No. 122558

IN THE
SUPREME COURT OF ILLINOIS

PHOUNGEUN THOUNSAVATH

Plaintiff-Appellee,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Defendant-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

PLAINTIFF-APPELLEE'S RESPONSE BRIEF

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POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

The plaintiff, Phoungeon Thounsavath, purchased an auto insurance policy from State Farm Insurance. (ROA 26-111) As required by Illinois law, the policy included underinsured motorist coverage. The coverage provided:

> *We* will pay compensatory damages for *bodily injury* an *insured* is legally entitled to recover from the owner or driver of an *underinsured motor vehicle*.
>
> (emphasis in original)(ROA 94)

The policy expressly defines the plaintiff as an "insured" person. (ROA 93) The policy defines a "Underinsured Motor Vehicle" as a land motor vehicle with limits of insurance less than the underinsured motorist coverage in the policy. (ROA 93-4) The underinsured limit in this policy was $100,000. (ROA 70)

The policy also contained an exclusion regarding her friend Clinton Evans. The exclusion read as follows:

> 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. (ROA 28)

Based upon the policy provision, the plaintiff did not allow Clinton Evans to operate any of her vehicles. Mr. Evans obtained coverage with a different company for his personal vehicle. On June 17, 2012, the plaintiff was involved in a collision while riding with Clinton Evans in his separately insured vehicle. (ROA 192) As a result of the collision, Thounsavath was injured and made a claim against Evans for her damages. (ROA 192) His liability policy paid out its limit of $20,000. (ROA 192) Thereafter, Thounsavath filed a claim against her own policy with State Farm, seeking underinsured motorist benefits. (ROA 192)

Although Thounsavath was the insured and was not excluded under the policy, State Farm denied coverage to her. They argued that no underinsured coverage was available because of the policy exclusion.

II. ISSUE

Can an insurer include a policy exclusion that denies mandatory coverage to its own insured?

III. ARGUMENT

A. The Illinois Legislature requires all policies to include all policies to include underinsured motorist benefits for the insured

The Illinois legislature made a decision to require all motor vehicle policies to include underinsured motorist coverage. 215 ILCS 5/143a-2(4). The statute provides:

> (N)o 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 shall be renewed or delivered or issued for delivery in this State with respect to any motor vehicle designed for use on public highways and required to be registered in this State unless underinsured motorist coverage is provided in such policy in an amount equal to the total amount of uninsured motorist coverage provided in that policy…."
>
> 215 ILCS 5/143a-2(4)

Unlike mandatory liability coverage statutes or uninsured motorist statutes, the goal of underinsured motorist coverage is not simply to provide minimal protection to all drivers. Rather, the goal is the provide a higher level of coverage to the insured driver who chooses higher limits. It is to "place the insured in the same position he would have occupied if injured by a motorist who carried liability insurance in the same amount as the policyholder." *State Farm Mut. Auto Ins. Co. v. Villicana*, 181 Ill.2d 436, 692 N.E.2d 1196 (1998)(citing *Sulser v. Country Mutual Insurance Co.*, 147 Ill.2d 548, 591 N.E.2d 427 (1992). 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. *Id*. (emphasis added)

In its opinion granting summary judgment to the plaintiff, the trial court correctly pointed out that the statutory coverage is mandatory and should not be whittled away by an unduly restrictive definition. (ROA 229)(citing *Pellegrini v. Jankoveck*, 245 Ill.App.3d 35)(1st Dist. 1993). The court also noted that a statute written for the protection of the public cannot be rewritten through a private limiting agreement. (ROA 229)(citing *Progressive Universal Ins. Co. v. Liberty Mutual Fire Ins. Co.*, 215 Ill.2d 121 (2005)). Citing many of the same cases, the Appellate Court agreed, finding that State Farm's named driver exclusion in this case was void because it violated the public policy established by the mandatory insurance statutes. *Thounsavath v. State Farm Mutual Auto Ins*., 82 N.E.3d 523, 415 Ill.Dec. 319 (1st Dist. 2017)

