No. 129031

In the

Supreme Court of Illinois

CARMEN GALARZA,

Appellee,

v.

DIRECT AUTO INSURANCE COMPANY,

Appellant,

v.

FREDY GUIRACOCHA and CHRISTOPHER GUIRACOCHA,
a minor by next best friend FREDY GUIRACOCHA,

Appellees.

On Appeal from the Appellate Court of Illinois,
First Judicial District, Nos. 1-22-0281 (cons. with 1-21-1595).
There Heard on Appeals from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 20 CH 4631 and 21 CH 02447.
The Honorable **David B. Atkins** and **Sophia Hall**, Judges Presiding.

BRIEF AND APPENDIX OF APPELLANT DIRECT AUTO INSURANCE COMPANY

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TABLE OF CONTENTS
AND STATEMENT OF POINTS AND AUTHORITIES

NATURE OF THE CASE

This is a declaratory action case. It's principal issue is whether the insurance policy issued violates 'public policy' or should be enforced as written.

Fredy Guiracocha (Fredy) filed a uninsured motorist claim under his DAI insurance policy after his son, Christopher Guiracocha (Christopher), was allegedly injured in an accident while riding his bicycle. DAI denied the claim under the explicit terms of the DAI policy.

Fredy and Christopher filed a declaratory in the circuit court of Cook County. The circuit court of Cook County (Judge Sophia H. Hall) granted summary judgment in favor of DAI. Fredy and Christopher filed an appeal.

The Appellate Court reversed in *Galarza v Direct Auto Ins Co v Guiracocha,* 2022 IL App (1st) 211595 on September 30, 2022. In doing so, the concurring opinion of Judge Gordon indicated the issue was one of first impression, P59. DAI filed a petition for leave to appeal to the Supreme Court of Illinois which was granted.

JURISDICTIONAL STATEMENT

The Appellate Court found that the summary judgment granted in favor of DAI was a final and appealable order, that they had jurisdiction, and reversed. [A consolidated case was returned to the trial court by the Appellate Court as there was no final and appealable concluding order]. A timely petition for leave to appeal to the Supreme Court of Illinois was filed and granted Ill. S. Ct. Rule 315. There is jurisdiction to hear this matter.

SUMMARY OF DIRECT AUTO'S POSITION

It is undisputed that a bicycle is not a 'motor vehicle' and has no attributes requiring mandatory liability insurance. Thus, it would make no sense to interpret the uninsured motorist statute, 215 ILCS 5/143a so as to mandate uninsured motorist coverage for bicycles.

DAI sold an auto policy and DAI has no obligation to provide either liability or uninsured motorist coverage for bicycles.

STATEMENT OF FACTS

Direct Auto Insurance Company ("DAI") issued a policy to Fredy Guiracocha on January 4, 2020 (C61). The DAI policy (C44) was a personal auto policy issued to Fredy Guiracocha on January 4, 2020 (C61). The policy contained Part I, for liability coverage (C44) and Part II, for uninsured motorist (C46) coverage.

In Part I, the **"persons insured"** were (C44, page 2 of the policy)

(a) "With respect to the owned automobile;
  (1) The named insured, or
  (2) Any other person using such automobile to whom the named insured has given permission…

(b) With respect to the non-owned automobile;
  (1) The named insured; provided the named insured received permission…
  (2) A relative, but only with respect to a private passenger automobile, provided the person using such automobile has received permission…

(c) Any other person … legally responsible for the use of;
  (1) An owned automobile; or
  (2) A non-owned automobile, …provided the actual use thereof is by a person who is an insured under (a) or (b) above with respect to such owned automobile or non-owned automobile…"

In Part II, (C46, page 4 of the policy) the **persons insured** are those who are "legally entitled to recover from the owner or operator of an uninsured motor vehicle because of" injuries from

(1) "caused by accident; and
(2) While "you" are an occupant of an 'insured automobile…
(3) Were as a result of the ownership, maintenance or use of such uninsured motor vehicle"

Part II (C47) for "hit & run" incidents indicates there is potential coverage "provided there was actual physical contact between the insured automobile and the hit-and-run motor vehicle…". A hit-and-run automobile (C47) is one that "hits or causes an object to hit an owned automobile which the insured is occupying at the time of accident…".

On September 24, 2020, Christopher Guiracocha was riding his bicycle on Kimball at Montrose avenues in Chicago and going through an intersection. An accident happened after dark at 7:00 PM. Whether Christopher was riding in the cross-walk, whether he had a light or reflectors is not known, but Christopher was apparently involved in a collision with an automobile and was consequently injured.

As DAI had denied the claim under the explicit terms of the policy, Fredy Guiracocha filed a declaratory action in Cook County chancery court on June 19, 2020 seeking a declaration of coverage against DAI.

The parties Guiracocha and DAI briefed cross Motions for summary judgment, including sur-replies, and Judge Hall granted the DAI motion after argument on the Record (R1) and Guiracocha appealed on February 1, 2022.

The parties did not dispute that a bicyclist was not a motor vehicle. The parties also did not dispute that if Christopher was negligent, DAI owes no liability coverage to third-parties he may injure while riding his bicycle. The parties also did not dispute below that the "plain language" of the policy does not cover Christopher.

