2016 IL App (1st) 153097-U

THIRD DIVISION
December 28, 2016

No. 1-15-3097

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GRANGE MUTUAL CASUALTY COMPANY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 13 CH 21957
ACUITY, a MUTUAL CASUALTY COMPANY,	)	
	)	
Defendant-Appellee.	)	
	)	The Honorable
	)	Sophia H. Hall
	)	Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The appellee insurance company did not underpay from its primary policy. The insurance policy was not ambiguous and the appellee did not violate the mend-the-hold doctrine. The judgment of the circuit court was affirmed.

¶ 2 Plaintiff Grange Mutual Casualty Company filed a declaratory action against defendant Acuity Mutual Insurance Company, arguing it was underpaid with respect to an underlying negligence lawsuit. Following a bench trial, the trial court ruled in favor of Acuity. Grange appeals arguing Acuity's insurance policy was ambiguous, the court's ruling was against the

manifest weight of the evidence, Acuity improperly changed its litigation position, and Grange is entitled to be compensated. We affirm.

¶ 3 ANALYSIS

¶ 4 In 2013, Nicholas Puccinelli's vehicle struck John Anagnopoulos' vehicle in a head-on collision, and John died from the accident. John's wife filed a negligence suit on his behalf against Nicholas, Timothy Puccinelli (Nicholas' father), and the family business, Action Caulking and Sealants, Inc., a building façade restoration company. The parties ultimately settled for $2,200,000. The insurance companies Grange and Acuity funded the settlement with Grange paying $2 million and Acuity $200,000 from their respective umbrella policies.

¶ 5 Grange subsequently filed a declaratory action ultimately contending that Acuity underpaid the judgment by some $400,000. At issue was Acuity's "Road and Residence" primary policy, which provided homeowner coverage and non-owned vehicle coverage to the insureds, Timothy and his wife. There is no dispute that Nicholas, as a "relative," was also an insured person. The policy specifically excluded coverage for, "Bodily injury or property damage resulting from the ownership, maintenance or use of a vehicle *** which is owned by you or a relative." (Emphasis in original). Thus, the policy excluded coverage for bodily injury or property damage resulting from the use of an *owned* vehicle and offered coverage for a *non-owned* vehicle, such as a borrowed or newly purchased car.

¶ 6 The main issue at the bench trial was whether the vehicle was co-owned by Timothy and his business Action Caulking or solely owned by Action Caulking. If solely owned by Action Caulking, Acuity's primary insurance offered coverage, and Acuity had underpaid. If owned by Timothy personally, the aforementioned exclusion in the insurance policy precluded Acuity's coverage.

¶ 7 Trial evidence showed that Timothy's name was listed underneath that of Action Caulking on the vehicle's certificate of title, registration, as well as the financing documents, which indicated the car was bought for "personal" use. Timothy, the president of the company,[1] did not sign the documents in his corporate capacity, although he claimed that was his intent. He testified he never intended to be named on the certificate of title as the vehicle owner. The business address was listed on the above-stated documents. Timothy testified that he intended to use the vehicle for his business when he purchased it in 2002, that Action Caulking reimbursed him for the cost of his personal trade-in vehicle after the purchase, and the business subsequently paid for the vehicle maintenance and repair and also the three-year loan installments. The vehicle was listed on Action Caulking's business insurance policy.

¶ 8 Timothy nonetheless kept the car at his home, driving it to and from work, and used it more often than not as his personal vehicle because it was the car he drove on a daily basis. His daughters sometimes drove the vehicle in a non-business capacity. By 2009 or 2010, Timothy had replaced the vehicle with another company car. At that time, Nick primarily used the car for personal purposes, as well, and was doing so in 2013 when the accident occurred about 3am. Because the business covered the vehicle expenses and because Timothy claimed he intended to use the vehicle for the business, Grange asserted the family business owned the vehicle and thus it was a "non-owned" by Timothy, triggering Acuity's primary policy coverage.

¶ 9 Following evidence and argument, the trial court determined that since Timothy's name was on the vehicle's certificate of title in his personal capacity, he was a presumptive owner of the vehicle. Grange, then, had the duty to overcome the presumption of ownership this certificate created. The court held that Grange did not, and accordingly, ruled that the Acuity policy did not cover the accident. This appeal followed.

[1] Timothy also testified that he was vice-president of the company in 2002.

¶ 10 ANALYSIS

¶ 11 Grange maintains that Acuity underpaid the personal injury settlement and owes Grange some $400,000. In support, Grange first contends the trial court erred in concluding the owned-vehicle exclusion applied. Grange argues the term "ownership" is not defined in the policy and is therefore ambiguous. Grange further asserts the vehicle was co-owned by Timothy and Action Caulking, since both names were on the certificate of title, and it's unclear whether the policy exclusion applies in such a case.

¶ 12 We construe the insurance policy as a whole, ascertaining the intent of the parties to the insurance contract, "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). Where the policy's words are unambiguous, the words will be given their plain, ordinary, and popular meaning. *Id*. Moreover, the clarity or ambiguity of the term "ownership" will depend on the facts of the case and the proposed application of the clause in which the term appears. *Dolan v. Welch*, 123 Ill. App. 3d 277, 280 (1984).

