

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

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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NATURE OF THE ACTION

Plaintiff Phoungoun Thounsavath brought this declaratory judgment action for a declaration that a Driver Exclusion Endorsement for Clinton M. Evans in two policies of motor vehicle insurance issued to her by defendant State Farm Mutual Automobile Insurance Company, as applied to her, violated the public policy of the State of Illinois and the Underinsured Motorist Statute, 215 ILCS 5/143a-2. State Farm filed a counterclaim for a declaration that Thounsavath is not entitled to underinsured motorist coverage under either of two policies of motor vehicle insurance issued to her by State Farm for her June 17, 2012 accident involving Clinton M. Evans because of the endorsement. The trial court entered summary judgment in favor of Thounsavath and against State Farm and declared that, as applied to Thounsavath, the Driver Exclusion Endorsement violated the public policy of Illinois, as well as the Illinois Safety and Family Financial Responsibility Law, 625 ILCS 5/7-317(b)(2). No question was raised on the pleadings.

State Farm appealed from the judgment of the trial court. On June 30, 2017, the appellate court issued its opinion affirming the orders of the trial court.

This court granted State Farm's petition for leave to appeal on September 27, 2017.

ISSUES PRESENTED FOR REVIEW

- I. Whether Named Driver Exclusions are Valid in Illinois
- II. Whether State Farm's Driver Exclusion Endorsement is Consistent with the Mandatory Insurance Law and Illinois Public Policy
- III. Whether Applying the Driver Exclusion Endorsement to Plaintiff Violates the Uninsured or Underinsured Motorist Statutes

JURISDICTION

On September 27, 2017, this court granted State Farm's Petition for Leave to Appeal. This court has jurisdiction pursuant to Supreme Court Rule 315..

STATUTES INVOLVED

215 ILCS 5/143a(1) "Uninsured and hit and run motor vehicle coverage"

No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle that is designed for use on public highways and that is either required to be registered in this State or is principally garaged in this State shall be renewed, delivered, or issued for delivery in this State unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in Section 7-203 of the Illinois Vehicle Code¹ for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. Uninsured motor vehicle coverage does not apply to bodily injury, sickness, disease, or death resulting therefrom, of an insured while occupying a motor vehicle owned by, or furnished or available for the regular use of the insured, a resident spouse or resident relative, if that motor vehicle is not described in the policy under which a claim is made or is not a newly acquired or replacement motor vehicle covered under the terms of the policy. The limits for any coverage for any vehicle under the policy may not be aggregated with the limits for any similar coverage, whether provided by the same insurer or another insurer, applying to other motor vehicles, for purposes of determining the total limit of insurance coverage available for bodily injury or death suffered by a person in any one accident. No policy shall be renewed, delivered, or issued for delivery in this State unless it is provided therein that any dispute with respect to the coverage and the amount of damages shall be submitted for arbitration to the American Arbitration Association and be subject to its rules for the conduct of arbitration hearings as to all matters except medical opinions. As to medical opinions, if the amount of damages being sought is equal to or less than the amount provided for in Section 7-203 of the Illinois Vehicle Code, then the current American Arbitration Association Rules shall apply. If the amount being sought in an American Arbitration Association case exceeds that amount as set forth in Section 7-203 of the Illinois Vehicle Code, then the Rules of Evidence that apply in the circuit court for placing medical opinions into evidence shall govern. Alternatively, disputes with respect to damages and the coverage shall be

determined in the following manner: Upon the insured requesting arbitration, each party to the dispute shall select an arbitrator and the 2 arbitrators so named shall select a third arbitrator. If such arbitrators are not selected within 45 days from such request, either party may request that the arbitration be submitted to the American Arbitration Association. Any decision made by the arbitrators shall be binding for the amount of damages not exceeding \$75,000 for bodily injury to or death of any one person, \$150,000 for bodily injury to or death of 2 or more persons in any one motor vehicle accident, or the corresponding policy limits for bodily injury or death, whichever is less. All 3-person arbitration cases proceeding in accordance with any uninsured motorist coverage conducted in this State in which the claimant is only seeking monetary damages up to the limits set forth in Section 7-203 of the Illinois Vehicle Code shall be subject to the following rules:

215 ILCS 5/143a-2 (4) “Additional uninsured motor vehicle coverage”

For the purpose of this Code the term “underinsured motor vehicle” means a motor vehicle whose ownership, maintenance or use has resulted in bodily injury or death of the insured, as defined in the policy, and for which the sum of the limits of liability under all bodily injury liability insurance policies or under bonds or other security required to be maintained under Illinois law applicable to the driver or to the person or organization legally responsible for such vehicle and applicable to the vehicle, is less than the limits for underinsured coverage provided the insured as defined in the policy at the time of the accident. The limits of liability for an insurer providing underinsured motorist coverage shall be the limits of such coverage, less those amounts actually recovered under the applicable bodily injury insurance policies, bonds or other security maintained on the underinsured motor vehicle.

625 ILCS 5/7-317 “Motor vehicle liability policy”

“Motor vehicle liability policy” defined

(a) Certification. — A “motor vehicle liability policy”, as that term is used in this Act, means an “owner’s policy” or an “operator’s policy” of liability insurance, certified as provided in Section 7-315 or Section 7-316 [625 ILCS 5/7-315 or 625 ILCS 5/7-316] as proof of financial responsibility for the future, and issued, except as otherwise provided in Section 7-316 [625 ILCS 5/7-316], by an insurance carrier duly authorized to transact business in this State, to or for the benefit of the person named therein as insured.

(b) Owner’s Policy. — Such owner’s policy of liability insurance:

1. Shall designate by explicit description or by appropriate reference, all motor vehicles with respect to which coverage is thereby intended to be granted;

2. Shall insure the person named therein and any other person using or responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured;
3. Shall insure every named insured and any other person using or responsible for the use of any motor vehicle owned by the named insured and used by such other person with the express or implied permission of the named insured on account of the maintenance, use or operation of any motor vehicle owned by the named insured, within the continental limits of the United States or the Dominion of Canada against loss from liability imposed by law arising from such maintenance, use or operation, to the extent and aggregate amount, exclusive of interest and cost, with respect to each motor vehicle, of \$25,000 for bodily injury to or death of one person as a result of any one accident and, subject to such limit as to one person, the amount of \$50,000 for bodily injury to or death of all persons as a result of any one accident and the amount of \$20,000 for damage to property of others as a result of any one accident. The changes to this paragraph made by this amendatory Act of the 98th General Assembly apply only to policies issued or renewed on or after January 1, 2015.

625 ILCS 5/7-601 Required liability insurance policy

625 ILCS 5/7-601 Required liability insurance policy

(a) No person shall operate, register or maintain registration of, and no owner shall permit another person to operate, register or maintain registration of, a motor vehicle designed to be used on a public highway unless the motor vehicle is covered by a liability insurance policy.

The insurance policy shall be issued in amounts no less than the minimum amounts set for bodily injury or death and for destruction of property under Section 7-203 of this Code [625 ILCS 5/7-203], and shall be issued in accordance with the requirements of Sections 143a and 143a-2 of the Illinois Insurance Code, as amended [215 ILCS 5/143a and 215 ILCS 5/143a-2]. No insurer other than an insurer authorized to do business in this State shall issue a policy pursuant to this Section for any vehicle subject to registration under this Code. Nothing herein shall deprive an insurer of any policy defense available at common law.

625 ILCS 5/7-602 Insurance card

625 ILCS 5/7-602 Insurance card Every operator of a motor vehicle subject to Section 7-601 of this Code [625 ILCS 5/7-601] shall carry within the vehicle evidence of insurance. The evidence shall be legible and sufficient to demonstrate that the motor vehicle currently is covered by a liability insurance policy as required under Section 7-601 of this Code and may include, but is not limited to, the following:

(a) an insurance card provided by the insurer under this Section;

...

