recognized Schneider's demand pursuant to a reservation of rights.

¶ 7 On April 19, 2011, Farmers filed a complaint for declaratory relief against Schneider. The complaint sought declaration by the court that (1) Schneider's April 11, 2006 motor vehicle accident did not involve a hit-and-run uninsured motor vehicle as defined by the policy, and (2) Farmers had no obligation to provide uninsured motorist coverage to Schneider. The parties filed cross motions for summary judgment, and on July 3, 2012, the trial court granted Schneider's motion for summary judgment,

denied Farmers' motion for summary judgment and dismissed the lawsuit with prejudice.

¶ 8 Farmers appealed the trial court's July 3, 2012 order granting Schneider's cross motion for summary judgment claiming Schneider's claim did not fall under the hit-and-run uninsured motorist provision in her insurance policy and, therefore, Farmers did not have to provide coverage for Schneider's bodily injuries. For the reasons that follow, we reverse the trial court's finding and direct summary judgment be entered in favor of Farmers.

¶ 9 ANALYSIS

¶ 10 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 (Am.) Inc. v. Hartford Insurance Co. of Illinois*, 326 Ill. App. 3d 874, 877 (2002). Summary judgment is appropriate only 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 the moving party is entitled to judgment as a matter of law. See 735 ILCS 5/2-1005(c) (West 2008); *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 395 (2008). It is well settled that when 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. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010).

¶ 11 Our review of the trial court's entry of summary judgment is *de novo*. *Clausen v. Carroll*, 291 Ill. App. 3d 530, 536 (1997). *De novo* review is also appropriate where the construction of an insurance policy is at issue. *Shefner v. Illinois Farmers Insurance Co.*, 243 Ill. App. 3d 683, 686 (1993).

¶ 12 Because an insurance policy is a contract, the rules applicable to contract interpretation govern the interpretation of an insurance policy. *Nicor, Inc. v. Associated Electric & Gas Insurance Services Ltd.*, 223 Ill. 2d 407, 416 (2006). Our primary function is to ascertain and give effect to the intention of the parties, as expressed in the policy language. *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010). If the language is unambiguous, the provision will be applied as written, unless it contravenes public policy. *Nicor*, 223 Ill. 2d at 416-17.

¶ 13 The rule that policy provisions limiting an insurer's liability will be construed liberally in favor of coverage only applies where the provision is ambiguous. *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 372 (2007). A policy provision is not rendered ambiguous simply because the parties disagree as

to its meaning. *Rich,* 226 Ill. 2d at 372. Rather, an ambiguity will be found where the policy language is susceptible to more than one reasonable interpretation. *Hobbs v. Hartford Insurance Co. of the Midwest,* 214 Ill. 2d 11, 17 (2005). Neither party here argues that the policy language at issue is ambiguous, and we agree that the language is unambiguous.

¶ 14 To ascertain the meaning of the policy's words and the intent of the parties, the court must construe the policy as a whole with due regard to the risk undertaken, the subject matter that is insured and the purposes of the entire contract. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992). We will not add terms to the contract of insurance which the parties have not included in the language of the policy. *Walsh v. State Farm Mutual Automobile Insurance Co.*, 91 Ill. App. 2d 156, 164 (1968). 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. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453 (2009).

¶ 15 Section 143a of the Illinois Insurance Code requires that all automobile insurance policies provide coverage for the protection of persons insured thereunder who are entitled to recover damages for bodily injury from the owners or operators of hit-and-run motor vehicles. See 215 ILCS 5/143a (West 2008);

Muller v. Firemen's Fund Insurance Co., 289 Ill. App. 3d 719, 725 (1997). It is well established in Illinois that an insured cannot recover under the hit-and-run provision of the uninsured motorist coverage unless there is "a physical contact of the unidentified motor vehicle with the insured or an automobile occupied by the insured." *Illinois National Insurance Co. v. Palmer*, 116 Ill. App. 3d 1067, 1069 (1983). The purpose of the requirement of contact, either in a statute or policy, is to reduce the potential for fraud in that otherwise an insured might simply lose control of his automobile and blame it on a nonexistent driver. *Id.* "Conversely, it is well established that where there is a direct casual connection between the hit-and-run vehicle and the plaintiff's vehicle, which connection carries through to the plaintiff's vehicle by a continuous and contemporaneously transmitted force from the hit-and-run vehicle, recovery is allowed."[1] *Id.*

¶ 16 Here, Farmers argues that Schneider's insurance policy does not provide uninsured motorist coverage for her injuries because there was no "physical contact" with a "hit-and-run vehicle"

[1] Notably, the language found in Schneider's insurance policy nearly mirrors the language found in the *Palmer* decision. Schneider's insurance policy states: "The physical contact requirement is met if the hit-and-run vehicle makes contact with another vehicle and this contact carries through to your insured vehicle by a continuous and contemporaneously transmitted force."

during her accident as defined in the policy. In making this argument, Farmers relies on the holding in *Yutkin v. U.S. Fidelity & Guaranty Co.*, 146 Ill. App. 3d 953 (1986). In *Yutkin*, the insureds were injured after hitting a piece of debris lying on the highway. One eyewitness testified that the debris was a tire that probably fell from a truck. Following the accident, the insureds filed a declaratory action seeking to determine their benefits under the hit-and-run language of the uninsured motorist policy provisions. The court in *Yutkin* found that, unlike in *Palmer* (discussed below),

> "there is no direct casual connection between any vehicle and plaintiff's vehicle. It is unknown whether another vehicle even existed, or, for example, whether the object lying in the road had fallen from a garbage truck weeks earlier. There is simply no evidence of when or how the piece of debris came to rest in the road." *Yutkin*, 146 Ill. App. 3d at 955.