DAI argues that the auto policy issued to Fredy was completely compliant with Illinois law and concerned only the use (whether as an operator or passenger) of an auto and Christopher does not fit within those parameters.

STANDARD OF REVIEW

The standard of review here is *de novo* because it requires the review of the entry of summary judgment. *Gen. Cas. Ins. Co. v. Lacey,* 199 Ill. 2d 281, 284 (2002).

ARGUMENT

I. CHRISTOPHER WAS NOT A PERSON INSURED FOR PART I LIABILITY OR PART II UNINSURED MOTORIST COVERAGES UNDER THE DAI POLICY

Guiracocha insists that Christopher is an "insured" but this argument fails to examine the particular terms of the DAI policy. Christopher *as a bicyclist* was not a 'person insured' under either the liability or uninsured motorist coverages.

The policy at issue is an auto policy and the definition in place that is relevant is "person insured" *in the context* of using an auto. While Christopher

could be a "person insured" *if* he was using an auto as an operator or passenger, Christopher was not a "person insured" when riding his bicycle.

The DAI policy explicitly provided liability coverage to Fredy, the named insured, for his potential negligence for ***use*** of a "owned" automobile or for ***use*** of a "non-owned automobile". This clearly specifies that the named insured must be an operator or a passenger. Fredy, the named insured, has liability coverage for his use of an auto.

If Christopher, who was Fredy's son, and a resident of the household, had been using an automobile and negligently caused damages or injuries to a third-party, then Christopher would have had liability coverage for his use of an auto.

Guiracocha argues below that Christopher "unquestionably constituted an insured at the time of the September 24, 2020 accident" (Guiracocha brief, page 10-11). But this vague statement constitutes an unfounded conclusion. It does not actually refer to the actual terms of either Part I or Part II (or any distinct part) of the DAI policy.

Christopher can only be considered a "person insured" *in relation to* use of a owned or non-owned or other auto with permission. The word "use" indicates that Christopher could be a "person insured" under Part I if he was operating a vehicle or if he was a passenger in a vehicle.

The DAI policy is an auto policy. The vague and conclusory statement that Christopher is "an insured" must be qualified: Christopher is only an

insured person in *the context of use of* an automobile for liability or uninsured motorist coverage.

When and if Christopher had done something to cause injuries to others, if that 'something' is not in relation to an owned or a non-owned automobile, Christopher is not a "person insured" under this DAI policy.

An individual *can* cause damages and injuries to others using all sorts of machinery but if one does so he or she is not entitled to be considered a "person insured" for liability under the DAI policy. Christopher can be walking down the street or sidewalk and kick a ball into the way of an oncoming auto and cause an accident. He may in that instance be negligent, but he is not a person insured under the DAI policy.

Christopher could be riding his bicycle and be liable to a third-party for a host of nefarious or negligent activities, *but unless they relate to use of an automobile,* Christopher is not a 'person insured' under the liability provisions of the DAI policy. See *White v. Luetch, et al*., 283 Ill. App. 3d 714 (3rd Dist. 1996), discussing an example of a negligent Minor bicyclist.

The DAI policy has no other purpose under mandatory insurance than to insure persons *in relation to their use of* a owned or a non-owned automobile [with permission].

The predicate that Christopher is not a "person insured" under Part I, liability, of the DAI policy leads to a logical examination of Part II, uninsured motorist. Christopher is explicitly not a "person insured" under Part II. For Part

II, Christopher would be a "person insured" if he had a claim against an uninsured motor vehicle *while he was an occupant of an automobile.*

In this context, Guiracocha makes much of *Direct Auto. Ins. Co. v. Merx,* 2020 IL App (2d) 190050. In *Merx,* the Appellate Court indicates that if an "insured person" is an occupant of a vehicle (i.e., either as an operator or a passenger) he or she must have uninsured motorist coverage. This excised the word "insured" from "insured automobile" in Part II, (C46) and replaced it with "automobile". Thus, if a "person insured" under the DAI policy is an occupant of ***a*** vehicle – whether a vehicle insured by DAI or not – he or she is entitled to potential uninsured motorist coverage. In doing so, *Merx* said at P21, "it is well settled that section 143a requires coverage of insured persons regardless of the motor vehicle the uninsured motorist is driving, and regardless of the vehicle in which the insured person is located when injured." First, the *Merx* court limited its holding to "insured persons", i.e., what the DAI policy includes for "persons insured". Second, the *Merx* court limited its holding to occupying a vehicle.

Most urgently, the *Merx* court said at P19 that uninsured motorist coverage must extend to persons "who are insured under the policy's liability provisions…if a person constitutes an insured for purposes of liability coverage" then the insurer must cover them for uninsured motorist coverage. Merx thus supports DAI – uninsured motorist coverage applied to occupants of the vehicle and persons covered under the liability portion of the policy, neither of which occur in this case.

But as is clear here, *and not disputed by Guiracocha in their briefs below* or in the circuit court, Christopher is not a "person insured" under Part I because what he was doing had nothing to do with using an automobile. Christopher did not qualify as a "person insured" under Part I and thereby he was not entitled to force DAI to cover him under Part II. Christopher could be a 'person insured' if his activities involved occupying (as an operator or passenger) a vehicle. Christopher could be a 'person insured' for both liability under Part I and uninsured motorist under Part II if he was occupying a vehicle. But riding his bicycle have nothing to do with using an auto and nothing to do with an automobile insurance policy.

