No. 122558

IN THE SUPREME COURT OF ILLINOIS

PHOUNGEUN THOUNSAVATH,

Plaintiff and Counterdefendant-Appellee,

-v-

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant and Counterplaintiff-Appellant.

Appeal from the Appellate Court of Illinois, First District
No. 16-1334

There Appealed from the Circuit Court of Cook County
Court No. 2014 CH 02511
The Honorable Kathleen M. Pantle, Judge Presiding

REPLY BRIEF OF DEFENDANT/APPELLANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Frank C. Stevens
TAYLOR MILLER LLC
175 N. Franklin Street, Suite 400
Chicago, Illinois 60606
(312) 782-6070
Attorneys for Defendant/Appellant State Farm Mutual Automobile Insurance Company

ORAL ARGUMENT REQUESTED

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REPLY BRIEF OF DEFENDANT/APPELLANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

INTRODUCTION

Plaintiff Phoungeun Thounsavath essentially raises two arguments in support of her position that the named driver exclusion in her State Farm policies cannot be enforced against her to deny her claim for underinsured motorist coverage arising from her accident with Clinton M. Evans on June 17, 2002.

First, relying on *American Access Casualty Co. v. Reyes*, 2013 IL 115601, Thounsavath claims that the exclusion is unenforceable because it violates the Illinois mandatory insurance law, 215 ILCS 5/143a-2.

Second, plaintiff argues that the exclusion cannot be applied to underinsured motorist coverage because it is contrary to the underinsured motorist statute, 215 ILCS 5/143-a(2), for a myriad of reasons.

Respectfully, the enforcement of the exclusion does not violate any public policy articulated by this court. Moreover, nothing in the Underinsured Motorist Statute prohibits the application of the exclusion in this case.

In addition, the enforcement of the exclusion in this case will prevent Thounsavath from claiming more coverage for herself than she was willing to extend to the general public when she agreed to and signed the named driver exclusion.

Although it is not determinative of the outcome of this case, for the sake of accuracy, it should be noted plaintiff incorrectly asserts in her Statement of Facts that she purchased one auto insurance police from State Farm that contained the named driver exclusion for Clinton M. Evans (Pl.Br.p.1). In fact, Thounsavath purchased two separate policies, which insured two different cars, and each policy included the "6023 CS DRIVER EXCLUSION ENDORSEMENT" for Clinton M. Evans, which she signed (R.C28 and C71). State Farm's Counterclaim for Declaratory Judgment sought a declaration that neither policy provided her with underinsured motorist coverage for her June 17, 2012 accident.

The Named Driver Exclusion Does Not Violate the Illinois Mandatory Liability Insurance Law Under the Facts and Circumstances of This Case

The trial court, appellate court and Thounsavath all assert, based upon *American Access Cas. Co. v. Reyes*, 2013 IL 115601, that to enforce the named driver exclusion against Thounsavath's claim for underinsured motorist coverage would violate the public policy behind the mandatory liability insurance statute, 625 ILCS 5/7-601(a). However, neither the courts nor Thounsavath identified the public policy behind the statute.

Citing *Progressive Universal Ins. Co. of Illinois v. Liberty Mut. Fire Ins. Co.*, 215 Ill.2d 121 (2005), and *State Farm v. Smith*, 197 Ill.2d 369, 376 (2001), the court in *Reyes* stated at ¶8:

> The principal purpose of this state's mandatory liability insurance requirement is to protect the public by securing payment of their damages.

That is the only public policy identified in *Reyes*.

Smith v. State Farm, provides at 376:

> This court many not establish a public policy which is contrary to the public policy that the Illinois legislature has determined is appropriate for the State of Illinois. See *Michigan Avenue National Bank v. County of Cook*, 191 Ill.2d 493, 522 (2000), quoting *People v. Garner*, 147 Ill.2d 467, 475-769 (1992) ("court may not legislate, rewrite or extend legislation.)

Public policy must be applied narrowly and its successful invocation requires a clear showing of a violation of an explicit public policy. *Am. Fed'n of State, City & Mun. Employees, AFL-CIO v. Dept. of Cent. Mgmt. Serv.*, 173 Ill.2d 299, 307 (1996).

Likewise, in *Reyes* the court stated at ¶9:

> A contractual provision will not be invalidated on public policy grounds unless it is clearly contrary to what the constitution, the statutes or the decisions of the courts have declared to be the public policy unless it is manifestly injurious to the public welfare. *Id*. At 129-30, 293 Ill.Dec. 677, 828 N.E.2d 1175. Such a determination depends upon the particular facts and circumstances of each case. *Id*. at 130, 293 Ill.Dec. 677, 828 N.E.2d 1175.