The form, contents and manner of issuance of the insurance card shall be prescribed by rules and regulations of the Secretary of State. The Secretary shall adopt rules requiring that reasonable measures be taken to prevent the fraudulent production of insurance cards. The insurance card shall display an effective date and an expiration date covering a period of time not to exceed 12 months. The insurance card shall contain the following disclaimer: "Examine policy exclusions carefully. This form does not constitute any part of your insurance policy." If the insurance policy represented by the insurance card does not cover any driver operating the motor vehicle with the owner's permission, or the owner when operating a motor vehicle other than the vehicle for which the policy is issued, the insurance card shall contain a warning of such limitations in the coverage provided by the policy.

STATEMENT OF FACTS

Phoungun Thounsavath filed a Complaint for Declaratory Judgment seeking a declaration that she is entitled to underinsured motorist coverage under a policy of motor vehicle insurance issued to her by State Farm Mutual Automobile Insurance Company (State Farm) under policy no. 447 5893-A17-13F for an automobile accident that occurred on June 17, 2012 (R.C3-C5). The complaint asserts that State Farm denied the claim because of a "named driver" exclusion for Clinton M. Evans, the person who operated the car that Thounsavath occupied at the time of the accident (R.C4). Thounsavath further asserted the exclusion violated both the public policy of Illinois and the Underinsured Motorist Statute, 215 ILCS 5/143a-2 (R.C4).

State Farm filed a Counterclaim for Declaratory Judgment. It alleged that there is no underinsured motorist coverage for Thounsavath under either of two policies issued by State Farm to Thounsavath, policy no. 447 5893-A17-13F or policy no. 118 8617-B18-13F, for the June 17, 2012 accident because of a Named Driver Exclusion Endorsement for Clinton M. Evans that appears in both policies (R.C22).

The described vehicle under policy no. 447 5893-A17-13F is a 2004 Pontiac GTO (R.C70). The described vehicle under policy no. 118 8617-B18-13F is a 1998 Pontiac Grand Am (R.C27). Neither vehicle was involved in the June 17, 2012 accident.

Both policies carried underinsured motorist coverage. Both policies also included an “6023CS DRIVER EXCLUSION ENDORSEMENT,” which were signed by Phoungun Thounsavath and provided:

IT IS AGREED WE SHALL NOT BE LIABLE AND NO LIABILITY OR OBLIGATION OF ANY KIND SHALL ATTACH TO US FOR BODILY INJURY, LOSS OR DAMAGE UNDER ANY OF THE COVERAGES OF THIS POLICY WHILE ANY MOTOR VEHICLE IS OPERATED BY:

CLINTON M. EVANS

(R.C28 and C71).

On June 17, 2012, Thounsavath was a passenger in a 2007 Hyundai automobile that was owned and operated by Clinton M. Evans when it was involved in an accident with an automobile operated by Paul J. Martineck (R.C4 and C24). Thounsavath was injured in the accident and made a claim for damages against Clinton M. Evans for her personal injuries, which claim was paid by the liability insurer for Clinton M. Evans, American Access Insurance Company, in the amount of \$20,000 (R.C24).

Thounsavath then made a claim for underinsured motorist coverage with State Farm for the June 17, 2012 accident based upon the negligence of Clinton M. Evans (R.C4, C24). State Farm denied the claim based upon the named driver exclusion (R.C4).

The trial court ordered the parties to file cross-motions for summary judgment (R.C118). State Farm filed its Motion for Summary Judgment on January 26, 2015 (R.C132). Thounsavath elected not to file a cross-motion for summary judgment. State

Farm's Motion for Summary Judgment was fully briefed and on May 27, 2015, the trial court denied State Farm's motion (R.C214). The trial court found the named driver exclusion violated the public policy of Illinois and the Illinois Safety and Family Financial Responsibility Law, 625 ILCS 5/7-100 (R.C214).

Plaintiff then filed her Motion for Summary Judgment on March 3, 2016 (R.C173). The trial court granted plaintiff's motion for summary judgment on May 4, 2016 (R.C224). State Farm filed its Notice of Appeal on May 10, 2016 (R.C225).

The appellate court entered its judgment in this case on June 30, 2017, affirming the judgment of the trial court and entering judgment for Phoungun Thounsavath (Appendix A002). No petition for rehearing was filed.

State Farm filed a petition for leave to appeal with the Supreme Court on August 4, 2017. The Petition was granted on September 27, 2017.

ARGUMENT

Introduction

The opinion of the appellate court purportedly relies on this court's analysis in *American Access Casualty Co. v. Reyes*, 2013 IL 115601 (Opinion, ¶ 28). However, as explained below, the appellate court's holding here is antithetical to the holding and the public policy articulated in *Reyes*. The decision is in conflict with a decision from the 5th District, *Rockford Mut. Ins. Co. v. Economy Fire Casualty Co.*, 217 Ill.App.3d 181 (5th Dist. 1991). The opinion is also based upon case law that has been statutorily overruled. Moreover, the outcome here is the same outcome this court found to be "repugnant to our system of justice" in *Fuoss v. Auto Owners (Mut.) Ins. Co.*, 118 Ill.2d 430 (1987). For all of these reasons, State Farm asks this court to reverse the decision of the appellate court and to enter judgment in favor of State Farm.

Standard of Review

Construction of the terms of an insurance policy and whether the policy comports with statutory requirements are questions of law properly decided on a motion for summary judgment. *Librizzi v. State Farm Fire & Casualty Co.*, 236 Ill.App.3d 582, 587 (1st Dist. 1992). The construction of an insurance policy is a question of law subject to *de novo* review. *State Farm v. Villicana*, 181 Ill.2d 436, 441 (1998). Moreover, a grant of summary judgment is reviewed *de novo*. *Adames v. Sheahan*, 233 Ill.2d 276, 296 (2009). Where the parties file cross-motions for summary judgment they concede the absence of a genuine issue of material fact and invite the court to decide the question presented as a matter of law. *Daniel v. AON Corporation*, 2011 IL App (1st) 101508 ¶ 17.

Insurance policies are contracts and should be construed as other contracts are construed. *Hartford Accident & Indemnity Co. v. Case Foundation Co.*, 10 Ill.App.3d 115, 121 (1st Dist. 1973). If a provision of an insurance policy can reasonably be said to be ambiguous, it will be construed in favor of the insured. *Dora Township v. Indiana Insurance Co.*, 78 Ill.2d 376, 379 (1980). If the provisions of the policy are clear and unambiguous, there will be no need for construction and the provisions will be applied as written. *Menke v. Country Mutual Insurance Co.*, 78 Ill.2d 420, 423 (1980). The court should not search for an ambiguity where there is none. *United States Fire Insurance Co. v. Schnackenberg*, 88 Ill.2d 1, 5 (1981).

The rules of construction do not require courts to reach strained or unreasonable interpretations which would have the effect of invalidating the contract between the parties. *JG Industries, Inc. v. National Union Fire Insurance Co.*, 218 Ill.App.3d 1061, 1066 (1st Dist. 1991). An insurer has the right to limit coverage on a policy, and where

an insurer has done so, a court must give effect to the plain language of the limitation, unless it conflicts with the law, *Britamco Underwriters, Inc. v. J.O.C. Enterprises, Inc.* 252 Ill.App.3d 96, 102 (2nd Dist. 1993), or violates public policy. *Menke* at 423.

I. Named Driver Exclusions are Valid in Illinois

The appellate court opinion recognizes that “[i]n general, named driver exclusions in automobile liability insurance policies are permitted in Illinois,” citing *American Access Casualty Co. v. Reyes*, 2013 IL 115601, ¶ 15 (Opinion ¶¶22).