In the Appellate Court's decision, P46, they admit that DAI's analysis here is correct: but they say this only has "facial appeal", whatever that means. Either Christopher is a 'person insured' under Part I, liability, or not. He is not. The Appellate Court, *id*., then says section 143a "is expressly designed to broadly mandate UM coverage for "the protection of *persons insured*" under an automobile liability policy. The DAI policy does this. The DAI policy protects persons insured under Part I for uninsured motorist coverage in Part II. That is all DAI must do.

II. PUBLIC POLICY CONCERNS ARE RECONCILED BY A DECLARATION OF NO COVERAGE AND ARE CONSISTENT TO THE LEGISLATURE'S CLEAR MANDATE

The Guiracocha brief acknowledges that the public policy of Illinois is an insurance policy needs to offer uninsured motorist coverage only up to the extent

of liability coverage. But the Guiracocha brief argues that the public policy is better described as putting the insured in 'substantially the same position he or she would occupy if the tort-feasor had $25,000 in liability coverage. *Squire v. Economy Fire & Casualty Co.,* 69 Ill.2d 167, 179 (1977).

Where Guircocha's argument loses its way is that these two principles are not contradictory and are easily reconciled.

First, the *Squire* Court, upon which Guiracocha relies, says that the principle that uninsured motorist is to put the injured party in substantially the same position as if the tort-feasor had insurance is *qualified by* the point they made that said this coverage is due "regardless of the vehicle in which the insured person is located when injured". These words certainly implicate the point that uninsured motorist coverage, like auto liability insurance, is about those who *occupy* a vehicle, i.e. operators or passengers.

Second, these two principles can also be reconciled by the analysis of the careful wording of section 143a.

Guiracocha and the Appellate decision read out of section 143a the *qualifying limitation* "**persons insured thereunder**". In other words, uninsured motorist applies to persons insured thereunder, carefully using the "terms of art" 'persons insured' just as the DAI policy does. This is simply how the Legislature set up the Illinois Insurance Code [unlike other state laws, such as Massachusetts, as noted in *Rosenberg v. Zurich American Ins. Co.,* 312 Ill.App.3d

97, 105 (1st Dist. 2000)]. If one is not a 'person insured' under the policy in Part I, then section 143a doesn't require DAI to cover them in part II.

215 ILCS 5/143a(1) indicates that uninsured motorist coverage is requires for "persons insured" thereunder the policy:

> § 143a. Uninsured and hit and run motor vehicle coverage.
> (1) 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

As Christopher was not a "person insured thereunder" while riding his bicycle, DAI is not required to cover him for uninsured motorist coverage whilst riding his bicycle. This confirms the public policy of Illinois is to force those who *use* Illinois roads to have liability insurance for that *use* of a vehicle. The purpose of mandatory uninsured motorist coverage is to mirror that obligation, i.e., to have *those who use an auto* be protected from uninsured motorists.

No party to this case disputes that Christopher has no liability coverage if he causes injuries ***to*** others whilst riding his bicycle. Yet Guiracocha seeks to force DAI to cover Christopher while riding his bicycle if he is injured ***by*** others. *This would expand uninsured motorist coverage well beyond liability coverage*. DAI

should not be forced to expand its Part II, uninsured motorist coverage, beyond the liability coverage of Part I.

It should also be noted that while uninsured motorist coverage nearly mirrors liability coverage, it is narrower than common-law tort liability in several ways. An injured party can sue another driver for causing an accident even if there is no actual physical contact between that driver and the injured party's auto. This is not true for a hit & run uninsured motorist claim, see *State Farm v. Benedetto*, 2015 IL App (1st) 141521. Similarly, fleet vehicles are exempted from uninsured motorist requirements, see *Ryan v State Farm Mutual Auto Ins. Co.,* 397 Ill. App. 3d 48 (1st Dist. 2009). Where the Legislature has spoken it has narrowed not expanded required uninsured motorist coverage.

Guiraocha criticizes the applicability of *Rosenberg v. Zurich American Ins. Co.,* 312 Ill. App. 3d 97, 105 (1st Dist. 2000) but *Rosenberg* is applicable here. In *Rosenberg*, the Appellate Court held that a nursing home resident was not really an insured because the actual insured was the nursing home. This is exactly the point here: Christopher was not a 'person insured' under the DAI policy absent the nexus of occupying a vehicle.

Moreover, *Rosenberg* explicitly stated that the wording of section 143a, in contrast of some other states, is narrow and does not require that pedestrians be covered. Guiracocha argues this is 'dicta'; in fact, the Appellate Court was asked in *Rosenberg* to overturn the explicit terms of a policy by the claim that section 143a requires coverage of pedestrians. The Appellate Court in *Rosenberg* refused

because the Legislature has not chosen to explicitly require an auto insurance policy to cover pedestrians. The declaration is not 'dicta'.

The Legislature could have expanded section 143a in response to *Rosenberg* but has not chosen to do so. *Rosenberg* should have bound the Appellate Court below as good precedent.