The facts and circumstances here are not at all similar to the facts and circumstances in *Reyes*. The public policy behind the mandatory liability insurance statute, i.e. "to protect the public by securing payment of their damages," is not applicable to Thounsavath's underinsured motorist claim. The appellate court here

attempted to extend the public policy specifically identified in *Reyes* to a situation that is not applicable to *Reyes*.

The enforcement of the named driver exclusion against Thounsavath's underinsured motorist claim will not violate or defeat the public policy behind the mandatory liability insurance law.

Enforcement of the Named Driver Exclusion Does Not Violate the Underinsured Motorist Statute

Thounsavath concedes that Illinois courts have upheld named driver exclusions for claims for uninsured motorist coverage. She cites both *Heritage Ins. Co. of America v. Phelan*, 59 Ill.2d 389 (1974), and *Rockford Mutual Ins. Co. v. Economy Fire & Casualty Company*, 217 Ill.App.3d 181 (5th Dist. 1991), as cases where the court enforced a named driver exclusion as to uninsured motorist coverage. However, according to Thounsavath, these cases offer no support to State Farm because "the Illinois Legislature has already established the public policy by mandating underinsured motorist coverage in every auto insurance policy" (Pl.Br.p.4-5) and "the public policy for mandating uninsured motorist coverage was intended to protect only policyholders and named insureds" (Pl.Br.p.6).

Neither statement is correct. First, underinsured motorist coverage is not required in every insurance policy. Second, an insurance policy cannot define an insured for uninsured motorist coverage differently than it does for underinsured motorist coverage. In *Schultz v. Ill. Farmers Ins. Co.*, 237 Ill.2d 391 (2010), the court stated:

> In addition to providing UM coverage, motor vehicle liability policies in Illinois are also required to provide UIM coverage where, as in the cases before us, the UM coverage exceeds the statutory minimums required for liability for bodily injury. The UIM coverage must be in an amount equal to the total amount of UM coverage provided under the policy. As with UM coverage, UIM coverage

> must also extend to all those who are insured under the policy's liability provisions. See *215 ILCS 5/143a-2(4)* (West 2004). For reasons explained earlier in this opinion, the category of those insured under a policy's liability provisions must always include permissive users, and permissive users includes permissive passengers as well as permissive drivers.
>
> Under Illinois law, liability, UM and UIM provisions are thus inextricably linked. See *Lee v. John Deere Insurance Co., 208 Ill.2d 38, 44-45, 802 N.E.2d 774, 280 Ill.Dec. 523 (2003)*; *Mercury Indemnity Co. of Illinois v. Kim, 358 Ill.App.3d 1, 11, 830 N.E.2d 603, 294 Ill.Dec. 191 (2005)*. Once a person qualifies as an insured for purposes of the policy's bodily injury liability provisions, he or she must be treated as an insured for UM and UIM purposes as well. Accordingly, just as the governing statutes prohibit an insurance company from directly or indirectly denying uninsured-motorist coverage to someone who qualifies as an insured for purposes of liability coverage (*Heritage Insurance Co. of America v. Phelan, 59 Ill.2d at 395*), it likewise prohibits companies from directly or indirectly denying underinsured coverage to such a person where, as here, the basic liability coverage exceeds statutory minimums.

Id. at 404.

Sulser v. Country Mutual Ins. Co., 147 Ill.2d 548 (1992), also demonstrates that uninsured motorist coverage and underinsured motorist coverage should be considered to be *in pari materia*, and should be construed together to produce a harmonious whole. *Id.* at 555. Contrary to plaintiff's assertions, underinsured motorist coverage does not enjoy a special status *vis-à-vis* uninsured motorist coverage. Illinois case law that upholds named driver exclusions for uninsured motorist coverage are persuasive authority for upholding such exclusions for underinsured motorist coverage.

Named driver exclusions have been enforced against uninsured motorist coverage. They should be found to be valid and enforceable against underinsured motorist coverage, as well.

Another argument that runs throughout plaintiff's brief is that an exclusion that is not specifically sanctioned in the language of the Underinsured Motorist Statute, 215 ILCS 5/143a-2, is invalid. ("In this case, the legislature has not created a named driver exclusion for underinsured motorist coverage like the one it did for liability coverage" (Pl.Br.p.4). "…If the legislature wanted to allow greater exclusions from underinsured policies, they could have created an exception similar to the one they created for liability policies" (Pl.Br.p.9)).