Accordingly, the court held:

> "any connection between the object plaintiff struck and another vehicle is far too attenuated to permit this court to declare

> that plaintiffs are entitled to benefits under the hit-and-run clause of the uninsured motorists policy. Illinois law reflects no indication that the courts or legislature are willing to extend the physical contact requirement to permit an insured, whose vehicle hits debris, to successfully claim they were damaged by the negligence of a hit-and-run driver." *Id.* at 957.

Farmers argues that, like in *Yutkin*, Schneider offered "absolutely no evidence indicating from where this [bumper] came."

¶ 17 Schneider argues, and the trial court agreed, the policy Schneider purchased from Farmers does provide uninsured motorist coverage for her injuries because there was contact with a "hit-and-run vehicle" during her accident. Schneider and the trial court compare Schneider's case to *Palmer*. In *Palmer*, the insured's vehicle was struck by a lug nut that flew off of a hit-and-run vehicle, causing bodily injuries to the insured. The insured in *Palmer* provided an affidavit verifying that the lug nut had fallen of another vehicle that had passed him on the highway. The court in *Palmer* was tasked with determining "whether before an insured can recover under the hit-and-run

provision of the uninsured motorist coverage provided in automobile liability policies he or his vehicle must be struck by the whole hit-and-run vehicle rather than and integral part of the vehicle." In answering this question, the *Palmer* court stated that recovery is allowed "where there is a direct causal connection between the hit-and-run vehicle and the plaintiff's vehicle, which connection carries through to the plaintiff's vehicle by a continuous and contemporaneously transmitted force from the hit-and-run vehicle." *Id.* at 1069. The court found that there was a continuous and contemporaneously transmitted force from the lug nut that fell from the hit-and-run vehicle to the plaintiff's vehicle, and that the lug nut was a sufficient part of the hit-and-run vehicle to allow for coverage under the uninsured motorist provision.

¶ 18 We find that Schneider failed to offer any evidence to show that the bumper she collided with in fact fell from a hit-and-run vehicle, making it impossible for her to show a "continuous and contemporaneously transmitted force" between a hit-and-run vehicle, or part of a hit-and-run vehicle, and her vehicle. As such, we find this case analogous to *Yutkin* rather than *Palmer*.

¶ 19 While there is no question that Schneider collided with a bumper, there is simply no evidence in the record to suggest that the bumper fell from another vehicle and not from a garbage truck

or a van carrying auto parts or some other unknown origin. Although it might appear logical that the bumper of a maroon Chevy fell from a maroon Chevy, this inference is not warranted by the record.[2] Schneider had the burden of proving the bumper at issue fell from a hit-and-run vehicle, as opposed to debris that had been laying in the road for some time, see *Fay*, 232 Ill. at 453, and she failed to do so.

¶ 20 In *Palmer*, the insured offered an affidavit stating the lug nut that caused his collision and injuries had fallen from another vehicle (the hit-and-run vehicle) that passed him while he was driving on the highway. Here, Schneider, Gargano and Parnell all testified that they did not see where the bumper came from and, further, that when they first noticed the bumper, it was already lying in the middle of the road. Such evidence fails

[2] Nor is this conclusion supported by case law. Even in cases where the insured struck a piece of a vehicle--a tire--courts have still required some proof that the tire in fact came from a hit-and-run vehicle. See *Yutkin*, 146 Ill. App. 3d 953 (holding no coverage under hit-and-run provision where the insured collided with an object that appeared to be a tire where there was no evidence to show where the tire came from or how long the tire had been there); *Adams v. Mr. Zajac*, 110 Mich. App. 522 (1981) (holding there was coverage under hit-and-run provision where insured collided with tires and two witnesses testified that immediately before the accident, they saw a truck with tires pull away from the roadway where the collision occurred); *Kersten v. D.A.I.I.E.*, 82 Mich. App. 459 (1978) (holding no coverage under hit-and-run provision where the insured collided with a tire and the evidence showed a truck had spilled scrap tires approximately ten hours earlier).

to show a "continuous and contemporaneously transmitted force" between the bumper of a hit-and-run vehicle and Schneider's vehicle, prohibiting this court from drawing the conclusion that the bumper at issue fell from a hit-and-run vehicle.

¶ 21 Accordingly, we find that the connection between the bumper plaintiff struck and another vehicle is far too attenuated to permit this court to declare that plaintiff is entitled to benefits under the hit-and-run clause of the uninsured motorists policy. See *Yutkin*, 146 Ill. App. 3d at 957.

¶ 22 For the above reasons, we reverse the trial court's grant of summary judgment in favor of Schneider and reverse with directions to grant summary judgment in favor of Farmers.

¶ 23 Reversed with directions.