III. EXPANSION OF AUTO LIABILITY POLICIES TO COVERING BICYLISTS AND OTHER PEDESTRIANS SHOULD ONLY BE DONE BY THE LEGISLATURE

When DAI issues a policy, it does to in reliance upon the application (C41, paragraph 4), as would any auto insurer. In this case, DAI issued a person automobile policy to Fredy Guiracocha on a Mercury Montaineer (C61).The policy was applied for by Fredy, and did not list any other individuals and certainly did not list any bicycles, nor did DAI ask about potential bicycle riders.

But in issuing the policy, DAI evaluated the risk in the context of the subject of the policy, i.e., use of an automobile: what was the situation with the operator's driver's license, how many auto accidents had he had, what did he use the auto for, where was the auto garaged, and how many operators would use the auto (see C64, the second page of the application). All the questions relate directly *to use of an automobile.* If Fredy had told DAI he had a lot of prior accidents, the premium would have been considerably higher since the frequency of accidents and the age and type of operators is clearly relevant to risk in issuing an automobile liability policy. See *Ratliff v. Safeway Ins. Co.*, 257 Ill.

App. 3d 281 (1st Dist. 1993), *American Service Ins. Co. v. United Auto Ins. Co.*, 409 Ill. App. 3d 27 (1st Dist. 2011).

If DAI was forced to provide coverage for bicyclists, they would have to underwrite that risk and charge for it. DAI would have to ask how many bicycles are in the household, how many operators used bicycles, and how many prior bicycle accidents there had been. There is no Illinois Secretary of State abstract available on bicycles. There is no registry for bicycles with the State. There is no system in place set up to evaluate bicyclist risk.

DAI should not be forced to issue insurance for bicycles when there is no provision for mandatory insurance under 625 ILCS 5/317 for bicycles. Section 317 is the mandatory insurance provision in Illinois and it is limited to motor vehicles:

> 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,

Guiracocha is seeking to vastly expand mandatory insurance to include provisions requiring insurance companies to insure pedestrians and bicyclists. There is no practical way DAI can evaluate the risk concerning everyone in the household who has a bicycle.

It is true that in the current day – as can be seen in Downtown Chicago and throughout the City of Chicago – there are bicyclist "lanes" on the street.

Those bicyclists can be seen to cause or contribute to *many* accidents with other pedestrians or autos. Notwithstanding that, the Legislature has not imposed mandatory insurance on bicyclists and the Appellate Court erred in doing so here.

As noted in *Stark v. Illinois Emasco Ins. Co.*, 373 Ill. App. 3d 804, 811 (1st Dist. 2007), when the language indicates the carrier never "contemplated undertaking the risk of insuring plaintiff, as a pedestrian" the Appellate Court should not have added to DAI's risk. Guiracocha seeks to make a new contract for DAI and Guiracocha and this is not appropriate.

IV. A DISTINCTION BETWEEN A BICYCLIST AND A PEDESTRIAN *MAY* HAVE TO BE TAKEN

The Appellate Court in this case considered several consolidated appeals – one involved a "pedestrian", i.e., someone on foot, and one involved Christopher Guiracocha, a bicyclist. DAI argued and argues this auto insurance policy covers ***neither.*** The Appellate Court dismissed the appeal concerning the pedestrian and decided the Guiracocha claim instead.

It must be confessed that nearly all the briefs – by all sides – viewed the principles of "pedestrians" and "bicyclists" as virtually the same thing because neither is a "motor vehicle" or a "automobile". Upon further reflection, this may be an oversimplification.

In a recently issued case of first impression, *Alave v. City of Chicago*, 2022 IL App (1st) 21082, the Appellate Court distinguished 'pedestrians' from 'bicyclists' and said, P27:

> The argument depends on plaintiff's assertion that bicyclists are pedestrians and crosswalks are intended for pedestrians. While crosswalks are intended for pedestrians … ("Pedestrian walkways are designated by painted crosswalks ***." (internal quotation marks omitted))), bicyclists are not pedestrians. The Chicago Municipal Code defines pedestrians as "any person afoot" and separately defines a bicylist as "a person operating a bicycle." Chicago Municipal Code § 9-4-010 (amended July 21, 2021). Our case law also recognizes this distinction… (referring to "bicyclists, *unlike pedestrians*" relying on some of the same signage as motorists (emphasis added)). Accordingly, even if the City owed a duty to pedestrians to maintain the crosswalk up to a standard befitting pedestrian use, bicyclists are not pedestrians, and there is no authority to support the proposition that that duty extends to bicyclists. Furthermore, Alave was not a user of the crosswalk, as he was crossing it perpendicular to its path while using the roadway as a bicyclist...

This distinction makes the DAI case much stronger.

The analysis provided by DAI is the same analysis as settled law that an ATV is not required to have liability or uninsured motorist coverage. An ATV ("all-terrain vehicle") is not a motor-vehicle and it is not designed for use on public roads. Thus, it is settled law that as the Legislature does not require mandatory liability insurance for an ATV then a carrier need not provide uninsured motorist coverage for an ATV. The Court in *Insura Property & Casualty Co. v. Steele,* 344 Ill. App. 3d 486, 472 (5th Dist. 2003) noted "it would make no sense to interpret the statute to mandate such coverage be provided to cover vehicles for which even basis liability insurance is not required". Thus, the *Steele*

court noted there is no mandatory uninsured motorist coverage for snow-mobiles, forklifts, and the other such machinery.

