2019 IL App (1st) 182345

SIXTH DIVISION
May 24, 2019

No. 1-18-2345

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DUANE ARRINGTON, Plaintiff-Appellant, v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, Subscribing to Policy Number BGA 300036-02; Defendant-Appellee (Assurance Agency, Ltd.; Defendant).	)	Appeal from the Circuit Court of Cook County. No. 16 CH 7485 Honorable Raymond W. Mitchell, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** In this insurance coverage case, the circuit court properly granted summary judgment in favor of the defendant insurer.

¶ 2 Plaintiff Duane Arrington filed a declaratory judgment action against defendants Certain Underwriters at Lloyd's, London, subscribing to policy number BGA 300036-02 (Lloyd's) and

Assurance Agency, Limited (Assurance). On appeal, plaintiff contends that the circuit court erred in granting summary judgment in favor of defendants.[1] We affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiff was a police officer for the city of Zion, Illinois (Zion). Lloyd's provided general liability insurance coverage for Zion, which included uninsured motorist coverage. Assurance was the broker of the policy. The following facts are adduced from the parties' cross-motions for summary judgment, as well as the discovery submitted in this case.

¶ 5 On June 3, 2014, plaintiff was on duty and went to assist two other officers, Joseph Richardt and Derek Zaloudek, at the scene of a traffic stop. Plaintiff, who was in the "cover car," arrived and parked his car behind Richardt's vehicle. Plaintiff parked his car about two to two-and-a-half car lengths behind the stopped vehicle for "public safety, our safety, and the offender's safety." Plaintiff explained that he was trained to position his squad car to protect not only himself when he gets out of his car, but also the vehicle and occupants in front of him. In addition to creating a "bubble of a safety zone," plaintiff added that his car also formed part of a "barrier" or "shield", which would divert cars coming from behind him and protect both officers (in the event of shots being fired) and the occupants (if they are handcuffed and removed from the stopped vehicle).

¶ 6 Plaintiff walked up to the stopped vehicle and stopped at the rear driver's side. While Richardt was trying to remove the driver, Jonathan Harris, from the stopped vehicle, plaintiff noticed that Harris was reaching for the stick shift to put the vehicle in gear. Plaintiff warned Richardt and tried to take hold of Harris to pull Harris from the car. Harris, however, drove off

[1] Assurance is not a party to this appeal and it does not appear that it participated in the court below. When the circuit court granted Lloyd's motion for summary judgment, it entered judgment in favor of *both* Lloyd's and Assurance. Plaintiff does not raise any issue with respect to Assurance's dismissal from this case.

and accelerated while plaintiff's arm was still in the car. Plaintiff fell and suffered a severe concussion and various injuries to his head, neck, back, and ankle. Although plaintiff stated in his answer to Lloyd's interrogatories that it was about one minute from the time he exited his car to when he was injured, plaintiff agreed at his deposition that "Dash Cam" video footage indicated that the entire incident took place within about 30 seconds.[2] Plaintiff also conceded that, at the time of his injury, he was neither touching nor in the process of returning to his police cruiser.

¶ 7 The Lloyd's policy listed Zion as the named insured, but added (with certain nonrelevant exceptions) that an insured party was also anyone "using" a covered automobile with Zion's permission. The uninsured motorist coverage also listed Zion as the named insured as well as "anyone else 'occupying' a covered 'auto' ***." The term "occupying" was defined to mean "in, upon, getting in, on, out or off" of a covered auto.