There are a long line of Illinois cases, upholding named driver exclusions, including *Heritage Ins. Co. v. Phelan*, 59 Ill.2d 389 (1974); *Rockford Mut. Ins. Co. v. Economy Fire & Casualty Co.*, 217 Ill.App.3d 181 (5th Dist. 1991) and *St. Paul Fire & Marine Ins. Co. v. Smith*, 337 Ill.App.3d 1054 (1st Dist. 2003).

In *St. Paul Fire & Marine Ins. Co. v. Smith*, the insured challenged the validity of a named driver exclusion that was asserted by the insurer to deny bodily injury liability coverage. The insured argued that the exclusion violated the mandatory automobile liability insurance law in Illinois, 625 ILCS 5/7-601(a), which, according to the insured, required that a motor vehicle liability policy “insure the person named therein and any other person using...such motor vehicle...with the express or implied permission of the insured.” The appellate court stated that section 7-602 of the mandatory insurance law recognizes that insurance policies may exclude *named* drivers from coverage (625 ILCS 5/7-602). The court held that section 7-602 creates a limited exception for named driver exclusions to the mandatory insurance laws. *Smith* at 1060.

There can be no argument that named driver exclusions do not violate 625 ILCS 5/7-601(a) or the public policy of Illinois. The public policy of Illinois is to be found in

its constitution, its statutes and its judicial decisions. *O'Hara v. Ahlgren, Blumenfeld & Kempster*, 127 Ill.2d 333, 341 (1989). The public policy as articulated in the mandatory insurance law, is to allow named driver exclusions. In fact, the court in *St. Paul Fire & Marine Ins. Co. v. Smith*, explained the public policy promoted by named driver exclusions, stating:

Additionally, we note that other states upholding the validity of named driver exclusions have delineated several public policy reasons supporting the exclusions. A Texas appeals court found that named driver exclusions furthered Texas's public policy of protecting all potential claimants from damages resulting from automobile accidents by enabling drivers with family members having poor driving records to procure affordable insurance, rather than obtaining coverage from an assigned risk pool at a greater cost or not securing insurance at all. Further, these exclusions deterred insured drivers from entrusting their vehicles to unsafe excluded drivers which kept those unfit drivers off the road. *Zamora v. Dairyland County Mutual Insurance Co.*; 930 S.W.2d 739, 741 (Tex. Ct. App. 1996). See also *Pierce v. Oklahoma Property & Casualty Insurance Co.*, 1995 OK 78, 901 P.2d 819, 823 (Okla. 1995) (“[o]ur legislature realized that premiums might be too costly in some circumstances, and chose to allow the contracting parties to exclude specifically named individuals,” allowing families to obtain affordable insurance); *State Farm Mutual Automobile Insurance Co. v. Washington*, 641 A.2d 449, 451-52 (Del. 1994) (named driver exclusions “ensure continued coverage of an automobile where the driving record of a household member warrants non-issuance or cancellation”); *Dairyland Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, 882 P.2d 1143, 1143 (Utah 1994) (the rationale of the exclusion “is to enable households that include a family member who has a poor driving record to obtain insurance at a reasonable cost by excluding the poor driver”). We agree that these policy reasons are sound and further support our holding.

Therefore, we hold that the named driver exclusion in St. Paul's automobile insurance liability policy does not contravene Illinois public policy because the legislature

created a limited exception to the mandatory insurance law for this exclusion.

Smith at 1061-1062.

Clearly, the reason for the driver exclusion endorsement for Clinton M. Evans is that State Farm identified Mr. Evans as an individual for whom State Farm would not provide insurance coverage of any kind. *St. Paul Fire & Marine Ins. Co. v. Smith* explains why such exclusions are upheld in Illinois. Thounsavath knew when she signed the endorsements that State Farm would not pay any liability of any kind under any coverage when Clinton M. Evans operated any automobile. Thounsavath had to understand that she could search for another insurer if the State Farm driver exclusion endorsements were not acceptable to her. As shall be explained, Thounsavath, and the appellate court, have taken the position that the endorsements are effective as to the general public, but cannot be enforced against Thounsavath, the person who agreed to the exclusionary endorsements. Such a conclusion is antithetical to the principles of fairness and justice.

II. State Farm's Driver Exclusion Endorsement is Consistent with the Mandatory Insurance Law and Illinois Public Policy

The appellate court opinion citing, *American Access Casualty Co. v. Reyes*, 2013 IL 115601, concludes that the named driver exclusion violates Illinois' mandatory insurance requirement, Section 143a-2 of the Insurance Code (215 ILCS 5/143a-2) and Illinois public policy (Opinion, ¶ 34). Respectfully, *Reyes* is easily distinguishable from Thounsavath's claims and is not support for her position.

In *Reyes*, American Access issued an automobile liability insurance policy to Ana Reyes for a 1999 Chrysler 300M she owned. The policy application showed her as driver

number one and her friend, Jose Cazarez, was listed as driver number two. The policy showed Reyes as the named insured, but also included an “ENDORSEMENT EXCLUDING SPECIFIED OPERATORS.” The Endorsement provided:

In consideration of the premium at which this policy is written, notwithstanding any other provision of the policy, it is agreed that no coverage is afforded under [sic] policy and to any claim or suit which occurs as the result of the vehicle being operated by the following person(s)"

Reyes at ¶ 4. Ana Reyes was identified as that person.

The policy defined Reyes as the named insured and also contained a clause excluding liability coverage for any bodily injury or property damage caused by “any automobile while in control of an excluded operator.” Reyes was therefore the named insured and the excluded operator. Reyes operated the Chrysler when she struck two pedestrians, seriously injuring one and killing the other. The injured person and the estate filed suit against Reyes.

American Access denied liability coverage to Reyes based upon the exclusion. The trial court granted summary judgment for American Access, but the appellate court reversed, holding that a blanket exclusion that precludes all liability coverage for the only named insured, violated public policy, and this court affirmed.

The narrow issue this court identified and addressed is “whether the sole named insured and owner can be excluded from coverage” under the Illinois Safety and Family Financial Responsibility Law (625 ILCS 5/7-606(a)). *Reyes* at ¶ 15. This court held that “an automobile liability insurance policy cannot exclude the sole named insured since such an exclusion conflicts with the plain language of section 7-317(b)(2) and, therefore, violates public policy.” *Id.* at ¶ 20.

The named driver exclusion in Thounsavath's policy does not name Thounsavath as the excluded driver. It names Clinton M. Evans. Under the named driver exclusion, Thounsavath would never be excluded from liability coverage for her operation of any vehicle. According to *Reyes*, "[t]he principal purpose of the state's mandatory liability insurance requirement is to *protect the public* by securing payment of their damage." *Id.* at ¶ 8 [emphasis added]. There is nothing in the *Reyes* decision to indicate there is a public policy of protecting named insureds at a level higher than the general public.

This court reasoned:

The issue in this case is whether an automobile liability policy can exclude the only named insured and owner of the vehicle without violating public policy. When a statute exists for the protection of the public, it cannot be overridden through private contractual terms. *Progressive*, 215 Ill. 2d at 129. One 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." *American Country Insurance Co. v. Wilcoxon*, 127 Ill. 2d 230, 241, 537 N.E.2d 284, 130 Ill. Dec. 217 (1989). Where liability coverage is mandated by statute, a contractual provision in an insurance policy which conflicts with the statute will be deemed void. *Progressive*, 215 Ill. 2d at 129. When we assess whether a statutory provision prevails over a contractual provision, however, we must keep in mind that parties have freedom to contract as they desire. *Id.* We have reasoned:

"The freedom of parties to make their own agreements, on the one hand, and their obligation to honor statutory requirements, on the other, may sometimes conflict. These values, however, are not antithetical. Both serve the interests of the public. Just as public policy demands adherence to statutory requirements, it is in the public's interest that persons not be unnecessarily restricted in their freedom to make their own contracts."