B. The Legislature has not created an exclusion to this right

State Farm makes the sweeping generalization that "Named Driver Exclusions are Valid in Illinois" and then goes into a lengthy discussion of *St. Paul Fire & Marine Ins. Co. v. Smith*, 337 Ill.App.3d 1054 and others. However, each of the cases cited by defendant involves the interpretation of a separate statute dealing with *liability* coverage. The court in St. Paul Fire & Marine, allowed a named driver exclusion within a liability policy, because they found that the legislature had intended to create a "limited exception" when it enacted 625 ILCS 5/7-602. In fact, the court explicitly pointed out that they determined that the St. Paul exclusion did not violate public policy "because the legislature created a limited exception to the mandatory insurance laws for this exclusion." *Id*.

This court has previously refused to interpret this statutory language as a blanket endorsement of named driver exclusions in all types of coverage. See e.g. *American Access Cas. Co. v. Reyes*, 1 N.E.3d 524, 376 Ill.Dec. 812 (2013). In cases such as *Reyes*, this court has struck down policy exclusions that diminished the mandatory coverage required by the legislature. *Id*. Fundamentally, it is a question of legislative intent. "The best indicator of the legislature's intent is the language of the statute itself, given it plain and ordinary meaning." *Id*. citing *Citizens Opposing Pollution v. Exxon Mobil Coal U.S.A.*, 2012 IL 111286, 962 N.E.2d 956, 357 Ill.Dec. 55 (2012). In this case, the legislature has not created a named driver exclusion for underinsured motorist coverage like the one it did for liability coverage.

The defendant argues that allowing a named driver exclusion in the liability context but not in the context of underinsured motorist claims is inconsistent. It is not. However, more importantly, the legislature has not seen fit to make that change. In the liability context, the legislature specifically identified the option of allowing a named driver exclusion and wrote it into a statute. This strongly suggests that the legislature was aware of the option but decided not to create a similar exception in the context of underinsured motorist coverage. This was not an oversight by the legislature. It was an intended distinction.

The defendant points out that the courts will strike a private contract on public policy grounds only under limited circumstances. This case, however, presents a different situation. The plaintiff here is not seeking to strike the exclusionary clause in the State Farm contract based on a novel public policy theory. Rather, the Illinois Legislature has already established the public policy by mandating underinsured motorist coverage in

every auto insurance policy. The public policy for this decision has been well recognized by the courts. See e.g. *State Farm Mut. Auto Ins. Co. v. Villicana*, 181 Ill.2d 436, 692 N.E.2d 1196 (1998). It is the defendant who is seeking to exempt itself from the public policy by adding an exclusion to the mandatory UIM coverage. The legislature here has not opted to create a named driver exclusion from underinsured motorist policies and the defendant should not be allowed to do so unilaterally.

"Statutes in force at the time an insurance policy was issued are controlling, and a statute's underlying purpose cannot be circumvented by a restriction or exclusion written into an insurance policy. Accordingly, insurance policy provisions that conflict with a statute are void." *Id*. (citing *State Farm Mutual Insurance v. Smith,* 197 Ill.2d at 372, 757 N.E.2d at 883, 259 Ill.Dec. 18 (2001) In this case, the policy violated the clear language of the statute and it is void.

C. The cases cited by defendant are distinguishable because they involve denying coverage to the excluded driver and not the named insured.

Each of the cases cited by defendant is distinguishable because it involves an insurer denying coverage to *the excluded driver*. In this case, however, State Farm is seeking to deny a mandatory coverage to *its own insured*. Although the policy seeks to exclude Clinton Evans, it is not Clinton Evans who sought coverage. Rather, it was State Farm's customer, Phoungeon Thounsavath, who was denied coverage. There is a separate body of case law regarding the denial of mandatory coverage to a *named insured*, and the result required by these cases is very different.