¶ 8 Lloyd's moved for summary judgment, arguing that plaintiff was ineligible for coverage under the policy because he was not "occupying" the covered automobile (*i.e.*, his police cruiser) at the time of his injury. Lloyd's conceded for the purpose of its summary judgment motion that plaintiff's police cruiser was a covered automobile under the policy, and it did not claim that plaintiff lacked Zion's permission to use the police cruiser. Plaintiff responded in part by arguing that, since the general liability coverage extended to persons only using a covered automobile with Zion's permission, the uninsured motorist provision requiring an insured to be

[2] Plaintiff failed to provide a copy of the Dash Cam video in the record on appeal, in violation of Supreme Court Rule 324. Ill. S. Ct. R. 324 (eff. July 1, 2017); see also "Standards and Requirements for Electronic Filing the Record on Appeal," § 3.d.v. *available at* http://efile.illinoiscourts.gov/documents/IL-Record-on-Appeal-Standards-v1.0.pdf (stating that video or audio recordings are to be "sent or delivered in original form to the reviewing court."). Instead of providing a copy of the actual video recording, plaintiff has provided a photocopy of the face of the disk itself. Although we can construe this omission against the plaintiff, the recording is not crucial to our disposition.

occupying a covered automobile to obtain coverage was void. Lloyd's replied arguing in part that, even if the "occupying" requirement was invalid, plaintiff was not using the vehicle at the time of his injury and thus was ineligible for coverage under the policy.

¶ 9 Plaintiff also filed a cross-motion for summary judgment, arguing that (1) he was occupying his police cruiser at the time of the injury, (2) the definition of an insured party under the uninsured motorist coverage provision was ambiguous, and (3) the policy violated state public policy because plaintiff was using a covered automobile at the time of his injury.

¶ 10 On October 12, 2018, the circuit court issued a written decision granting Lloyd's summary judgment motion and denying plaintiff's. The court agreed with Lloyd's that plaintiff was not occupying the covered automobile at the time of his injuries and disagreed with plaintiff's argument that the policy definition of an uninsured motor vehicle allowed for coverage even if the insured party was not occupying a covered auto. The court further rejected plaintiff's arguments that his use of the police cruiser at one particular point in time qualified him for coverage under the policy's uninsured motorists provision, and that Lloyd's should have received approval of its policy provisions from the Department of Insurance. This appeal followed.

¶ 11 ANALYSIS

¶ 12 Plaintiff contends that the circuit court erred in granting defendants' summary judgment motion and in denying his motion. Since the parties filed cross-motions for summary judgment, they conceded that no material questions of fact existed and that only a question of law was involved that the court could decide based on the record. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. Nonetheless, the mere filing of cross-motions for summary judgment does not conclusively

establish that there is no issue of material fact, nor is the circuit court obligated to enter summary judgment for either party. *Id.*

¶ 13 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(c) (West 2016). To determine whether there is a genuine issue of material fact, we construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 131-32 (1992). Unsupported conclusions, opinions, or speculation, however, are insufficient to raise a genuine issue of material fact. *Id.* at 132.

¶ 14 In construing the language of an insurance policy, our primary objective is to ascertain and give effect to the intent of the parties to the contract. *Id.* at 108. To determine the meaning of the policy's language and the parties' intent, we 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." *Id.* If the policy terms are clear and unambiguous, we afford them their plain, ordinary, and popular meaning. *Id.* Conversely, if the language of the policy is ambiguous (*i.e.*, susceptible to more than one meaning), it is construed strictly against the insurer who drafted the policy and in favor of the insured. *Id.* at 108-09. We will not, however, "strain to find ambiguity in an insurance policy where none exists." *McKinney v. Allstate Insurance Co.*, 188 Ill. 2d 493, 497 (1999).

¶ 15 We review the circuit court's decision as to cross-motions for summary judgment *de novo*. *Id.* ¶ 30; see also *Outboard Marine*, 154 Ill. 2d at 102 (circuit court's entry of summary judgment reviewed *de novo*). The construction of an insurance policy is also a question of law

that we review *de novo*. *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 292-93 (2001). Finally, we review the judgment, not the reasoning, of the circuit court, and we may affirm on any grounds in the record, regardless of whether the court relied on those grounds or whether its reasoning was correct. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995).