Just as with a bicyclist an ATV operator may cause injuries *to* others by his negligence but there is no mandatory liability insurance. Just as with a bicyclist an operator or passenger may be injured *by* an uninsured ATV. A bicycle is not a "motor vehicle" and is not "designed for use on the public roads". See *Bertz v. City of Evanston*, 2013 IL App (1st) 123763, 625 ILCS 5/1-146. There is neither an obligation to provide mandatory liability insurance to a bicyclist nor an obligation to provide a bicyclist uninsured motorist coverage.[1]

It is true that bicyclist rental stations and bicyclist 'lanes' are being put into City of Chicago streets. It may become necessary in the future to require bicyclists using a roadway to have mandatory liability insurance – but for now, the Legislature has not required this. A bicycle is for the most part a flimsy apparatus, and it is not *designed* for use *on* the *public roads*, even if bicycle *lanes* are being put on the side of streets.

Mandatory insurance only applies to "motor vehicles" and even if a bicyclist is not exactly the same as a pedestrian, it is undisputed that a bicycle is not a 'motor vehicle' and is not designed for use on the public roads.

[1] While DAI strongly rejects the argument that a "pedestrian" is entitled to uninsured motorist coverage either, since that appeal was severed and dismissed, it may be outside of the necessity to argue here.

V. CONCLUSION: GUIRACOCHA HAS NO EXPECTATION OF COVERAGE AND CANNOT MEET THE HEAVY BURDEN TO OVERTURN A CONTRACT FREELY ENTERED INTO

Christopher can't have any expectation that if he causes injuries to someone else while riding his bicycle that he is covered by DAI. DAI was not asked to evaluate the risk of Christopher's bicycle use. As noted by the *Steele* court, 344 Ill. App. 3d 486, 472 (5th dist., 2003), "it would make no sense to interpret the statute to mandate such coverage be provided to cover vehicles for which even basis liability insurance is not required". This conclusion directly contradicts the Appellate Court's erroneous reversal of Judge Hall. Guiracocha has a high burden to overturn the terms and conditions of the DAI insurance policy, long approved by the Illinois Department of Insurance. *Phoenix Ins. Co. v. Rosen*, 242 Ill. 2d 48, 55 (2011).

The Appellate Court here acknowledged that Guiracocha has such a heavy burden to meet but then ignored it. DAI is not required to write the or accept the liability risk of an ATV, a snow blower, a fork-lift, or a bicyclist. The policy covers no liability that Christopher may be guilty of. That being the case, the operator or passenger in a ATV, a snow blower, a fork lift or a bicyclist is not entitled to uninsured motorist coverage.

PRAYER FOR RELIEF

DAI prays the Honorable Court reverse the Appellate Court, 2022 IL App (1st) 211595, and affirm Judge Hall's declaration that DAI owes Guiracocha no duty and no coverage.

Respectfully submitted,

/s/ Samuel A. Shelist

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), contains 18 pages.

/s/ Samuel A. Shelist
Samuel A. Shelist

APPENDIX

TABLE OF CONTENTS TO APPENDIX

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Direct Auto Ins Co		]
vs	Plaintiff,	]No. 21CH02447
		]
Guiracocha et al.,		]
	Defendant,	]

ORDER

This Cause coming to be heard on January 11, 2022, briefs submitted and oral argument had, notice given, this Court being so fully advised in the Premises,

It is ordered: 1. the Motion for summary judgment by DAI is GRANTED for the reasons stated on the record, and the Court DECLARES DAI owes no coverage, DAI owes no duty to defend or indemnify.

This is a final order disposing of all issues. Plaintiff DAI waives costs.

X_____1_ 1/12/22

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Zoom Password: 253498

ENTERED
Judge Sophia H. Hall-0162
JAN 12 2022
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

129031

2022 IL App (1st) 211595

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Appellate Court of Illinois, First District,
THIRD DIVISION.

Carmen GALARZA, Plaintiff-Appellee,
v.
DIRECT AUTO INSURANCE COMPANY, Defendant-Appellant.
Direct Auto Insurance Company, Plaintiff-Appellee,
v.
Fredy Guiracocha and Cristopher Guiracocha, a minor by next best friend Fredy Guiracocha, Defendants-Appellants.

Nos. 1-21-1595 & 1-22-0281 (cons.)
|
September 30, 2022

Synopsis

Background: Automobile insurer brought action against named insured and his child for declaratory judgment that child was not insured and was not entitled to uninsured motorist (UM) benefits for injuries as bicyclist involved in collision with hit-and-run driver. The Circuit Court, Cook County, Sophia H. Hall, J., entered summary judgment in favor of insurer. In separate case, pedestrian brought action against her insurer to recover UM benefits for injuries caused by hit-and-run driver. The Circuit Court, Cook County, David B. Atkins, J., entered summary judgment in favor of pedestrian. Insurer, named insured, and child appealed, and appeals were consolidated.

Holdings: The Appellate Court, Reyes, J., held that:

[1] judgment against insurer on pedestrian's declaratory judgment count was not appealable, and

[2] provision defining "insured" to include relatives who were occupants of insured automobile violated public policy and was invalid.

Appeal dismissed; reversed and remanded.

Robert E. Gordon, J., specially concurred and filed opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (20)

[1] **Appeal and Error**

An appeal generally may be taken only after the circuit court has resolved all of the claims against all of the parties to the action.