For example, the defendant cites the case of *Heritage Ins. Co. of America v. Phelan*, 59 Ill.2d 389, 321 N.E.2d 257 (1974). In that case, Heritage Insurance issued a policy to William Phelan. The policy included a provision that specifically excluded William's

seventeen year old son, James Phelan, from coverage. James was injured while operating a vehicle and sought to obtain uninsured motorist coverage under his father's policy. The court concluded that James was not an "insured" under the policy because of the exclusion and that he was therefore not entitled to underinsured motorist benefits. The court spent considerable time discussing the status of an "insured" as opposed to someone who is not the insured. *Heritage v. Phelan* is distinguishable from the instant case. State Farm is not seeking to deny coverage to the excluded driver, Clinton Evans. Instead, they are seeking to deny coverage to *their own insured*, Phoungeon Thounsavath. In so doing, they are subverting the legislative intent of requiring coverage that will put her in the same position she would have been in if the underinsured driver had full coverage.

The other cases cited by the defense also involve claims which were made by the *excluded driver*, and not the *named insured*. In *Rockford Mutual Ins. Co. v. Economy Fire & Casualty Company*, 217 Ill.App.3d 181 (5th Dist. 1991), the claimant was not an insured under the policy. The court took time to point out that the public policy for mandating uninsured motorist coverage was intended to protect only policyholders and named insureds. *Thomas v. Progressive Cas. Ins. Co.*, 749 N.W.2d 678 (2008) also involves claims for coverage by the excluded driver and not the named insured.

This court reached a different result in a case where the insurer sought to deny coverage to the named insured. In *Barnes v. Powell*, 49 Ill.2d 449, 275 N.E.2d 377 (1971), Agatha Barnes was insured under a policy of insurance from LaSalle National Insurance Company. As in this case, Agatha Barnes was injured while riding in a car operated by an excluded driver. The policy contained an exclusion that specifically denied liability and uninsured coverage for accidents caused by a named insured. The insurer argued that the

policy clearly excluded both liability and uninsured coverages. Despite the exclusion, the Illinois Supreme Court found that the policy must be construed in light of the uninsured motorist statute. The Court held:

> We find that the intent of the legislature was that the uninsured motorist coverage would protect an insured generally against injuries caused by motorists who are uninsured, and by hit-and-run motorists, and that this would complement the liability coverage. The distinction that the uninsured motorist was the driver of the automobile in which plaintiff was a passenger, rather than the driver of another automobile is not decisive.

The court went on to find that the exclusion could not work to deny uninsured motorist coverage to the insured. *Id*.

Following *Barnes*, other courts have ruled similarly. In *Illinois Emasco Ins. Co. v. Doran*, 160 Ill.App.3d 927 (1987), the court held that an exclusion that denied uninsured coverage to the named insured was void as against the public policy. The Illinois Supreme Court reaffirmed the same logic in the case of *Madison County Mut. Auto. Ins. Co. v. Goodpasture*, 49 Ill.2d 555 (1971). See also *Kerouac v. Kerouac*, 99 Ill.App.3d 254, 425 N.E.2d 543 (3rd Dist. 1981) and *Doxtater v. State Farm Mut. Auto. Ins. Co.*, 8 Ill.App.3d 547, 290 N.E.2d 284 (1972). Although these cases are based upon a different policy exclusion (member of household exclusion as opposed to a named driver exclusion) they are highly analogous, and involve the same policy considerations.