¶ 16 In this case, plaintiff makes four arguments. First, plaintiff claims that the Lloyd's "exclusion provision" (*i.e.*, the provision in the policy requiring an insured to be "occupying" the insured vehicle to be eligible for coverage) conflicts with uninsured motorist coverage required by law, rendering the provision "void and unenforceable." Plaintiff next argues that Lloyd's had a duty to disclose its provision requiring an insured to be occupying an insured vehicle to obtain coverage, but Lloyd's failed to disclose this provision, rendering it void. Plaintiff's third argument is that the provision at issue is void because Lloyd's failed to obtain approval or an "advisory opinion" from the Department of Insurance. Plaintiff's final argument is that summary judgment in favor of Lloyd's was improper because he was "occupying" an insured vehicle at the time of his injury. We address each argument in turn.

¶ 17 Plaintiff's first contention is that the uninsured motorist provision is void and unenforceable because it conflicts with the statute concerning uninsured motorist coverage. Plaintiff explains that section 143a of the Illinois Insurance Code (Code) (215 ILCS 5/143a (West 2016)) requires insurers to provide uninsured motorists coverage for insured parties regardless of whether the insured parties occupied the insured vehicles at the time of injury. Plaintiff then recounts that the Lloyd's policy requires an insured to occupy an insured vehicle to obtain uninsured motorist coverage. Plaintiff argues that, since the "occupancy" requirement in

the Lloyd's policy conflicts with the statutory requirement, it is void. We reject plaintiff's claim, but on different grounds than the circuit court.

¶ 18 "With certain exceptions not relevant here, all motor vehicles operated or registered in this State and designed for use on a public highway must be covered by a liability insurance policy." *Schultz v. Illinois Farmers Insurance Co.*, 237 Ill. 2d 391, 400 (2010); see also 625 ILCS 5/7-601(a) (West 2016). These insurance policies must provide certain minimum liability amounts and specific coverage requirements, such as insuring not only the named insured but anyone using the insured vehicle with the insured's permission. *Id.* at 400-01. Automobile liability policies in this state must also include uninsured motorist coverage that includes all who are insured under the policy's liability provisions. *Id.* at 403. Liability, uninsured, and underinsured motorist provisions in Illinois are thus "inextricably linked." *Id.* at 404. Consequently, if a person qualifies as an insured for purposes of the policy's bodily injury liability provisions, he or she is treated as an insured for uninsured purposes as well. *Id.* Nonetheless, "[n]either the statute nor the case law places any restriction on the right of the parties to an insurance contract to agree on which persons are to be the 'insureds' under an automobile insurance policy." *Thounsavath v. State Farm Mutual Automobile Insurance Co.*, 2018 IL 122558, ¶ 31 (citing *Heritage Insurance Co. of America v. Phelan*, 59 Ill. 2d 389, 395 (1974)).

¶ 19 Section 143a(1) of the Code provides in relevant part as follows:

> "No policy insuring against loss resulting from *** bodily injury *** suffered by any person *arising out of the *** use of a motor vehicle* that is designed for use on public highways and *** registered in this State *** shall be renewed *** or issued ***

> unless coverage is provided *** for bodily injury *** of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles *** because of bodily injury *** resulting therefrom." (Emphasis added.) 215 ILCS 5/143a(1) (West 2018).

¶ 20 As it pertains to this issue, section 143a(1) limits the requirement of uninsured motorist coverage to injuries "arising out of the *** use" of a vehicle. Similarly, the insurance policy extended coverage to Zion and anyone "using" a covered automobile with Zion's permission. The noun "use" is defined in part as "the act or practice of using something," implying the verb form of the word, defined as "to put into action or service." Webster's Third New International Dictionary 2523 (1986). "One uses an automobile whenever such use 'is rationally connected to the vehicle for the purpose of providing transportation or satisfying some other related need of the user.' " *Schultz*, 237 Ill. 2d at 401-02 (quoting *Jaquez v. National Continental Insurance Co.*, 178 N.J. 88, 96 (2003)). Riding in an automobile also constitutes the use of it. *Id.* at 402.