This court has dealt with and dismissed similar arguments in *Founders Ins. Co. v. Munoz*, 237 Ill.2d 424 (2010), and *Progressive Universal Ins. Co. of Illinois v. Liberty Mut. Fire Ins. Co.*, 215 Ill.2d 121 (2005). In *Munoz*, this court stated at pages 444-5:

> In *Progressive*, we expressly rejected the argument that the only valid coverage exclusions are those authorized by the legislature:
>
> "That permissive users must be covered along with the named insured in no way compels the conclusion that exclusions are never permissive. Inclusion of permissible users goes to the issue of *who* must be covered. It says nothing of *what risks* must be covered. To hold that requiring coverage for permissive users means that insurers are forbidden from excluding certain types of risks from coverage requires a leap in reasoning that neither the language of the statute nor the rules of statutory construction will support." (Emphasis in original.) *Progressive,* 215 Ill.2d at 137, 293 Ill.Dec. 677, 828 N.E.2d 1175.

The court in *Sulser v. Country Mutual Ins. Co.*, 147 Ill.2d 548 (1992), rejected an argument that a policy provision that allowed a deduction from the underinsured motorist

coverage for amounts received by the claimant under a worker's compensation claim is unenforceable because such a deduction is not listed in section 143a-2(3). The court stated at page 555:

> That section 143-2(3) lists only deductions for "applicable bodily injury insurance policies, bonds or other security" does not lead us to the conclusion that the list is exhaustive. *Expressio unius est exclusion alterius* is a rule of statutory construction, not a rule of law, and may be overcome by a strong indication of legislative intent.

Similarly, the court in *State Farm Mut. Auto. Ins. Co. v. Villacana*, 181 Ill.2d 436 (1998), rejected the insured's argument that a "family car exclusion" under the underinsured motorist coverage could not be enforced because any exclusion that limits coverage mandated by statute necessarily violates public policy. *Id*. at 446. In response, the court stated:

> Notwithstanding the above, Jennifer argues that the exclusion limits coverage otherwise mandated by statute and thus cannot stand. We disagree. An insurance policy is a contract between the company and the policyholder, the benefits of which are determined by the terms of the contract unless the terms are contrary to public policy. *Sulser*, 147 Ill.2d at 558, 169 Ill.Dec. 254, 591 N.E.2d 427. We have determined today that the insurance contract at issue does not contravene the public policy implicit in the underinsured statute under the specific factual circumstances present in the case at bar. For this reason, the exclusion, which is both clear and unambiguous, must be enforced.

Id. at 454.

Exclusions and restrictions not specifically approved in the Underinsured Motorist Statute have been repeatedly upheld by Illinois courts. Both *Sulser* and *Villicana* hold that "[p]arties to a contract may agree to any terms they choose unless their agreement is contrary to public policy." *Sulser* at 559 and *Villicana* at 454. As

demonstrated in State Farm's briefs, the application of the named driver exclusion as to Clinton M. Evans under the underinsured motorist coverage of Thounsavath's policies is not contrary to the public policy of Illinois.

Thounsavath argues on pages 8 and 9 of her brief that to apply the "named driver" exclusion for Clinton Evans in her State Farm policies to her claim for underinsured motorist coverage will encourage insurance companies:

> [T]o try to exclude many people and even categories of people: drivers who were drinking, unlicensed drivers, drivers with certain medical conditions.

Why Thounsavath believes this is a likely outcome, if this court reverses the trial and appellate court and enforces the exclusion against Thounsavath's underinsured motorist claim, is not explained. However, a similar argument was addressed and rejected by this court in *Founders Ins. Co. v. Munoz*, 237 Ill.2d 424 (2010).

Munoz holds that an exclusion for a driver, either the named insured or any permissive user who uses a vehicle "without a reasonable belief that the person is entitled to do so," is valid and enforceable against a user who does not have a driver's license. *Id.* at 445. The *Munoz* court rejected the argument by an insurer-appellee that the reasonable belief exclusion could be asserted by an insurer to effectively deny liability coverage to an intoxicated driver or a driver who is old and feeble. *Id.* at 439-40. The court stated:

> We also need not speculate as to the myriad of other factual scenarios to which the exclusion might apply. The issue before us is much narrower. The issue is whether, as a matter of law, a person without a valid driver's license can have a reasonable belief that he or she is entitled to drive. That the exclusion could conceivably apply in other factual circumstances does not mean that the exclusion is ambiguous as to unlicensed drivers.