D. It is not inconsistent or unfair to limit named driver exclusions from underinsured motorist policies

The plaintiff purchased a policy of insurance with higher liability limits than is required by law. It also provided higher limits to her in the event of injury by an underinsured motorist. That coverage was not a gift, State Farm was required to law to

provide it, and the plaintiff paid for it. State Farm repeatedly argues that there is something underhanded about this:

> "It smacks of injustice to allow Phoungeon Thounsavath to contract away coverage for the general public when Clinton Evans operates a car, but to claim she is somehow immune from the exclusion." (Def Brief at 26)

This is a misleading argument. The law allows State Farm to refuse **liability** coverage to a specific driver. That exclusion is allowed because the legislature carved out a limited exception from mandatory liability coverage allowing such exclusions. Once they excluded Clinton Evans, the Plaintiff had an obligation to make sure he did not drive her car. She did not let him drive her car. The exclusion did not prevent Clinton Evans from driving, it merely required him to obtain insurance of his own before driving a car. He was free to select coverage at any level allowed by law. The Plaintiff did not get to choose his level of coverage. Like every other member of the public, Thounsavath had the right to choose higher levels of underinsured coverage if she did not want to accept the risk of injury by an underinsured driver. She is not seeking to shortchange the general public by obtaining the benefit of some mysterious coverage not obtainable by others. She is seeking the benefit of insurance she bought to protect herself, and which was available to anyone who cared to buy it.

If the law were changed to allow this type of exclusion it would greatly complicate the ability of insureds to protect themselves. Surely, insurance companies would prefer not to provide coverage for injuries caused by poor drivers of all types. If it were allowed, it would make sense for insurance companies to try to exclude many people, and even categories of people: drivers who were drinking, unlicensed drivers, drivers with certain medical conditions. To make sure that they were protected by their own underinsured

motorist coverage, insureds would need to ask everyone what limit of insurance they have and whether they fall under an exclusion, before getting into their car. Instead of being confident of coverage at their chosen level, their coverage would always be in jeopardy.

There are sound public policy reasons for allowing a named driver exclusion in the liability context, but not in the underinsured motorist context. 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. They have not done so. Where there are sound public policy reasons for limiting such exclusions, the statute should be upheld as written.

E. Coverage should not be denied to the named insured under 625 ILCS 5/7-317

In her motion for summary judgment, the plaintiff relied primarily on the mandatory underinsured motorist statute, 215 ILCS 5/143a-2. The trial court agreed with plaintiff's position but also found that the named driver exclusion was improper because it violated the Illinois Supreme Court case of *American Access Co v. Reyes*, 1 N.E.3d 524, 376 Ill.Dec. 812 (2013)(see e.g. ROA at 230-)

In *Reyes*, the subject policy excluded the person who bought the insurance – Ana Reyes. When Reyes caused an accident, the injured party filed suit against her. Reyes' insurance company denied the claim because she was an excluded driver under the policy. The Illinois Supreme Court discussed the public policy reasons for requiring mandatory liability coverage and held that the policy exclusion was void. Although the case involved mandatory liability coverage, rather than mandatory underinsured motorist coverage, the ruling addressed many of the same issues posed in this case. In its decision granting plaintiff's summary judgment, the trial court summarized *Reyes* nicely:

> In examining the issue of whether a policy could exclude the policyholder, the court first noted that where a statute exists for the protection of the public, it cannot be overridden by contract. *Reyes,* 1 N.E.3d 524, 376 Ill.Dec. 812. Where liability coverage is mandated by statute, a contractual provision in an insurance policy which conflicts with that statute will be deemed void. *Id*. citing *Progressive*, 215 Ill.2d at 129. The primary objective of statutory construction is to give rise to the legislature's intent. *Id*. The best indicator of the legislature's intent is the language of the statute itself, given its plain and ordinary meaning. *Id*.
>
> The Supreme Court ultimately found that the plain language of the statute required that a liability policy cover "the person named therein." *Id*. Excluding the person named therein, who was required to be covered through a contractual provision, violated the statute and, therefore public policy.
>
> *Id*. (ROA 230)

All of these arguments are equally applicable to the underinsured motorist coverage at issue in this case. The underinsured coverage was statutorily required for public policy reasons by a clearly worded statute. As in *Reyes*, the insurance company should not be allowed to evade the mandatory coverage.