Reyes at ¶ 9 [emphasis added].

Thounsavath had the freedom to make her own contract with State Farm. No attempt is being made to enforce the exclusion against members of the general public. The exclusion is being applied against only Thounsavath and only in accordance with her contract. No innocent third party is jeopardized by applying the contractual agreement to her.

Second, *Reyes* deals only with liability coverage, the only coverage that is addressed by the Illinois Safety and Family Financial Responsibility Law. Thounsavath's claim is for underinsured motorist coverage, which is not addressed by that statute. Liability coverage provides protection for the general public. Underinsured motorist coverage provides protection only for those who are "insured" as defined by the policy. *Schultz v. Ill. Farmers Ins. Co.*, 237 Ill.2d 391 (2010). The public policy considerations are necessarily different and this court has consistently applied reasonable limitations on underinsured motorist coverage consistent with out "system of justice."

Third, *Reyes* does not hold that a named driver exclusion, *per se*, violates the Illinois Safety and Family Financial Responsibility Law. In fact, *Reyes* states just the opposite. The court stated:

There is no question that, as a general matter, named driver exclusions are permitted in Illinois. *Dungey*, 155 Ill. 2d at 336; *Phelan*, 59 Ill. 2d at 396; *Arive*, 2012 IL App (1st) 111885, ¶ 17; *Smith*, 337 Ill. App. 3d at 1060; *Rockford*, 217 Ill. App. 3d at 187. However, as State Farm points out, none of the authorities relied upon by American Access address the question at issue here—whether the sole named insured and owner can be excluded from coverage. In *Dungey*, we upheld a named driver exclusion for the husband of the named insured wife. In *Phelan*, the issue was whether the excluded driver, who was the insured's teenage son, was an "operator" under the language of the exclusion provision since at the time of the accident, he was outside of the insured vehicle. In *Rockford*, the named

insureds' son was excluded, and the issue was whether that named driver exclusion violated public policy to the extent it voided uninsured-motorist coverage. In *Smith*, once again, the named insureds' son was excluded, and the issue was whether this exclusion violated public policy. Lastly, in *Arive*, the issue was whether the fact that the excluded driver was not listed on the insurance card rendered the named driver exclusion unenforceable. Again, none of these cases addressed the question of whether the *sole* named insured can be excluded and none of these cases held that a named driver exclusion can override the plain language of section 7-317(b)(2)

Reyes at ¶ 15.

The public policy of Illinois is to be found in its constitution, its statutes and its judicial decisions. *O'Hara v. Ahlgren, Blumenfeld & Kempster*, 127 Ill.2d 333, 341 (1989). The public policy must be clearly defined and dominant, and should not be gleaned from "general considerations of supposed public interests." *Hyatte v. Quinn*, 239 Ill.App.3d 893, 898-9 (2nd Dist. 1993). 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, Cty. & Mun. Employees, AFL-CIO v. Dep't of Cent. Mgmt. Servs.*, 173 Ill. 2d 299, 307 (1996).

Am. Access Cas. Co. v. Reyes, supra, clearly defines the public policy behind Illinois' mandatory liability insurance law, i.e. "to protect the public by securing payment of their damages." *Id.* at ¶ 8. That clearly defined public policy has no application to Thounsavath's claim for underinsured motorist coverage.

The named driver exclusion in Thounsavath's policies would preclude coverage for Clinton M. Evans' operation of either of Thounsavath's vehicles, or any other vehicle, for that matter. See *Heritage Ins. Co. v. Phelan*, 59 Ill.2d 389, 398 (1974). There would be no liability coverage available to the general public. The application of the exclusion,

according to *St. Paul Fire & Marine Ins. Co. v. Smith, supra*, would not violate the mandatory insurance laws or this State's public policy.

III. Applying the Driver Exclusion Endorsement to Plaintiff does not Violate the Uninsured or Underinsured Motorist Statutes

The appellate court opinion relies on case law that is no longer the law of this state. The court cites *Doxtater v. State Farm Mutual Automobile Insurance Co.*, 8 Ill.App.3d 547 (1st Dist. 1972), for “finding that section 143a of the Insurance Code [the Uninsured Motorist Statute] directed insurance companies to provide uninsured motor vehicle coverage for an insured regardless of whether, at the time of injury, the insured occupied or operated vehicles declared in the subject policy, citing *Barnes v. Powell*, 49 Ill.2d 449 (1971).”

The insurance policy in *Doxtater* insured an automobile owned by the named insured, Ervin Doxtater, and described in the declarations. The insured's son, a resident of his father's household, operated his own motorcycle when it was struck by an uninsured motor vehicle. The collision caused injuries to the son. The son made a claim for uninsured motorist coverage under his father's policy. The insurer denied the claim because of an exclusions in the policy that provided:

THIS INSURANCE DOES NOT APPLY:

. . .

(b) To bodily injury to an insured while occupying or through being struck by a land motor vehicle owned by the named insured or any resident of the same household, if such vehicle is not [the vehicle described in the declarations. . . a temporary substitute automobile, or a newly acquired automobile]...

Doxtater at 548.

The *Doxtater* court refused to enforce the exclusion to deny uninsured motorist coverage to the son. *Doxtater* was legislatively overruled by the Illinois legislature in 1995 when the Uninsured Motorist Statute, 215 ILCS 5/143a, was amended to add the following provisions:

Uninsured motor vehicle coverage does not apply to bodily injury, sickness, disease or death resulting therefrom, of an insured while occupying a motor vehicle owned by, or furnished or available for the regular use of the insured, a resident spouse or resident relative, if that motor vehicle is not described in the policy under which a claim is made or is not a newly acquired or replacement motor vehicle covered under the terms of the policy,

thus effectively overruling *Doxtater*. (See also *Luetchefeld v. Allstate Ins. Co.*, 167 Ill.2d 148 (1995)). *Doxtater* is no longer the law of this state and the public policy of Illinois, as expressed in its statutes and its judicial decisions, allows for exclusions to uninsured motorist coverage.

The 1995 amendment to the Uninsured Motorist Statute shows that reasonable restrictions under uninsured motorist coverage on the vehicle an insured occupies at the time of his accident are permissible under the statute.

The appellate court here was simply incorrect in asserting the Uninsured Motorist Statute “direct[s] insurance companies to provide uninsured motor vehicle coverage for an insured, regardless of whether, at the time of injury, the insured occupied or operated vehicles’ declared in the subject policy.” (Appendix A007, Appellate Opinion, ¶24).

Doxtater cannot be a basis in support of Thounsavath’s position.

The appellate court’s opinion here also conflicts with the Fifth District’s decision in *Rockford Mut. Ins. Co. v. Economy Fire & Casualty Co.*, 217 Ill.App.3d 181 (5th Dist. 1991). There, the court rejected the insured’s argument that a named driver exclusion

could not be enforced under the uninsured motorist coverage. The insured had argued that enforcing the exclusion would violate the public policy of the State of Illinois expressed in the Uninsured Motorist Statute, 215 ILCS 5/143a, which requires mandatory uninsured motorist coverage. The argument was rejected.

Implicit in both the appellate court's opinion and the argument advanced by Thounsavath in the trial court and the appellate court is that the named driver exclusion cannot be applied to her claim for underinsured motorist coverage based upon the operation of any vehicle by Clinton M. Evans, but can be applied to anyone else who may make an underinsured claim. The distinction that she made between herself as a named insured and other insureds under the requirements of the underinsured motorist coverage is not recognized by this court. See *Schultz v. Ill. Farmers Ins. Co.*, 237 Ill.2d 391, 404-5 (2010). She has no special privilege or status by virtue of being the named insured.