[2] **Appeal and Error**

Judgment against insurer on insured's declaratory judgment count was not appealable, where circuit court did not resolve insured's claim for attorney fees, costs, and statutory penalties and never made express finding of no just reason to delay enforcement or appeal or both. 215 Ill. Comp. Stat. Ann. 5/155; Ill. Sup. Ct. R. 304(a).

[3] **Judgment**

The construction of the terms of an insurance policy and whether the insurance policy comports with statutory requirements present questions of law that are properly decided on a motion for summary judgment.

[4] **Appeal and Error**

The determination of whether a provision in a contract, insurance policy, or other agreement is invalid because it violates public policy presents a question of law, which is reviewed de novo.

[5] **Appeal and Error**

Under de novo review, the Appellate Court performs the same analysis as a circuit court and gives no deference to the circuit court's conclusions or specific rationale.

129031

[6] Insurance

If insurance policy terms are clear and unambiguous, they must be enforced as written unless doing so would violate public policy.

[7] Statutes

The public policy of Illinois is reflected in its constitution, statutes, and judicial decisions.

[8] Insurance

Terms of insurance policy that conflict with statute are void and unenforceable.

[9] Insurance

Insurance policy terms cannot circumvent underlying purpose of statute in force at time policy is issued.

[10] Statutes

Statute that exists for protection of public cannot be rewritten through private limiting agreement.

[11] Contracts

The power to declare a contract invalid on public policy grounds is exercised sparingly.

[12] Contracts

An agreement will not be invalidated as violative of public policy unless it is clearly contrary to what the constitution, statutes, or judicial decisions have declared to be the public policy or unless it is manifestly injurious to the public welfare.

[13] Contracts

Whether an agreement is contrary to public policy depends on the particular facts and circumstances of the case.

[14] Automobiles

The public policy of Illinois is to protect members of the public injured in vehicular accidents.

[15] Insurance

The principal purpose of the liability insurance requirement is to protect the public by securing payment of their damages. 625 Ill. Comp. Stat. Ann. 5/7-203, 5/7-601.

[16] Insurance

Uninsured motorist (UM) coverage must extend to all who are insured under the policy's liability provisions. 215 Ill. Comp. Stat. Ann. 5/143a.

[17] Insurance

If person constitutes insured for purposes of liability coverage under policy, insurance company may not, either directly or indirectly, deny uninsured motorist (UM) coverage to that person. 215 Ill. Comp. Stat. Ann. 5/143a.

[18] Insurance

Automobile policy provision defining "insured" to include relatives who were occupants of insured automobile violated public policy and was invalid as applied to claim for uninsured motorist (UM) benefits for injuries that hit-and-run driver caused to named insured's child while riding bicycle, even though child was not an insured under the liability coverage; statute broadly mandated UM coverage for "the protection of persons insured" under automobile liability policy, insurer effectively evaded this requirement by linking coverage to occupancy of an automobile, purpose of UM coverage was

129031

thwarted if it was effectively whittled away by unduly restrictive language, and public policy sought to ensure coverage for policyholders injured by uninsured motorists. 215 Ill. Comp. Stat. Ann. 5/143a.

[19] **Insurance**

Although insurers are not required to cover every possible loss and may legitimately limit their risks, an insurer may not directly or indirectly deny uninsured motorist (UM) coverage to an insured. 215 Ill. Comp. Stat. Ann. 5/143a.

[20] **Insurance**

Uninsured motorist (UM) coverage is required so that policyholder is placed in substantially same position he or she would occupy if injured or killed in accident where party at fault carried minimum liability coverage required by law. 215 Ill. Comp. Stat. Ann. 5/143a.

Appeal from the Circuit Court of Cook County, No. 20 CH 4631, Honorable David B. Atkins, Judge Presiding.

Appeal from the Circuit Court of Cook County, No. 21 CH 2447, Honorable Sophia H. Hall, Judge Presiding.

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Matthew Friedman and Howard H. Ankin, of Ankin Law Office LLC, of Chicago, for Carmen Galarza.

OPINION

JUSTICE REYES delivered the judgment of the court, with opinion.

*1 ¶ 1 These two consolidated appeals involve a single issue: whether a provision in an automobile insurance policy which limits uninsured motorist coverage to insureds occupying an "insured automobile" violates section 143a of the Illinois Insurance Code (Insurance Code) (215 ILCS 5/143a (West 2020)) – which addresses uninsured and hit-and-run motor vehicle coverage (UM coverage) [1] – and is thus unenforceable as against public policy.

¶ 2 In the first case, Carmen Galarza (Galarza) – a pedestrian who was allegedly injured by a hit-and-run driver – filed a complaint against her automobile insurer, Direct Auto Insurance Company (Direct Auto), seeking a declaratory judgment that she was entitled to UM coverage. The circuit court of Cook County (Judge David B. Atkins) granted summary judgment in favor of Galarza and found there was coverage. In the second case, Fredy Guiracocha (Fredy) filed a claim under his Direct Auto insurance policy after his 14-year-old son, Cristopher Guiracocha (Cristopher), was allegedly injured by a hit-and-run driver while riding his bicycle. The circuit court of Cook County (Judge Sophia H. Hall) granted summary judgment in favor of Direct Auto in its declaratory judgment action and found there was no UM coverage. Direct Auto appeals from the ruling in *Galarza*, and Fredy and Cristopher appeal from the ruling in *Guiracocha*. As discussed below, we find that this Court lacks jurisdiction to consider the *Galarza* appeal, and we thus sever the consolidated appeals and dismiss the *Galarza* appeal. As to *Guiracocha*, we reverse the judgment in favor of Direct Auto and remand this matter for further proceedings.