F. Statutory changes enacted by the legislature after the decision of *Doxtater v. State Farm* have no effect on the outcome of this case

The defendant makes the bold assertion that the Appellate Court relied on case law that is "no longer the law of this state." Defendant's Brief at 16. That statement is misleading. The Appellate Court cited *Doxtater* as support for its argument that this Court has favored an upholding the mandatory coverages provided by Section 143a of the insurance code. Thounsavath. 2017 Ill.App. 161334, 82 N.E.3d 523, 415 Ill.Dec. 319 (1st Dist. 2017). That has not changed. The defendant's argument is based on a legislative change in 215 ILCS 5/143a made long after the *Doxtater* case was decided. But that statutory change would not change the outcome of this case.

In *Doxtater*, the plaintiff was injured while riding on a motorcycle which was owned by a member of the household, but not listed on his policy. A specific policy provision prohibited coverage for household vehicles which were not listed on the policy. State Farm sought to deny coverage under the exclusion. Essentially State Farm objected to the plaintiff seeking benefits for a vehicle he did not list for coverage. The court in *Doxtater* concluded that coverage should be afforded because of the mandatory coverage requirement under 215 ILCS 5/143a. Many years later the legislature decided to amend 5/143a to allow an exclusion of this type. It did not overrule *Doxtater*. More importantly, the change would have had no effect on the case at bar.

In this case, the plaintiff was not riding in a car that was owned by a household member. She was under no obligation to list the vehicle in her policy. Nothing about the amended 5/143a would deny or limit coverage to her. However, the legislative change cited by the defendants *is* one more piece of evidence that the legislature did not intend to allow broader named driver exclusions. Clearly the legislature is aware of the case law and makes periodic changes. And yet, in 1995 when they carved out an exception to the mandatory coverage for non-listed household vehicles, they did not create an exception for named-driver exclusions.

G. Other cases cited by the defendant are also distinguishable

The defendant goes on to cite a number of cases arising under entirely different circumstances to support its claims. Each of them is distinguishable from this case.

1. *State Farm Mutual v. Villicana*

In *State Farm v. Villicana* this court upheld a policy exclusion which is different from the policy exclusion at issue in this case and did so for different policy reasons. 181

Ill.2d 436, 692 N.E.2d 1196 (1998) In that case, *Villicana* bought several different insurance policies for several different cars in the household. *Id*. *Villicana* bought policies with different policy limits. *Id*. Ultimately, a family member was involved in a collision in a vehicle that carried a $100,000 underinsured policy limit. *Id*. The family member collected on that policy, but then also attempted to collect under a policy insuring a different car with a $250,000 policy limit. *Id*. State Farm objected based on a "family car exclusion" which states that another car in the household and available for use which is not listed in the policy is not considered an underinsured vehicle. In essence the exclusion seeks to prevent an insured from purchasing a low limit policy on one car and a high limit on a different car and then obtaining the benefit of the high limit for both cars. The court agreed with State Farm and concluded that public policy did not require State Farm to provide a higher limit on a car for which the insured had selected a lower limit. This is entirely different from what happened in the case at bar.

Phoungeon Thounsavath had only one policy. It had an underinsured limit of $100,000. The car in which she was injured was not owned by somebody who lived in her household. The exclusion which State Farm seeks to enforce here is a "named driver" exclusion and not a "family car" exclusion. More importantly, the plaintiff here is not seeking to get the benefit of something she did not buy. She is seeking to get the benefit of $100,000 in coverage the she purchased. In *Villicana*, this court was saying that the public policy behind underinsured motorist coverage does not require the insurance company to provide the highest level of coverage. The insured bought $100,000 in coverage for that vehicle and she was entitled to $100,000 in underinsured coverage, but not the $250,000 in coverage that was available on a different car. The court reasonably concluded that the

public policy goals of the legislature were met. In this case, the plaintiff bought $100,000 in underinsured coverage, and State Farm is seeking to deny that coverage completely, leaving Plaintiff with only the $20,000 from the at fault driver. An exclusion with that effect does not meet the public policy goals of the legislature which were to "place the insured in the same position he would have occupied if injured by a motorist who carried liability insurance in the same amount as the policyholder." *Sulser v Country Mutual Insurance Co.,* 147 Ill.2d 548, 591 N.E.2d 427, 169 Ill.Dec. 254 (1992).