State Farm Mut. Auto Ins. Co. v. Villicana, 181 Ill.2d 436 (1998), also supports State Farm's position. In *Villicana*, Jennifer Villicana, the daughter of the named insured, was injured in a one vehicle accident. She was a passenger in a car owned by her father. The car was operated by Jennifer's boyfriend. State Farm paid Jennifer the \$100,000 bodily injury liability limit of the policy issued to the vehicle involved in the accident.

Jennifer then made a claim for underinsured motorist coverage under a second policy issued by State Farm to her father that insured another vehicle owned by her father. That policy provided liability and underinsured motorist coverage in the sum of \$250,000 per person.

The second policy contained the following provision:

An underinsured motor vehicle does not include a land motor vehicle:

1. insured under the liability coverage of this policy;
2. furnished for the regular use of you, your spouse or any relative;

State Farm denied Jennifer's claim for underinsured motorist coverage for the reason that the car involved in the accident was furnished for the regular use of both Jennifer and her father and could not be considered an underinsured motor vehicle under the second policy.

The appellate court held the exclusion was unenforceable for the reason it contravened the public policy represented in 215 ILCS 5/143a-2(4) because it could operate in some circumstances to leave the insured without any protection against an underinsured motorist. That is also a reason for the appellate court's ruling here.

The supreme court reversed the appellate court. The court began its analysis by discussing the public policy underlying underinsured motorist coverage, stating:

Both the underinsured and uninsured motor vehicle provisions contemplate that consumers will select the total "package" of coverage, i.e., liability, uninsured and underinsured, in amounts they themselves deem adequate for their own protection as well as for the protection of their additional insureds. As such, underinsured motor vehicle coverage protects the insured and any additional insureds from the risk that a negligent driver of another vehicle (i) will cause injury to the insured or his additional insureds and (ii) will have inadequate liability coverage to compensate the injuries caused by his or her negligence. Stated differently, this type of coverage guarantees the protection of an injured insured against the possibility that a tortfeasor, over whom the insured has no control, purchases inadequate amounts of liability coverage.

Villicana at 444-445.

Initially, it needs to be noted that the supreme court did not give the named insured special status. The public policy as expressed in *Villicana* applies equally to named insureds and additional insureds.

Second, it cannot be said that Phoungoun Thounsavath had no control over the tortfeasor, Clinton M. Evans, or his decision to purchase minimal liability coverage. The trial court here argued that “Plaintiff was in a position to stop Evans from driving one of her insured vehicles, but cannot stop him from driving one of his own insured vehicles.” The argument misses the point. Thounsavath had the choice not to ride as a passenger in Evans’ own vehicle or any other vehicle Evans decided to operate. Thounsavath knew when she signed the named driver exclusions that State Farm would not be liable “under any of the coverages” while Clinton M. Evans operated “any motor vehicle.” Yet, she chose to ride as a passenger in his vehicle. The choice was completely hers.

Villicana provides another reason why there is no underinsured motorist coverage for Thounsavath’s accident. Thounsavath has asserted that the named driver exclusion could not be enforced against her because she was the named insured under her policies. The *Villicana* court addressed a similar argument on page 447:

In this respect, we must point out that had Bernard or Jennifer been involved in an accident while driving the vehicle and if he or she were determined to be at fault, only \$100,000 in coverage would be available to injured third parties. Jennifer here is attempting to recover more benefits when injured by her own family car than was made available to potential third parties injured by the same vehicle.

In our view, this was not the scenario that the legislature sought to prevent when it enacted the underinsurance statute. Underinsured coverage was not designed to provide consumers with protection from their own insurance decisions. Rather, the statute was enacted to afford

consumers with the means by which they could protect themselves from the choices of other drivers over which they had no control.

Villicana at 447.

Villicana demonstrates that policy exclusions or restrictions for underinsured motorist coverage do not become unenforceable merely because the named insured is the person seeking the coverage. Moreover, this court has approved exclusions for underinsured motorist coverage when the exclusions promote a well-articulated policy and do not violate the public policy behind underinsured motorist coverage. Finally, underinsured motorist coverage “was not designed to provide consumers with protection from their own insurance decisions.” Once again, Thounsavath made this decision.

The purpose of the statute requiring automobile insurance policies to provide underinsured motorist coverage, 215 ILCS 5/143a-2, is to place the insured in the same position she would have occupied if the tort-feasor had carried adequate insurance.

Villicana at 443. Underinsured motorist coverage is one of the three statutorily mandated coverages meant to protect people who suffer bodily injuries as a result of the negligence of an operator of a motor vehicle, i.e. liability coverage for drivers who injure others, uninsured motorist coverage for drivers who have no insurance and injure a person who is defined as an insured under the policy, and underinsured motorist coverage for drivers with too little insurance who injure a person defined as an insured under the policy. It simply makes no sense that a named driver exclusion could exclude liability coverage for Thounsavath’s own injuries at the hand of Clinton M. Evans, but cannot exclude underinsured motorist coverage for the same accident and injuries because underinsured motorist coverage, and not liability coverage, is claimed.

Thounsavath's argument that she has a special status as a named insured was also addressed and rejected by the Supreme Court of Pennsylvania in *Progressive N. Ins. Co. v. Schneck*, 572 Pa. 216, 813 A.2d 828, 2002 Pa. LEXIS 3120, (Pa. 2002). The court stated:

75 Pa.C.S. §1731(a) requires policies to offer UM/UIM coverage in amounts provided in §1734, which sets the amounts equal to or less than the limits of liability for bodily injury. The effect of the ***named driver exclusion*** was to set the limit of liability for bodily injury to zero. Permitting the recovery of UM/UIM benefits in excess of the liability coverage would be contrary to the statutory scheme of limiting UM/UIM benefits to liability limits. See 75 Pa.C.S. §1736 (limiting UM/UIM coverage increases no greater than limits of liability specified in bodily injury provisions).

Obviously, liability coverage for Christopher would have been costly, given his license suspension; Michelle limited the cost of premiums by electing to exclude Christopher from liability coverage. As the practical effect of the ***named driver exclusion*** was to provide Christopher with no liability coverage, then pursuant to §1731 & §1734, UM/UIM coverage was also zero. To gain UM/UIM coverage under the policy for Christopher, he was required to purchase the cost prohibitive liability coverage. Therefore, to the extent a ***named driver exclusion*** operated to bar UM/UIM coverage because of foregone liability coverage, the result is consistent with the public policy of cost containment and consumer choice. *See generally Luechtefeld v. Allstate Ins. Co.*, 167 Ill.2d 148 (1995) (indicating that, allowing an insured to claim UIM benefits in an amount greater than the limits of his liability coverage would be “repugnant to our system of justice,” as it would allow him to “provide more protection for himself than he was...willing to extend to the general public” (internal quotation marks omitted)).

Progressive N. Ins. Co. v. Schneck at 222-223.

Luechtefeld v. Allstate Ins. Co., 167 Ill.2d 148 (1995), is not the only case where this court spoke to the inequity of allowing a named insured to recover underinsured

motorist coverage in an amount greater than the liability coverage the policy provided for injuries to others. In *Fuoss v. Auto Owners (Mut.) Ins. Co.*, 118 Ill.2d 430 (1987), the named insured, Fuoss, was injured by the negligence of another driver. The other driver had \$100,000 of bodily injury liability coverage that was paid to Fuoss. Fuoss had bodily injury liability limits of \$25,000/\$50,000, uninsured limits of \$15,000/\$30,000, and no underinsured motorist coverage.