¶ 3 BACKGROUND

¶ 4 The pertinent provisions of the Direct Auto automobile insurance policies at issue in *Galarza* and *Guiracocha* appear to be identical. Part I of the policy provides liability coverage, *i.e.*, coverage for a driver who harms another individual or their property while operating a vehicle. The definition of "Insureds" under Part I differs depending on whether the liability relates to operation of an "owned automobile" or a "non-owned automobile," as defined therein.

¶ 5 Part II of the Direct Auto policy provides UM coverage, *i.e.*, coverage for when the insured is injured by a driver

129031

who does not have liability insurance. In Part II, the term "Insured" is defined to include the named insured and a "relative," as defined in Part I of the policy. UM coverage may be available under the Direct Auto policy provided that the damages (1) were caused by accident, (2) while the insured was an occupant in an "insured automobile," and (3) were as a result of the ownership, maintenance, or use of the uninsured motor vehicle.

¶ 6 *Galarza v. Direct Auto Insurance Company*, 20 CH 4631

¶ 7 Galarza was a named insured under a Direct Auto automobile insurance policy. The policy insured two vehicles – a 2012 Nissan Sentra and a 2017 Nissan Versa – and included UM coverage with limits of $25,000 per person and $50,000 per accident.

*2 ¶ 8 On July 21, 2018, Galarza allegedly was struck by a Jeep while walking out of a store. According to a witness, the driver of the Jeep exited his vehicle, checked on Galarza, and left the scene.

¶ 9 Galarza initiated a UM claim for bodily injury damages against Direct Auto and made a demand for arbitration pursuant to the policy. Direct Auto notified Galarza that there was no coverage in effect for the incident as she was not occupying an "insured automobile" at the time.

¶ 10 Galarza filed a two-count complaint against Direct Auto in the circuit court of Cook County. In count I, she alleged that Direct Auto wrongfully denied her claim as the relevant policy provision – requiring her to have been an occupant in an "insured automobile" – was against public policy and violated section 143a of the Insurance Code. She sought a declaratory judgment stating that Direct Auto owed a duty of coverage for her UM claim. In count II, Galarza asserted a claim under section 155 of the Insurance Code (215 ILCS 5/155 (West 2020)), alleging she was entitled to a statutory penalty in the amount of $60,000, plus attorney fees and costs, based on Direct Auto's "vexatious and unreasonable" conduct.

¶ 11 Direct Auto filed a counterclaim seeking a declaratory judgment that there was no coverage for Galarza's claim under the policy. Direct Auto also filed an answer to Galarza's complaint and a motion for a 90-day extension to plead as to count II (the section 155 claim). The record does not indicate whether the circuit court ruled on the extension motion.

¶ 12 Direct Auto subsequently filed a motion for summary judgment. Direct Auto initially asserted that the plain language of the policy clearly precluded coverage for Galarza's claim. According to Direct Auto, not only was Galarza required to have been an occupant of an "insured automobile" at the time of the incident, but actual physical contact between the insured automobile and the hit-and-run vehicle also was required pursuant to the terms of the policy. Direct Auto then argued that the policy as issued – which was approved by the Illinois Department of Insurance – did not violate section 143a of the Insurance Code, as Galarza's status as a pedestrian was unrelated to the "ownership, maintenance or use of a motor vehicle" (215 ILCS 5/143a (West 2020)).

¶ 13 Galarza filed a cross-motion for summary judgment and a response to Direct Auto's motion for summary judgment. She argued that the public policy underpinning UM coverage is to essentially place the insured in the same position as if the at-fault party carried the liability insurance required by Illinois law. She asserted that the fact that she was struck as a pedestrian should not have caused the denial of coverage under her policy. As to count II of her complaint (section 155 damages), Galarza contended that Direct Auto's failure to settle the claim or agree to arbitrate constituted an "unreasonable and vexatious delay."

¶ 14 In its reply and its response to Galarza's cross-motion for summary judgment, Direct Auto argued that there was no basis for interfering with the parties' contractual rights under the policy where neither the legislature nor the judiciary has enacted or interpreted UM coverage to include pedestrians. Characterizing this issue as one of first impression, Direct Auto contended that a *bona fide* coverage dispute may not serve as the basis for a claim under section 155.

*3 ¶ 15 In an order entered on November 24, 2021, the circuit court denied Direct Auto's motion for summary judgment and granted Galarza's cross-motion, concluding that Direct Auto owed a duty of coverage with respect to her UM claim. The circuit court found that Galarza had "provided adequate support to demonstrate Illinois law has found insurance policies that bar coverage due to the insured not occupying the insured vehicle at the time of an accident are against public policy." In support of this finding, the circuit court relied on *Direct Auto Insurance Co. v. Merx*,

129031

2020 IL App (2d) 190050, ¶ 42, 443 Ill.Dec. 488, 161 N.E.3d 1140, and *Squire v. Economy Fire & Casualty Co.*, 69 Ill.2d 167, 176, 13 Ill.Dec. 17, 370 N.E.2d 1044 (1977) (discussed below). Direct Auto filed a notice of appeal.