¶ 13 We agree with Acuity that there are no ambiguous terms in the policy provisions at issue in this case. Although "own" is not defined in the insurance policy, we will apply the word as written unless it contravenes public policy. See *Nudi Auto RV & Boat Sales, Inc. v. John Deere Insurance Co.*, 328 Ill. App. 3d 523, 531 (2002); *American States Insurance Co. v. Gawlicki & Hussey, Inc.*, 231 Ill. App. 3d 199, 201 (1992) (noting, the word, "own," has a plain, dictionary definition which can reasonably be given to it in this contract). Illinois defines a vehicle "owner" as "a person who holds legal document of ownership of a vehicle," including a certificate of title. 625 ILCS 5/3-100 (West 2014); *Nudi Auto RV & Boat Sales, Inc.*, 328 Ill. App. 3d at 535. A certificate of title to an automobile is evidence of legal title. *Id*. A *prima facie* presumption of

ownership arises from a certificate of title, and this presumption may be rebutted by competent evidence of actual ownership. *Pekin Insurance Co. v. U.S. Credit Funding, Ltd.*, 212 Ill. App. 3d 673, 677 (1991). In addition, ownership for insurance purposes is governed by the intent of the parties as of the time of the collision. *Sheary v. State Farm Mutual Insurance Co.*, 207 Ill. App. 3d 1067, 1069 (1991).

¶ 14 Here, Timothy's name was on the certificate of title, as well as the financing document, and the vehicle registration. He did not sign his name in a corporate capacity, and the financing document stated he was purchasing the vehicle for "personal" use. Although Action Caulking's name was also listed on these documents above that of Timothy's, the use of the vehicle was consistent with personal ownership in that Nicholas drove it to and from high school daily and used the vehicle for errands. When he returned home following a semester in college, Nicholas drove the vehicle to his uncle's home, where he left it parked and then went to work. During off hours, the vehicle was "pretty much at his disposal," although Timothy also stated that permission for use was required. Both Nicholas and Timothy had access to the keys located in the Puccinelli home, and the vehicle remained parked at Timothy's home. Nicholas was admittedly driving the vehicle for personal reasons (around 3am) when the accident giving rise to this insurance dispute occurred. Additionally, while the vehicle was sometimes borrowed for business purposes, it largely served as a personally-owned vehicle for some years before the accident and at the time of the accident. The fact that Timothy treated the vehicle as a "business" expense and paid for it out of his corporate budget did not defeat that it was largely used as a personal vehicle. See . *Gawlicki & Hussey, Inc.*, 231 Ill. App. 3d at 202 (van was personally and not corporately owned regardless of corporation's having made payments on the vehicle and paying its operating expenses). Rather than disproving Timothy's personal ownership of the

vehicle, which was evidenced by the certificate of title, trial evidence merely confirmed this fact. The term ownership in the context of this insurance policy was not ambiguous since the evidence showed Timothy was the true owner.

¶ 15 Likewise, we conclude that the trial court's determination was not against the manifest weight of the evidence. On appeal, the reviewing court must take questions of testimonial credibility as resolved in favor of the prevailing party and must draw from the evidence all reasonable inferences in support of the judgment. *Wildman, Harrold, Allen and Dixon v. Gaylord*, 317 Ill. App. 3d 590, 599 (2000). A reviewing court will not reverse a trial court's decision if different conclusions can be drawn from contradictory testimony unless an opposite conclusion is clearly apparent. *Id*. For the reasons stated above, the opposite conclusion was not clearly evident, nor were the trial court's factual findings unreasonable, arbitrary and not based on the evidence. See *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002).

¶ 16 We next reject Grange's argument that Acuity changed its litigation position, violating the mend-the-hold doctrine, and prejudicing Grange. Grange asserts Acuity has taken "three separate positions for denying coverage." For example, in arguing against coverage, early on Acuity cited the regular use exclusion and then later cited the owned-vehicle exclusion. In the insurance context, courts have precluded insurers from denying a claim on one basis and then changing the basis for denial during litigation. *Grinnell Mutual Reinsurance Co. v. LaForge*, 369 Ill. App. 3d 688, 699 (2006).

¶ 17 Here, Grange attached the certificate of title for the first time to its summary judgment motion. It was then that Acuity latched on to the fact that the certificate of title listed both Action Caulking and Timothy as owners of the vehicle, and its defense of the owned vehicle exclusion. This defense came well over a year before trial, and Acuity filed an amended

counterclaim identifying this litigation position. At trial, Acuity claims representative Little Willie Mingo, Jr., confirmed that Acuity's coverage position altered upon receipt of the certificate of title. Where new facts emerge underlying the basis for a defense, we do not believe the mend-the-hold doctrine precludes amending the defense. See *Smith v. Union Automobile Indemnity Co.*, 323 Ill. App. 3d 741, 746 (2001). Moreover, Acuity at all times asserted the primary policy did not offer coverage.

¶ 18 Regardless, the mend-the-hold doctrine does not apply in the absence of detriment to the party seeking its application, unfair surprise, or arbitrariness. *LaForge*, 369 Ill. App. 3d at 699; see also *FHP Tectonics Corp. v. American Home Assur. Co.*, 2016 IL App (1st) 130291, ¶ 58 ("more recent cases explicitly recognize that the mend the hold doctrine requires a showing of unfair surprise or detriment"). As set forth above, there was no unfair surprise or arbitrariness in Acuity's position, which was established long before trial. See *Smith*, 323 Ill. App. 3d at 746-47. At trial, plaintiff's counsel acknowledged that there was no procedural prejudice, effectively conceding the current contention. We further note that Grange has only cited one case in support of its mend-the-hold argument, but in that case the appellate court found the doctrine inapplicable for lack of prejudice. We thus conclude Grange's assertion of prejudice now on appeal to be entirely unpersuasive.

¶ 19 CONCLUSION

¶ 20 For the reasons stated, we affirm the judgment of the trial court.

¶ 21 Affirmed.