Fuoss proved his insurer failed to meaningfully offer underinsured motorist coverage as required by the statute, 215 ILCS 5/143a-2(3). The judicially determined remedy in Illinois was to imply such additional coverage by operation of law with limits equal to the injured party's uninsured motorist coverage. *Tucker v. Country Mut. Ins. Co.*, 125 Ill.App.3d 329 (4th Dist. 1984). Obviously, such a remedy would have provided no relief to Fuoss.

Fuoss, however, argued that the remedy for his insurer's failure to offer underinsured motorist coverage should have been to allow him to purchase a sufficient amount of underinsured motorist coverage to cover his loss. In other words, Fuoss requested UIM coverage in excess of the \$100,000 liability coverage he had already recovered from the other driver. The Supreme Court rejected Fuoss's claim, stating:

Finally, as our appellate court accurately observed, to give credence to Fuoss' statement would result in "an aggrieved party rewrite[ing] his insurance contract to fit his needs *after* a loss [has] occurred, a procedure completely inimical to the concept of insurance." (Emphasis in original.) (148 Ill.App.3d 526, 534.) It would permit Fuoss to choose, after the fact, underinsurance coverage in an amount greater than he originally selected for bodily injury liability coverage with the result that Fuoss would be providing more protection for himself than he was originally willing to extend to the general public. Such an outcome would, as the appellate court said, be "repugnant to our system of

justice.” (148 Ill.App.3d 526, 535.) Therefore, the judgments of the circuit and appellate courts are affirmed.

Fuoss at 434.

Thounsavath’s argument that the named driver exclusion cannot apply to her as the named insured presents the same inequitable argument the *Fuoss* court rejected, i.e. providing more protection to herself than she was willing to extend to the general public when she agreed to and signed the named driver exclusions.

The appellate court relied heavily on the decision in *Barnes v. Powell*, 49 Ill.2d 449 (1971), in support of its holding that the named driver exclusion in Thounsavath’s policies could not act to deprive her of underinsured motorist coverage. (Opinion, ¶ 24).

Barnes was decided in 1971. It dealt with a “member of the household” exclusion under liability coverage. This court held that a “member of the household” exclusion was enforceable, but the injured insured was then entitled to make a claim for uninsured motorist coverage under the same policy. Two of the other cases relied upon by the appellate court, *Madison County Automobile Insurance Co. v. Goodpasture*, 49 Ill.2d 555 (1971), and *Kerouac v. Kerouac*, 99 Ill.App.3d 254 (3rd Dist. 1981), also involved a “member of the household” exclusion and followed *Barnes*. None of these three cases involved a named driver exclusion.

However, this court in *Heritage Ins. Co. v. Phelan*, 59 Ill.2d 389 (1974), decided three years after *Barnes*, in specifically discussing *Barnes* and *Goodpasture*, stated that *Barnes* and *Goodpasture* were not applicable to the enforcement of the named driver exclusion as it applies to uninsured motorist coverage. *Phelan* at 395.

The injured person in *Barnes*, the person making the claims for coverage, was the named insured’s spouse. The *Barnes* court found, and the claimant spouse agreed, that

there was no liability coverage afforded to the named insured because of the “member of the household” exclusion. There was no exclusion under the uninsured motorist coverage. The issue the court was asked to address in *Barnes* was whether the driver would be considered uninsured because of the “member of the household” exclusion.

It is questionable whether *Barnes* is still good law since the passage of the mandatory liability insurance laws. In *State Farm v. Smith*, 197 Ill.2d 369 (2001), this court held that “[e]xclusions written into an insurance policy by the insurance company are not “policy defenses available at common law.” They are contractual provisions and they will be found to violate the mandatory insurance law. *Id.* at 378. *American Access Cas. Co. v. Reyes*, 2013 IL 155601, holds that 625 ILCS 5/7-317(b)(2) prohibits any contractual exclusion for liability coverage to the named insured. Thus, the “member of the household” exclusion should no longer be applied, to the named insured or any insured driver, to deny liability coverage for the claim of a spouse or relative. The named driver exclusion, however, is authorized by Section 7-602 of the mandatory insurance law (625 ILCS 5/7-602) and remains a viable exclusion.

However, *Barnes* does not need to be overruled here to reverse the appellate court. *Barnes* is easily distinguishable from both Thounsavath’s claim and from *Reyes* . *Reyes* holds that a named driver exclusion cannot be enforced against a named insured to exclude liability coverage from claims made by others against her. *Barnes* does not address that question and it certainly does not address the mandatory liability insurance law. It is simply inapplicable to Thounsavath’s claim.

Respectfully, the trial court misinterpreted the holding of *Reyes* and misunderstood the public policy articulated by the Supreme Court in its opinion. The

narrow, well-defined public policy articulated in *Reyes*, i.e. “to protect the public by securing payment of their damages” is not the public policy applicable to Thounsavath’s claim for underinsured motorist coverage.

Named driver exclusions are permitted in Illinois. It smacks of injustice to allow Phoungun Thounsavath to contract away coverage for the general public when Clinton M. Evans operates a car, but to claim she is somehow immune or exempt from the exclusion.

CONCLUSION

The appellate court’s decision is inconsistent with the reasoning of *American Access v. Reyes*. It is a drastic departure from the public policy pronouncement in *Fuoss v. Auto Owners*. It relies on case law that has been legislatively overruled or is no longer viable in light of the mandatory insurance law. State Farm respectfully requests this court reverse the decision of the appellate court, enter judgment for State Farm and provide any additional relief the court deems appropriate.

Respectfully submitted,



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CERTIFICATE

I certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and 341(b). The length of this brief, excluding the pages and words contained in the 341(d) cover, the Rule 341(h)(1) statement of points and authorities, The Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is Twenty-six (26) pages.



Frank C. Stevens, Attorney for Appellant

APPENDIX

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2017 IL App (1st) 161334

FIFTH DIVISION
June 30, 2017

No. 1-16-1334

PHOUNGEUN THOUNSAVATH,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff and)	
Counterdefendant-Appellee,)	
)	
v.)	No. 2014 CH 02511
)	
STATE FARM MUTUAL AUTOMOBILE)	
INSURANCE COMPANY,)	Honorable
)	Kathleen M. Pantle,
Defendant and)	Judge Presiding.
Counterplaintiff-Appellant.)	
)	
)	

JUSTICE HALL delivered the judgment of the court, with opinion.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment and opinion.

OPINION

¶ 1 The plaintiff, Phoungoun Thounsavath, filed a complaint for declaratory judgment against the defendant, State Farm Mutual Automobile Insurance Company (State Farm). The plaintiff sought a declaration that, as applied to her, the driver exclusion endorsement in the automobile liability policies issued to her by State Farm violated section 143a-2 of the Illinois Insurance Code (215 ILCS 5/143a-2 (West 2012)) and the public policy of Illinois. State Farm answered the complaint and filed a counterclaim for declaratory judgment, seeking a declaration that the plaintiff was not entitled to underinsured coverage under her

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automobile liability policies with State Farm. The circuit court denied State Farm's motion for summary judgment and granted the plaintiff's motion for summary judgment. State Farm appeals.

¶ 2 On appeal, State Farm contends that, as to the plaintiff, its driver exclusion endorsement does not violate section 7-317(b)(2) of the Illinois Safety and Family Financial Responsibility Law (Financial Responsibility Law) (625 ILCS 5/7-317(b)(2) (West 2012)), section 143a-2 of the Insurance Code, or Illinois public policy.

¶ 3 **BACKGROUND**

¶ 4 The facts are not in dispute. The plaintiff was injured while a passenger in a vehicle driven by Clinton M. Evans. At the time of the accident, Mr. Evans was insured by American Access Insurance Company (AAIC), and the plaintiff was insured by State Farm under two automobile liability policies. The plaintiff made a claim against Mr. Evans for her personal injuries, which was paid by AAIC in the amount of \$20,000.