2. *Fuoss v. Auto Owners (Mutual) Insurance Company* is distinguishable

Fuoss v. Auto Owners also involves a scenario that is entirely different from the issue in this case. *Fuoss v. Auto Owners Mut. Ins. Co.,*118 Ill.2d 430, 516 N.E.2d 268 (1987) Ed Fuoss purchased an insurance policy with liability limits of $25,000/$50,000. The policy failed to include underinsured motorist coverage. The plaintiff was injured by a driver who had $100,000/$300,000 coverage, and recovered the full $100,000 from him. He then sued his own insurance company, arguing that they should have offered him underinsured coverage. Inexplicably, he then argued that the court should give him underinsured motorist coverage in excess of $100,000. The court agreed that UIM coverage was required, but pointed out that under the insurance code, the company would only have offered him coverage up to the limits of his liability coverage ($25,000/$50,000). Essentially the plaintiff was asking the court to give him more coverage than he ever selected. *In dicta*, the court noted that giving him a higher limit than he obtained for the general public under his liability policy would be "repugnant to our system of justice." The relief requested by the plaintiff in that case was illogical, but it was entirely different from the case at bar.

In this case the plaintiff bought a policy with liability limits of $100,000 and underinsured coverage of $100,000. She is seeking to recover $100,000 on her own underinsured policy. There is nothing repugnant or unfair about her request. It is the coverage she purchased and it is what the Illinois statute requires. The unfairness that State Farm claims here is that the named driver exclusion could exclude a member of the public from receiving liability coverage, and Thounsavath could still recover underinsured motorist benefits. That might be true if she allowed Evans to drive her car, however, she did not. The accident happened while Evans was driving his own, separately insured vehicle. Her liability policy was not at issue in this case at all. If he caused an injury to a third party, they would have the same right as any other motorist to sue him and recover under his policy. If they wanted more protection, they could (as Thounsavath did) buy higher UIM limits coverage.

IV. CONCLUSION

The legislature enacted mandatory insurance laws to make sure that every insurance purchaser received three types of coverage: liability, uninsured and underinsured motorist. The Courts have recognized the legislative intent of making sure that every insurance purchaser receives these coverages, and they have routinely voided exclusions that attempt to limit this protection. When it enacted 625 ILCS 5/7-602, the legislature created a narrow exception allowing insurance companies to exclude a named driver from *liability* policies in some situations. The courts have recognized that exception because they found that the legislature expressly intended to allow it. But the legislature did not create a similar exception for underinsured motorist policies. The court should not assume that this distinction was unintended. There are sound public policy reasons for it.

The precise purpose of underinsured motorist coverage is to allow insured drivers to protect themselves from harm by purchasing a higher level of coverage. It frees them from having to worry that other drivers, over whom they have not control, may purchase inadequate insurance coverage. State Farm is attempting to chip away at this mandatory coverage by unilaterally adding a policy exclusion not allowed by the legislature.

The exclusion undermines the public policy set forth by the legislature and recognized by the courts. By excluding mandatory coverage the policy expressly violates the statute as written. The exclusion should be held void as against public policy.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 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 fifteen pages.

/s/ Eric J. Parker

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NOTICE OF FILING

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PLEASE TAKE NOTICE that on December 1, 2017 before 5:00 pm I electronically filed with the Supreme Court of Illinois, PLAINTIFF-APPELLEE'S RESPONSE BRIEF.

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PROOF OF SERVICE

I, Dana M. Zampillo, 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 12/01/2017.

[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.

/s/Dana M. Zampillo
Dana M. Zampillo

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