¶ 21 In this case, however, plaintiff's injuries did not arise in connection with the use of an insured vehicle. Plaintiff admitted in his deposition that he had stopped his (insured) vehicle about two to two-and-a-half car lengths from the uninsured motorist's vehicle. At the time of his injuries, he was not putting his vehicle into action or service, he was not riding in the vehicle as a passenger, nor was any purported use of the vehicle " 'rationally connected to the vehicle for the purpose of providing transportation or satisfying some other related need of the user.' " *Id.* at 401-02 (quoting *Jaquez*, 178 N.J. at 96). At best, plaintiff stated that his vehicle was being used to create a safety bubble or zone to shield him and others at the scene from both potential cars

approaching from behind and also potential gunfire. This was not connected to transportation or a related need. *Id.*

¶ 22 As noted above, the policy defined an "insured" as Zion (the named party) and others "using" a covered vehicle with Zion's permission. In addition, section 143a(1) mandates uninsured motorist insurance coverage for injuries arising out of the "use" of a vehicle. On the facts of this case, however, plaintiff's injuries did not arise from the use of his cruiser, and thus he was not eligible for any coverage under the policy, uninsured or otherwise. See *Phelan*, 59 Ill. 2d at 395 (holding that there is no restriction on the right of parties to an insurance contract to agree on who is an insured under an automobile insurance policy). Therefore, the circuit court correctly determined that plaintiff was not entitled to uninsured motorist coverage under the policy. Although the circuit court's reasoning was that plaintiff's use of the vehicle "at one point in time [did] not qualify him as an insured when he is no longer occupying the vehicle," we may affirm the court's reasoning on any ground in the record, regardless of either the basis or correctness of the court's reasoning. See *Leonardi*, 168 Ill. 2d at 97. We therefore reject plaintiff's first contention of error.

¶ 23 Plaintiff next argues that Lloyd's had a duty to disclose the effect of its provision requiring an insured to be occupying an insured vehicle to obtain coverage, but Lloyd's failed to disclose this provision, rendering it void. This argument fails for multiple reasons. First, as Lloyd's points out, plaintiff has forfeited this argument for failure to raise it in the court below. See *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996) ("It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal."). Allowing plaintiff to change his theory on appeal undermines " 'the adversarial process and our system of appellate jurisdiction' " and prejudices Lloyd's because it is denied the ability "to

present evidence to discredit the theory had it been raised in the evidence presentation stage, that is to say, in the trial court." See *id.* at 536 (quoting *Daniels v. Anderson*, 162 Ill. 2d 47, 59, (1994)). For this reason alone, we reject plaintiff's argument.

¶ 24 Moreover, plaintiff cites nothing, nor can we find anything, to indicate that an insurer has a duty to disclose the various conditions and exclusions within a written insurance contract. To the contrary, state law is clear that the individual insured "bears the burden of knowing the contents of insurance policies *and has an affirmative duty of bringing any discrepancies in the policy to the attention of the insurer*." (Emphasis added.) *Connelly v. Robert J. Riordan & Co.*, 246 Ill. App. 3d 898, 902 (1993) (citing *Foster v. Crum & Forster Insurance Cos.*, 36 Ill. App. 3d 595 (1976)). Nor does the law impose on an insurer the duty of reviewing the adequacy of an insured's coverage. *Id.* Plaintiff's argument is therefore unavailing.

¶ 25 Plaintiff's third argument is that the provision at issue is void because Lloyd's failed to obtain approval or an "advisory opinion" from the Department of Insurance. Plaintiff cites two cases in support of his claim: *Schultz v. Illinois Farmers Insurance Co.*, 387 Ill. App. 3d 622 (2009), and *Doxtater v. State Farm Mutual Automobile Insurance Co.*, 8 Ill. App. 3d 547 (1972). Neither *Schultz* nor *Doxtater*, however, discuss (or even mention) a purported requirement that an insurer must obtain approval or an advisory opinion from the Director of the Department of Insurance. Although citation to cases that are merely unpersuasive or inapposite is not "tantamount to failing to cite relevant authority altogether," "citation to completely irrelevant authority may, in some cases, be so inadequate as to run afoul of Rule 341(h)(7)." *Vancura v. Katris*, 238 Ill. 2d 352, 372 (2010). Here, plaintiff's argument contains no citation to statutory or decisional authority that would support his claim. Accordingly, it is forfeited. See Ill. S. Ct. R.

