No. 129031

In the

Supreme Court of Illinois

CARMEN GALARZA

Appellee

v.

DIRECT AUTO INSURANCE COMPANY

Appellant

v.

FREDY GUIRACOCHA and CHRISTOPHER GUIRACOCHA

A minor by his next best friend FREDY GUIRACOCHA

Appellees

On Appeal from the Appellate Court of Illinois

First Judicial District Nos. 1-22-0281 (consolidated with 1-21-1595)

There Heard on Appeals from the Circuit Court of Cook County, County Department, Chancery Division, No 20 CH 4631 and 21 CH 2447, The Honorable David B. Atkins and Sophia H. Hall, judges Presiding

REPLY BRIEF OF APPELLANT DIRECT AUTO INSURANCE COMPANY

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STATEMENT OF POINTS AND AUTHORITIES

DIRECT AUTO'S REPLY ARGUMENT

I. INTRODUCTION – ILLINOIS' STATUTORY SCHEME IS NARROWLY FOCUSED AND DEFENDANTS CAN NOT EXPAND IT

This case involves a statutory coverage – uninsured motorist – that does not exist at the common law. The legislature created uninsured motorist coverage for automobiles. *State Farm v Yapejian*, 152 Ill 2nd 533 (1992), *Brooks v Cigna Property & Casualty Ins.*, 299 Ill App 3d 68 (2nd dist., 1998). But there is no mandatory insurance on bicycles, snow-mobiles, all-terrain-vehicles and the like. Defendant Guiracocha seeks to impose an obligation of mandatory insurance for operation of a bicycle which should only be done by the Legislature under section 143a.

II. ILLINOIS HAS CHOSEN A NARROW UNINSURED MOTORIST PROVISION

The purpose of 215 ILCS 5/143a is to provide someone approximately the coverage their activities would have had under the liability provisions. The defendants seek to re-write this narrowly focused statutory scheme with a broader, much more extensive insurance scheme. The Guiracocha brief seeks to expand uninsured motorist requirements well beyond liability coverage.

Some states – such as Florida or Massachusetts – have very broad uninsured motorist provisions. The Florida Supreme Court, for instance,

said "Whenever bodily injury is inflicted upon named insured members of his family by the negligence of an uninsured motorist, *under whatever conditions, locations, or circumstances, any of such insureds happen to be in at the time,* they are covered by uninsured motorist... They may be pedestrians at the time of such injury, they may be riding in motor vehicles of others or in public conveyances and they may occupy motor vehicles (including ...motorcycles) owned by but which are not insured automobiles' of named insured'. *Mullis v State Farm Mutual Auto Ins Co.,* 252 So 2nd 229 at 233 (1971).

In *Rosenberg v Zurich American Ins Co.,* 312 Ill App 3d 97, 105 (1st dist., 2000), the Illinois Appellate Court noted the Massachusetts uninsured motorist statute covers someone similarly under 'whatever conditions, locations or circumstances' and compared it to the much narrower Illinois statute. The *Rosenberg* court said at 105 "(we) first note that the Illinois statute pertaining to uninsured motorist coverage does not specify that pedestrians must be included in underinsured and uninsured motorist coverage as Massachusetts statute does (see 215 ILCS 5/143(a) (West 1998))". DAI urges this precedent be upheld.

The problem for defendants is the Illinois uninsured motorist statute just isn't written the expansive way they wish it were and it does not cover persons 'under whatever conditions, locations or circumstances an insured happens to be at the time'. It is written to cover motor vehicles

and the Guiracocha bicycle is not a motor vehicle. Such an expansion of potential coverage for bicycles would lead to a vast increase in insurance rates and obligations for carrier and that is a political decision for the elected Legislature.

III. DEFENDANT IS ATTEMPTING TO RECOVER MORE BENEFITS FOR HIMSELF WHEN INJURED BY OTHERS THAN HE ELECTED TO MAKE AVAILABLE TO THIRD PARTIES HE INJURED

In terms of the DAI policy and 'public policy', it is Guiracocha whose position is ultimately both illogical and unfair. Christopher ***Guiracocha seeks to provide himself benefits while operating his bicycle that he doesn't provide to others he injures while riding his bicycle.*** As noted in *Luechtefeld v Allstate Ins Co.,* 167 Ill 2nd 148, 160 (1995), this is not appropriate ("defendant is now attempting to recover more benefits for himself when injured by others than he elected to make available to third parties whom he injured").

All parties agree that if Christopher injures someone else while riding his bicycle – whether a pedestrian, another bicyclist, or a person driving an auto – the DAI policy doesn't provide any liability coverage whatsoever. A bicyclist can violate the rules of the road, dart out, and cause an accident with a vehicle, another bicyclist, or a pedestrian. The DAI policy is not a bicycle policy.