Id. at 440.

Munoz recognizes that a reasonable exclusion that does not violate Illinois public policy as set forth in 625 ILCS 5/7-317(b)(2) of the Vehicle Code, will be enforced.

Thounsavath also argues that State Farm should not be allowed to assert the named driver exclusion against her because she paid a premium for the underinsured motorist coverage (Pl.Br.p.7-8). The identical argument has been rejected by this court in numerous cases, including *Stryker v. State Farm Mut. Auto. Ins.*, 74 Ill.2d 507, 513 (1978); *Menke v. County Mut. Ins. Co.*, 78 Ill.2d 420, 425 (1980); and *Sulser v. Country Mutual Ins. Co.*, 147 Ill.2d 548, 558 (1992). In *Stryker* the court stated:

> Finally, we are not persuaded by the contention that plaintiff, having paid a premium for uninsured motorist coverage, is therefore entitled to recover. This policy, like all others, is a contract between the company and the policyholder, the benefits of which are determined by the terms of the policy purchased insofar as those terms are not contrary to public policy. The terms of this policy, held valid in *Ullman*, do not entitle the policyholder to recover under the circumstances present here. Premiums are computed on the basis of the coverage provided, and plaintiff did not pay a premium for the coverage he now claims.

Id. at 513.

Thounsavath signed the named driver exclusion for Clinton M. Evans for each of her two State Farm policies. She agreed that State Farm would not be liable "for bodily injury…under any of the coverages…while any motor vehicle is operated by Clinton M. Evans." Her premiums were calculated based on the exclusion. Thounsavath did not pay a premium for the coverage she claims.

Finally, Thounsavath argues that the exclusion cannot be enforced against her because she was a passenger in Clinton M. Evans' car, not one of her cars, when the accident occurred. The focus of the named driver exclusion is Clinton M. Evans, not any

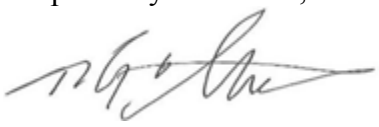
particular vehicle he many operate. Clinton M. Evans was identified by State Farm as an unacceptable risk no matter what vehicle he operated. Thounsavath pretends she had no choice over riding in Evans' vehicle. However, she signed the named driver exclusions and she knew she agreed there would be no coverage of any kind for any accident where Clinton M. Evans operated any vehicle. *Reyes* states that "[o]ne reason for this rule is that 'the members of the public to be protected are not and, of course, could not be made parties to any such contract." *Id*. at ¶9. Unlike the public, Thounsavath was a party to the contract and she was aware of the exclusion. Despite signing the exclusion, she nevertheless, chose to ride as a passenger in Evans' vehicle.

CONCLUSION

Thounsavath has failed to demonstrate a legally cognizable reason why she is entitled to receive more protection than she was willing to extend to the general public. Her position is, as stated in *Fouss v. Auto Owners (Mut.) Ins. Co.*, 118 Ill.2d 430, 434 (1987), repugnant to our system of justice.

For all of these reasons, State Farm requests that the decision of the appellate court be reversed and that judgment be entered in favor of State Farm.

Respectfully submitted,



Frank C. Stevens
Taylor Miller, LLC.
175 N. Franklin Street, Suite 400
Chicago, Illinois 60606
(312) 782-6070
taymil@taylormiller.com

CERTIFICATE

I certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and 341(b). The length of this reply brief, excluding the pages and words contained in the 341(d) cover and the certificate of service is ten (10) pages.

Frank C. Stevens, Attorney for Appellant

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NOTICE OF FILING

To: Mr. Eric Parker
Stotis & Baird Chartered
200 W Jackson Blvd Ste 1050
Chicago IL 60606
eparker@stotis-baird.com

PLEASE TAKE NOTICE that on December 19, 2017 before 5:00 pm we electronically filed with the Supreme Court of Illinois the Reply Brief of Appellant.

TAYLOR MILLER LLC
175 North Franklin Street; Suite 400
Chicago, Illinois 60606
(312) 782-6070
taymil@taylormiller.com

PROOF OF SERVICE

I, Carolyn Holzer, a non attorney, served the above described document by emailing a copy to the attorney listed above at that email address by 5:00 p.m. on 12/19/2017.

[X] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct

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