341(h)(7) (eff. May 25, 2018) (providing in part that the argument section of a brief "shall contain *** the authorities *** relied on. * * * Points not argued are forfeited ***.").

¶ 26 Plaintiff's final contention of error is that summary judgment in favor of Lloyd's was improper because plaintiff established that he was "occupying" an insured vehicle at the time of his injury. Specifically, plaintiff argues that, at the time of his injuries, although he was not in actual contact with his vehicle, he was in "virtual contact," which would entitle him to coverage under the Lloyd's policy. Although we have already held, *supra*, that plaintiff failed to establish that his injuries arose from the use of his vehicle at the time of his injuries (thus precluding any insurance coverage), even assuming *arguendo* that he did establish "use" of his vehicle at the time of his injuries, this claim would still fail.

¶ 27 An insured party has the initial burden of proof to prove that the claimed loss was covered under the terms of the insurance policy. *Old Second National Bank v. Indiana Insurance Co.*, 2015 IL App (1st) 140265, ¶ 22 (citing *Hays v. Country Mutual Insurance Co.*, 28 Ill. 2d 601, 605-06 (1963)). The Lloyd's policy limited uninsured motorist coverage to injuries that arose while an insured was "occupying" an insured vehicle. As noted above, the Lloyd's policy defined "occupying" as "in, upon, getting in, on, out or off" of a covered auto. We agree with prior decisions that this definition is unambiguous. See, *e.g.*, *Greer v. Kenilworth Insurance Co.*, 60 Ill. App. 3d 22, 25 (1978) (holding that a policy definition of "occupying" as "in or upon, entering into or alighting from" the automobile was unambiguous).

¶ 28 To show that he was "occupying" a covered vehicle, a plaintiff must establish both (1) "some nexus or relationship between the insured and the covered automobile" and (2) either actual or "virtual" physical contact with the insured vehicle. *Id.* Failure to establish both elements defeats a claim that an insured was occupying a covered vehicle. *Id.*

¶ 29 There is no clear delineation as to what constitutes a nexus or relationship between an insured and covered vehicle. Prior decisions found a nexus when an individual was (1) a passenger in the car (*id.*), (2) walking toward an insured vehicle with the intent to get in (*id.* (citing *Allstate Insurance Co. v. Horn*, 24 Ill. App. 3d 583, 590 (1974))), (3) standing in front of the car immediately after parking it (*id.* (citing *Wolf v. American Casualty Co.*, 2 Ill. App. 2d 124 (1954))), (4) exiting a school bus, which had its emergency flashers activated, and lining up next to or near the buses "minutes before" the accident (*Mathey ex rel. Mathey v. Country Mutual Insurance Co.*, 321 Ill. App. 3d 805, 812 (2001)), or (5) walking to and from the vehicle to get parts for a job (*Cohs v. Western States Insurance Co.*, 329 Ill. App. 3d 930, 934 (2002)).

¶ 30 With respect to contact, plaintiff agrees that he was not in actual (*i.e.*, physical) contact and contends solely that he was in virtual contact with his vehicle, entitling him to coverage. Virtual contact, like the term nexus, escapes precise definition. To determine the existence of virtual contact, prior decisions have focused on (1) the distance from the covered vehicle and (2) the time since losing actual contact with the vehicle. In *Cohs*, virtual contact was rejected where the plaintiff stated in his affidavit that, when he was struck by the underinsured motorist, he was between 12 and 15 feet from his van and one to two minutes had transpired. *Cohs*, 329 Ill. App. 3d at 936. In *Greer*, the court held that there was a "total absence of contact" when the plaintiff was between 10 and 15 feet from the insured vehicle (and, presumably, very little time would elapse to walk that short distance to the car). *Greer*, 60 Ill. App. 3d at 26.