There is absolutely no dispute that the DAI policy covers a person for his use of a "owned automobile", a "non-owned automobile" and for being 'responsible for the use of' an "owned automobile" or a non-owned automobile" (C44,46). Christopher is simply *not* a *"person insured"* under liability, Part I, of the DAI policy. Christopher seeks for force DAI to provide uninsured motorist coverage when he is using his bicycle even though Christopher did not purchase a bicycle policy and Christopher provides no liability protection to persons he injures.

IV. BICYCLE ACCIDENTS DO NOT REQUIRE UNINSURED MOTORIST COVERAGE BECAUSE BICYCLES ARE NOT SUBJECT TO MANDATORY INSURANCE

When a bicycle hits a pedestrian and causes injuries, Courts in other states have found the uninsured motorist provisions don't apply, for example, see *Haynes v Lock,* 127 Ohio App 3d 569 (Court of Appeals Ohio 1998). A bicycle that was the tort-feasor caused an auto to swerve to avoid, injuring passengers. Courts in other states have found that uninsured motorist provisions don't apply. See *Lee v Davis and State Farm Mutual Auto Ins Co.,* 897 So 2nd 753 (Court of Appeal of Louisiana 2005).

The reasoning of these cases is of course that a bicycle is not a "motor vehicle" and mandatory insurance applies to the operation of a motor vehicle and not to bicycles. But in this case, where Guiracocha alleges, he was not the tort-feasor, defendant *seeks to impose uninsured motorist*

coverage for operation of a bicycle where if he was the tort-feasor he would have no liability protection. Thus, in the same accident between two parties, Guiracocha claims that DAI must provide uninsured motorist protection if he is hit by an uninsured motorist and not at fault, but DAI owes no coverage if he hits someone else and is the tort-feasor. Bicyclists ride on the street on "bike lanes". Accidents between bicyclists, autos, and pedestrians occur frequently. To add to the risk insured against without the payment of premium, without the evaluation of risk, without having any way to know if the bicyclist is a safe rider or not, whether he wears a helmet or not, is both unfair and should not be interpreted as required by Illinois law.

V. THE UNINSURED MOTORIST STATUTE REFERS TO "PERSONS INSURED THEREUNDER" AND CHRISTOPHER IS NOT A "PERSON INSURED THEREUNDER" FOR LIABILITY

There is no doubt that a 'insured' or a 'person insured' under the DAI policy as written has neither liability nor uninsured motorist coverage. Guiracocha alleges that if a person is a 'insured' he or she must have uninsured motorist coverage even if he or she has no liability coverage. This does not make sense in the statutory scheme set up in Illinois.

Under Part I, as discussed just above, Christopher is not a "person insured" because he was not using a "owned" or "non-owned" automobile or 'responsible for the use of' either. DAI owes no liability coverage for

Christopher. Under Part II, similarly, Christopher was not an occupant of an automobile, and was not involved in "actual physical contact between the insured automobile and the hit-and-run motor vehicle", see 'uninsured motor vehicle', part 'c'.

Christopher argues that under Part II he is a 'resident relative' and a potential insured generally. This is true under part II ***if*** he is an occupant of a vehicle or operating a vehicle, he is insured by the DAI policy. But this general definition is further detailed and refined by Part II which says a person may recover uninsured motorist benefits "provided the damages were caused by accident, and while "you" are an occupant in an "insured automobile". (This has been interpreted to be "automobile" whether insured or not, see *Direct Auto v Merx,* 2020 Il App 2nd 190050). A 'hit and run' vehicle means a vehicle which "hits or causes an object to hit an owned automobile which the insured is occupying at the time of the accident which causes bodily injury to the insured", see 'hit and run motor vehicle'. The policy quite properly refines the definition to be co-extensive with the liability Part I coverages.

Section 143a seems carefully not to use the word "insured" but instead uses the words "for the protection of persons insured thereunder". In using these words, the statute refers to 625 ILCS 7-203. This refers to the *liability* 'bond' minimum of $25,000/$50,000 requires of all auto carriers in Illinois. A sensible interpretation is *the Legislature meant to require*

carriers to cover persons who are covered by the liability portion of the policy with uninsured motorist coverage.

While Christopher is a potential insured while operating or occupying a vehicle, he is not a "person insured thereunder" when operating his bicycle. This interpretation is consistent to the public policy of the statute: to provide nearly co-extensive coverage to Christopher if he operates or occupies a vehicle under either Part I or Part II.

Guircocha's brief argues that Part I liability and Part II uninsured motorist need not be co-extensive; if the Legislature wants to expand uninsured motorist coverage to *exceed* liability coverage and put an onerous and very expensive burden on carriers to cover bicyclists, that is for the Legislature but they have never done so. Even under *Merx*, 2020 Il App 2nd 190050, somewhat oddly cited to by defendant, the Court said uninsured motorist coverage should extend to her "under the policy's liability provisions". If one extends the liability provisions of Part I of the DAI policy to Guiracocha to the uninsured motorist Part II provisions, defendant has no right to coverage for operating his bicycle.