¶ 5 The plaintiff then filed an underinsured motorist claim with State Farm. State Farm denied coverage under the following provision contained in both of the automobile liability policies it issued to the plaintiff:

“ ‘IT IS AGREED *WE* SHALL NOT BE LIABLE AND NO LIABILITY OR OBLIGATION OF ANY KIND SHALL ATTACH TO *US* FOR *BODILY INJURY, LOSS OR DAMAGE* UNDER ANY OF THE COVERAGES OF THIS POLICY WHILE ANY MOTOR VEHICLE IS OPERATED BY: CLINTON M. EVANS’ ”

(Emphasis in original.)

¶ 6 On May 27, 2015, the circuit court denied State Farm's motion for summary judgment. The court found that while named driver exclusions are recognized in Illinois, the issue was

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whether such exclusions may be used to deny coverage to the named insured. The court determined that such exclusions do not override the plain language of section 7-317(b)(2) of the Financial Responsibility Act and denied State Farm's motion for summary judgment. Thereafter, the plaintiff filed her motion for summary judgment, which was granted by the circuit court on May 4, 2016.

¶ 7 On May 10, 2016, State Farm filed its notice of appeal from the May 27, 2015, and May 4, 2016, orders of the circuit court.

¶ 8 ANAYLSIS

¶ 9 I. Standards of Review

¶ 10 We review the granting of summary judgment, the construction of an insurance policy, and the construction of a statute *de novo*. *Goldstein v. Grinnell Select Insurance Co.*, 2016 IL App (1st) 140317, ¶ 10.

¶ 11 II. Applicable Principles

¶ 12 "Summary judgment is proper if, and only if, the pleadings, depositions, admissions, affidavits and other relevant matters on file show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Illinois Farmers Insurance Co. v. Hall*, 363 Ill. App. 3d 989, 993 (2006). "The cardinal rule of statutory construction is to determine and give effect to the legislature's intent." *Sulser v. Country Mutual Insurance Co.*, 147 Ill. 2d 548, 555 (1992).

¶ 13 The rules of construction applicable to contracts apply as well to insurance policies. *Goldstein*, 2016 IL App (1st) 140317, ¶ 13. The primary objective is to ascertain and give effect to the parties' intentions as expressed in the policy's language. *Goldstein*, 2016 IL App (1st) 140317, ¶ 13. The policy is construed as a whole giving effect to every provision;

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unambiguous words in the policy are to be given their plain, ordinary and popular meaning. *Goldstein*, 2016 IL App (1st) 140317, ¶ 13.

¶ 14 III. Statutes and Public Policy

¶ 15 A. Illinois's Mandatory Insurance Statutory Scheme

¶ 16 Under the Financial Responsibility Law, no one may operate a motor vehicle or allow a vehicle to be operated without obtaining sufficient insurance. 625 ILCS 5/7-601(a) (West 2012); see 625 ILCS 5/7-605(a), 7-203 (West 2012) (setting forth the mandatory minimum amounts of insurance to be carried). Section 7-317(b) of the Financial Responsibility Law provides that the owner's policy of liability insurance "[s]hall insure the person named therein and any other person using or responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured." 625 ILCS 5/7-317(b)(2) (West 2012).

¶ 17 "The 'principle purpose' of the mandatory liability insurance requirement is 'to protect the public by securing payment of their damages.' " *Phoenix Insurance Co. v. Rosen*, 242 Ill. 2d 48, 57 (2011) (quoting *Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co.*, 215 Ill. 2d 121, 129 (2005)). In furtherance of that purpose, the Insurance Code requires automobile liability insurance policies to include uninsured and underinsured motorist coverage. See 215 ILCS 5/143a, 143a-2 (West 2012). Uninsured-motorist coverage is required so that the policyholder is placed in substantially the same position he would occupy if he were injured or killed in an accident where the party at fault carried the minimum liability coverage specified in section 203 of the Financial Responsibility Law. *Phoenix Insurance Co.*, 242 Ill. 2d at 57; see 625 ILCS 5/7-203 (West 2010). From the legislative history, the supreme court concluded that the "legislative purpose

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of the underinsured-motorist coverage provision is the same as that of uninsured-motorist coverage, ‘i.e., to place the insured in the same position he would have occupied if the tortfeasor had carried adequate insurance.’ ” *Phoenix Insurance Co.*, 242 Ill. 2d at 57 (quoting *Sulser*, 147 Ill. 2d at 555).

¶ 18

B. Public Policy

¶ 19

“ ‘Parties to a contract may agree to any terms they choose unless their agreement is contrary to public policy.’ ” *Allstate Property & Casualty Insurance Co. v. Trujillo*, 2014 IL App (1st) 123419, ¶ 18 (quoting *Sulser*, 147 Ill. 2d at 559). “An agreement will not be invalidated unless it is clearly contrary to what the constitution, the statutes, or the decisions of the courts have declared to be the public policy of Illinois or unless the agreement is ‘manifestly injurious to the public welfare.’ ” *Phoenix Insurance Co.*, 242 Ill. 2d at 55 (quoting *Progressive Universal Insurance Co. of Illinois*, 215 Ill. 2d at 129-30).

¶ 20

IV. Discussion

¶ 21

State Farm maintains that the named driver exclusion in the automobile liability insurance policies it issued to the plaintiff does not violate either the provisions of the Illinois Insurance Code or Illinois public policy. We disagree.

¶ 22

In general, named driver exclusions in automobile liability insurance policies are permitted in Illinois. *American Access Casualty Co. v. Reyes*, 2013 IL 115601, ¶ 15. Such exclusions have been enforced by both the supreme court and the appellate court. In *Heritage Insurance Co. of America v. Phelan*, 59 Ill. 2d 389 (1974), the supreme court upheld the denial of uninsured motorist coverage to the son of the named insured where the son was excluded from liability coverage under a restrictive endorsement. In *St. Paul Fire & Marine Insurance Co. v. Smith*, 337 Ill. App. 3d 1054 (2003), the appellate court, as a matter of first

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impression determined that section 7-602 of the Financial Responsibility Law, requiring an insurance card to provide warnings if the insurance policy contained coverage restrictions, permitted named driver exclusions from the mandatory liability insurance requirement. To the extent section 7-602 conflicted with section 7-317(b)(2) of the Financial Responsibility Law, the court held that in enacting section 7-602, the legislature intended to create a limited exception to the mandatory insurance laws and, therefore, the named driver exclusion did not violate Illinois public policy. *Smith*, 337 Ill. App. 3d at 1060, 1062. See *Rockford Mutual Insurance Co. v. Economy & Casualty Co.*, 217 Ill. App. 3d 181 (1991) (the named driver exclusion endorsement precluded uninsured motorist coverage where the decedent was a passenger in a vehicle whose driver was the subject of the exclusion endorsement).

¶ 23 *Smith* and the cases relied on by State Farm are distinguishable. In those cases, the named driver exclusion was enforced as to parties other than the named insured.

¶ 24 The plaintiff relies on a line of cases beginning with *Barnes v. Powell*, 49 Ill. 2d 449 (1971), in which Illinois courts refused to enforce named driver exclusion endorsements. See *Barnes*, (injured insured entitled to uninsured motorist coverage under her own policy, where she was a passenger in her vehicle driven by an individual, who was uninsured at the time of the accident); *Madison County Automobile Insurance Co. v. Goodpasture*, 49 Ill. 2d 555 (1971) (citing and following *Barnes*); *Kerouac v. Kerouac*, 99 Ill. App. 3d 254 (1981) (policy exclusion for family members rendered the vehicle driven by the defendant-son uninsured, and therefore, the uninsured motorist coverage available to the plaintiffs-father and brother); *Doxtater v. State Farm Mutual Automobile Insurance Co.*, 8 Ill. App. 3d 547 (1972) (finding that section 143a of the Insurance Code directed insurance companies to provide uninsured

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motor vehicle coverage for an insured regardless of whether, at the time of injury, the insured occupied or operated vehicles declared in the subject policy, citing *Barnes*).