¶ 31 In this case, it is questionable whether plaintiff established a nexus with his police cruiser. At the time of his injuries, his vehicle had been stopped and parked at an angle at some distance to create a barrier or safety "bubble." Plaintiff was not in or immediately near the car, he was not returning to it for materials to complete his job, nor was he walking toward it with the

intent to get back into it. On the other hand, plaintiff's injuries occurred a very short time after he parked and got out of his car. Plaintiff, however, must show both a nexus and virtual contact to the car to meet the definition of "occupying." See *id.* at 25. As such, even if plaintiff established a nexus with the car, his claim nonetheless fails because he was not in virtual contact with it.

¶ 32 Here, plaintiff admitted in his deposition that, after parking his car and getting out of it, he walked about two to two-and-a-half car lengths to the stopped vehicle, which plaintiff estimated was 20 – 25 feet from his vehicle. This is greater than the distances the insured parties were from their respective vehicles in either *Cohs* (12 – 15 feet) or *Greer* (10 – 15 feet). In addition, although plaintiff stated in his answers to Lloyd's interrogatories that about one minute elapsed from the time he got out of his car to when he was injured, the circuit court and plaintiff agreed that his vehicle's Dash Cam video indicated that the elapsed time was about 30 seconds. Although this time span is less than that in *Cohs* (one to two minutes), we do not read *Cohs* as setting a bright-line minimum amount of time below which virtual contact is always present. Furthermore, *Greer* did not indicate the amount of time the plaintiff was out of "actual contact" with the vehicle prior to suffering injury, but because the plaintiff was only 10-15 feet from the vehicle, it was presumably at least equivalent to the 30 seconds that plaintiff in this case had been out of actual contact with his police cruiser when he walked the 20-25 feet from his vehicle to the stopped car.

¶ 33 Regardless, plaintiff here had parked his police vehicle and got out of it to assist a fellow officer in a traffic stop. At no point was plaintiff in contact with his police car; rather, he was in contact with the stopped vehicle, which caused his injury while plaintiff was reaching into that vehicle to prevent Harris from fleeing the scene. Construing the pleadings, depositions,

admissions, and affidavits strictly against the moving party (here, Lloyd's) and liberally in favor of the opponent (plaintiff), as we must (*Outboard Marine*, 154 Ill. 2d at 131-32), we hold that the circuit court did err in finding no genuine issue of material fact as to whether plaintiff was in virtual contact with his vehicle. The court therefore properly granted summary judgment in favor of Lloyd's on this issue, and plaintiff's final contention of error is without merit.

¶ 34 Moreover, plaintiff's citation to *DeSaga v. West Bend Mutual Insurance Co.*, 391 Ill. App. 3d 1062 (2009), does not alter this result. In that case, the decedent (the insured party) was hit by a car and killed after he went into the roadway to remove some pieces of "angle iron" that had fallen off of his truck. *Id.* at 1063. On appeal, the court held that, "[b]ased upon the unique facts of this particular case," the decedent was in virtual physical contact with the covered vehicle at the time of the accident and therefore "occupying" it at the time of the accident. *Id.* at 1071. The court recounted that, shortly before the fatal accident, decent had parked his truck with emergency lights flashing, but left the engine running while he removed the iron that had fallen from his truck. *Id.* Here, by contrast, plaintiff was not in the process of retrieving anything from the stopped vehicle with the intent to return it to his vehicle. Instead, plaintiff reached into Harris's vehicle to prevent Harris from fleeing the scene. *DeSaga* is therefore unavailing.

¶ 35 CONCLUSION

¶ 36 The circuit court properly granted summary judgment in favor of defendants and denied plaintiff's summary judgment motion. Accordingly, we affirm the judgment of the circuit court.

¶ 37 Affirmed.