As noted in *Insura Property & Casualty Co v Steele*, 344 Ill App 3d 486 (5th dist., 2003), it would make no sense to interpret the statute to mandate such coverage be provided where liability is not provided. The sensible interpretation of section 143a is that is a person is insured thereunder for

the liability bond, his or her uninsured motorist coverage should be co-extensive to that liability coverage.

If Fredy Guiracocha was operating a bicycle, DAI would owe him no coverage for accidents he is responsible for or their consequent injuries. Fredy is the 'named insured' and still would have no liability coverage. There is no reason that Fredy under those circumstances, despite being the 'named insured,' would have uninsured motorist coverage for operating a bicycle. To extend uninsured motorist obligations beyond liability obligations, even for a named insured, is not appropriate and the DAI policy is not against public policy.

If Fredy were operating a snow-mobile or an all-terrain-vehicle ("ATV"), which just like a bicycle has no mandatory insurance requirements, and he caused injuries to others this DAI policy would not cover him. There is no reason the DAI policy should have to cover Fredy in an uninsured motorist claim for operating a snow-mobile or ATV.

Operation of a bicycle has no mandatory insurance obligations and thereby DAI should owe neither liability nor uninsured motorist coverage to Guiracocha for operation of a bicycle.

VI. DEFENDANT NEVER ADDRESSES HIS BURDEN OF RE-WRITING OR OVERRURNING THE DAI POLICY OR THE PUBLIC POLICY IMPLICATIONS OF REQUIRING BICYCLE COVERAGE

Albeit this policy jacket form has been in existence – and approved by the Illinois Department of Insurance for a long number of years – defendant Guiracocha never addresses the issue of burden both in terms of consequences or the burden in terms of overturning and re-writing a contract.

In order to obtain the result, he wants, defendant Christopher would have the Courts re-write the policy definitions of "hit-and-run" motor vehicle, the policy definitions of a "uninsured motor vehicle", and the policy Part II which says a person may recover uninsured motorist benefits "provided the damages were caused by accident, and while "you" are an *occupant* in an "insured *automobile*"". There is no basis to ask the Court's to re-write the DAI policy when bicycles carry mandatory insurance requirements.

Christopher ignores the constitutional fact that contracts are generally enforced as written, and he has a very high burden to re-write the DAI policy on public policy grounds.

Moreover, Guiracocha ignores the fact that there are financial and public policy *consequences* of his view. Requiring coverage for bicyclists means a vast increase in premium. While auto accidents can generally be researched in public databases and of course via an Abstract by the Illinois Secretary of State, how could DAI underwrite this potential risk? There is no motor vehicle record for bicyclists, and DAI would have no way to underwrite a safe bicycle operator from an unsafe bicycle operator.

Moreover, in an accident between a bicycle and a motor vehicle, simply common sense says whatever the liability the bicyclist probably comes out the loser in terms of injuries.

There are serious financial implications of imposing uninsured motorist coverage onto DAI or other auto insurers for bicyclists. Such decisions should be left the Legislature.

The Illinois Department of Insurance has long approved this policy, and deference should be paid to them.

The Legislature could have expanded section 143a and chose not to and deference should be paid to them.

The long-standing *Rosenberg* and *Steele* courts decisions could have been overturned by the Legislature mandating changes in section 143a, [but this didn't happen] and deference should be paid to this point also.

VII. CONCLUSION

Guiracocha seeks to force DAI to provide him benefits while operating his bicycle that he doesn't provide to others he injures while riding his bicycle. There is no reason to support such an idea. Guiracocha bought a auto policy and is covered for his use and occupation of an auto for liability and uninsured motorist. Guiracocha did not buy a bicycle policy and is not covered for his use of a bicycle whether in terms of liability to others or for uninsured motorist coverage. The Appellate court should be reversed.

Respectfully Submitted:

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CERTIFICATE OF COMPLIANCE

I certify this brief confirms to the requirements of Rules 341(a) and (b), the length of this brief (excluding pages contained in the Rule 34a(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those Matters appended under Rule 342(a) contains 11 pages.

/s/ Samuel A. Shelist
SHELIST LLC

No. 129031

IN THE SUPREME COURT OF ILLINOIS

Carmen Galarza	)	
Appellee,	)	
	)	No. *129031*
	)	
Direct Auto Ins Co	)	
Appellant,	)	
	)	
	)	
Fredy Guiracocha, et al	)	
	)	
Appellees,	)	

NOTICE OF FILING and PROOF OF SERVICE

The undersigned, being first duly sworn, deposes and states that on May 23, 2023, there was electronically filed and served upon the Clerk of the Supreme Court the ***Reply Brief of Appellant*** On May 23, 2023 service of same will be accomplished through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 copies of the Reply Brief bearing the court's file-stamp will be sent to the above court.

/s/ *Samuel A. Shelist*
Samuel A. Shelist

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ *Samuel A. Shelist*
Samuel A. Shelist