¶ 25 Moreover, in *Rockford Mutual Insurance Co.*, the appellate court ruled that since the named driver exclusion rendered the Economy-insured vehicle uninsured, the decedent's mother was required to seek recovery under the uninsured motorist coverage in her own Rockford insurance policy for the death of her son. *Rockford Mutual Insurance Co.*, 217 Ill. App. 3d at 187. The court further held that its ruling was consistent with cases such as *Barnes* and *Kerouac*, where a specific exclusion rendered the insureds' own vehicles in which they were riding uninsured. *Rockford Mutual Insurance Co.*, 217 Ill. App. 3d at 187. The court stated further as follows:

“To deny any insurance policy coverage to these policyholders would indeed violate the public policy expressed in section 143a of the Illinois Insurance Code. The instant case is distinguishable from those cases, however, in that in the instant case the injured party is not seeking to recover under his or her own insurance policy, but under the policy of the vehicle which was rendered uninsured at the time of the injury and of which the injured party was neither a policy holder nor a named insured.” *Rockford Mutual Insurance Co.*, 217 Ill. App. 3d at 187.

¶ 26 Moreover, our courts have applied the analysis in *Barnes* even in different factual situations. In *Doxtater*, the reviewing court stated as follows:

“Although we recognize that the facts of *Barnes v. Powell* are distinguishable from the facts at bar, we nonetheless cannot overlook the Supreme Court's statements therein regarding the legislative intent behind Section 143a. The expansive interpretation applied by a majority of that court leads us to conclude that, presented

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with the issue at bar, our Supreme Court would interpret Section 143a of the Insurance Code as a direction to insurance companies to provide uninsured motor vehicle coverage for ‘insureds,’ regardless of whether, at the time of injury, the insureds occupied or operated vehicles declared in the subject policy.” *Doxtater*, 8 Ill. App. 3d at 552.

See *Comet Casualty Co. v. Jackson*, 125 Ill. App. 3d 921, 924 (1984) (in light of the supreme court’s expansive interpretation of section 143a in *Barnes*, “the decision was intended to be an expression of the legislative objective to provide extensive uninsured motorist coverage for those insured under a valid automobile liability policy”).

¶ 27 State Farm points out that the cases relied on by the plaintiff were decided prior to the enactment of the mandatory insurance requirements authorizing named driver exclusions. See Pub. Act 85-1201, § 1 (eff. July 1, 1989) (adding 625 ILCS 5/7-602). We disagree with State Farm’s premise that the enactment of mandatory insurance would have rendered the cases relied on by the plaintiff inapplicable because exclusions are now authorized. The supreme court in *Phelan*, decided in 1974 and cited by State Farm, upheld a restrictive endorsement. *Phelan*, 59 Ill. 2d at 399.

¶ 28 The issue in the present case is whether the named driver exclusion violates our mandatory insurance requirements and public policy where the exclusion bars coverage for the named insured. While none of the cases relied on by either party addresses this precise issue or fact pattern, we find the supreme court’s analysis in *Reyes* instructive.

¶ 29 In *Reyes*, the defendant was the sole named insured under her automobile policy with American Access Casualty Company (American Access). In consideration for the premium charged for the policy, an endorsement to the policy barred coverage where the insured

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vehicle was operated by the defendant. While the defendant was the named insured, she was excluded from coverage if she operated the vehicle. *Reyes*, 2013 IL 115601, ¶ 4. Subsequently, while driving the insured vehicle, the defendant struck two pedestrians, resulting in the death of one individual and injury to the other individual.

¶ 30 In response to the wrongful death suit brought against the defendant, American Casualty filed a declaratory judgment suit, seeking a declaration that it owed no liability coverage to the defendant based on the named driver exclusion. The circuit court granted summary judgment to American Casualty, but the appellate court reversed, finding the exclusion violated public policy. *Reyes*, 2013 IL 115601, ¶ 6.

¶ 31 On further review, our supreme court identified the issue as “whether an automobile liability policy can exclude the *only* named insured and owner of the vehicle without violating public policy.” (Emphasis in original.) *Reyes*, 2013 IL 115601, ¶ 9. In its analysis, the court first observed that a statute that exists for the protection of the public cannot be overridden by private contracts, since members of the public are not parties to the contract. The court further observed that the public policy demands adherence to statutory requirements, but it was also in the public’s interest not to unduly restrict the freedom to contract. *Reyes*, 2013 IL 115601, ¶ 9. In order to invalidate a contract provision on public policy grounds it must be “clearly contrary to what the constitution, the statutes, or the decisions of the courts have declared to be the public policy or unless it is manifestly injurious to the public welfare.” *Reyes*, 2013 IL 115601, ¶ 9 (citing *Progressive Universal Insurance Co. of Illinois*, 215 Ill. 2d at 129-30). Such a determination depends on the facts and circumstances of each case. *Reyes*, 2013 IL 115601, ¶ 9.

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¶ 32 The court in *Reyes* held that under the plain and unambiguous language of section 7-317(b)(2), defendant, as the named insured, could not be excluded from coverage. *Reyes*, 2013 IL 115601, ¶ 13. The court rejected American Casualty's argument that section 7-602 of the Financial Responsibility Law allowed the exclusion of " 'any driver.' " The language of section 7-602 permitted the exclusion of an owner or policy holder or insured "for *other* vehicles, not the vehicle that is insured. This clause does not authorize a named driver exclusion for the sole insured and owner of the vehicle." (Emphasis in original.) *Reyes*, 2013 IL 115601, ¶ 17.

¶ 33 The court rejected American Casualty's public policy argument that the exclusion allowed individuals with high risk factors to obtain insurance at reasonable rates rather than operate a vehicle with no insurance at all. The court found that the public policy was expressed in the plain language of section 7-317(b)(2) and found that the interest in protecting the driving public outweighed an individual's desire to obtain a lower insurance premium. *Reyes*, 2013 IL 115601, ¶ 19 (citing *Williams v. U.S. Agencies Casualty Insurance Co.*, 2000-1693, p. 6 (La. 2/21/01); 779 So.2d 729 (superseded by statute)).

¶ 34 In the present case, Mr. Evans's vehicle was underinsured. The plaintiff sought to recover for her injuries under her own automobile liability insurance policy, which provided the underinsured motorist coverage mandated by section 143a-2 of the Insurance Code. *Barnes* and its progeny, together with *Reyes*, support the conclusion that a named driver exclusion in an insured's policy that bars liability, uninsured, or underinsured coverage for the named insured violates Illinois's mandatory insurance requirements and Illinois public policy. Therefore, the named driver exclusion endorsement in the plaintiff's automobile liability policies with State Farm is not enforceable against the plaintiff, as the named insured.

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¶ 35

CONCLUSION

¶ 36

We affirm the orders of the circuit court denying State Farm's motion for summary judgment and granting summary judgment to the plaintiff.

¶ 37

Affirmed.

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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

NOTICE OF FILING

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PLEASE TAKE NOTICE that on November 1, 2017 before 5:00 pm we electronically filed with the Supreme Court of Illinois the Brief of Appellant.



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PROOF OF SERVICE

I, Carolyn Holzer, a non attorney, served the above described documents by emailing a copy to the attorney(s) listed above at that email address by 5:00 p.m. on 11/01/2017..

[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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 Carolyn Taft Grosboll
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