¶ 16 *Direct Auto Insurance Company v. Guiracocha*, 21 CH 2447

¶ 17 On September 24, 2020, 14-year-old Cristopher allegedly was involved in a hit-and-run incident, *i.e.*, he was struck by a vehicle while riding his bicycle. Fredy, Cristopher's father, was a named insured under an automobile policy issued by Direct Auto; the policy insured a 2006 Mercury Mountaineer. The UM coverage was $25,000 per person and $50,000 per accident.

¶ 18 Fredy filed a UM claim against Direct Auto based on his son's status as a "relative" under the policy and requested administration by the American Arbitration Association (AAA), in accordance with the policy. Direct Auto denied coverage, as Cristopher was not an occupant of an insured vehicle at the time of the incident. In May 2021, Direct Auto filed a declaratory judgment action in the circuit court of Cook County against Fredy and Cristopher (the Guiracochas). Direct Auto also requested and was granted a stay of the AAA proceedings pending resolution of the declaratory judgment action.

¶ 19 The Guiracochas answered the complaint, and Direct Auto subsequently filed a motion for summary judgment. Direct Auto argued that a bicycle is not a vehicle under Illinois law and thus Cristopher was a pedestrian. According to Direct Auto, section 143a of the Insurance Code does not require UM coverage for pedestrians or individuals not occupying a vehicle. Direct Auto also asserted that hit-and-run cases are "notorious for fraud."

¶ 20 In their response, the Guiracochas acknowledged the potential for fraud in cases where there is no contact with the hit-and-run vehicle, but they asserted that Cristopher was physically struck by a vehicle, as corroborated by eyewitness statements included in the police report regarding the incident. The Guiracochas argued that Direct Auto violated public policy and section 143a of the Insurance Code by conditioning UM coverage on the insured's occupancy of their own vehicle and by denying coverage to pedestrians who have been physically struck by hit-and-run vehicles.

¶ 21 Direct Auto replied, in part, that Cristopher is "not even a person insured." The Guiracochas countered that Cristopher, as a relative residing with Fredy, was an "insured" under the policy. They further noted that Direct Auto had not previously challenged Cristopher's status as an insured in its coverage denial letter or its motion for summary judgment.

¶ 22 After hearing the arguments of counsel, the circuit court entered an order on January 12, 2022, granting summary judgment in favor of Direct Auto and declaring that Direct Auto owed no coverage or duty to defend or indemnify. The Guiracochas filed a timely appeal.

¶ 23 ANALYSIS

¶ 24 As discussed above, the circuit court in *Galarza* ruled against Direct Auto, and the circuit court in *Guiracocha* ruled in Direct Auto's favor. The cases have been consolidated on appeal. Direct Auto (as the appellant in *Galarza* and the appellee in *Guiracocha*) contends on appeal that its automobile insurance policy does not violate public policy regarding UM coverage and thus the insurance policy should be enforced as written. Galarza and the Guiracochas argue that the UM provisions of the insurance policy violate public policy and are unenforceable. The Illinois Trial Lawyers Association was granted leave to file an *amicus curiae* brief in support of Galarza.

*4 ¶ 25 Prior to considering the parties' respective contentions, we must address a jurisdictional issue: whether the challenged order in *Galarza* was a final and appealable order.

¶ 26 *Finality of Galarza Order*

[1] [2] ¶ 27 An appeal generally may be taken only after the circuit court has resolved all of the claims against all of the parties to the action. *Ely v. Pivar*, 2018 IL App (1st) 170626, ¶ 30, 424 Ill.Dec. 10, 107 N.E.3d 323. Galarza filed a two-count complaint against Direct Auto. Count I – the declaratory judgment count – was resolved by the circuit court in Galarza's favor. In count II, Galarza sought attorney fees, costs, and statutory penalties under section 155 of the Insurance Code. Section 155 " 'provides an extracontractual remedy to policyholders whose insurer's refusal to recognize liability and pay a claim under a

129031

policy is vexatious and unreasonable.' " *American Service Insurance Co. v. Passarelli*, 323 Ill. App. 3d 587, 590, 256 Ill.Dec. 755, 752 N.E.2d 635 (2001) (quoting *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 520, 221 Ill.Dec. 473, 675 N.E.2d 897 (1996)).

¶ 28 Based on our review of the record, Galarza's claim pursuant to section 155 was not resolved (or even considered) by the circuit court. In the absence of a ruling by the circuit court regarding the section 155 claim, the order at issue on appeal was not a final and appealable order. See *Shelter Mutual Insurance Co. v. Flynn*, 2020 IL App (1st) 191123, ¶ 40, 440 Ill.Dec. 853, 155 N.E.3d 1109.

¶ 29 We recognize that Illinois Supreme Court Rule 304(a) provides that, in matters involving multiple claims or multiple parties, an appeal may be taken when the circuit court has entered a final order as to one or more parties or claims, but fewer than all, if the circuit court makes an express finding that there is no just reason to delay enforcement or appeal or both. Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016). Although the November 24, 2021, order in *Galarza* fully resolved count I, the section 155 claim (count II) was not addressed. As the order did not include a Rule 304(a) finding, we lack jurisdiction to consider the appeal. *Shelter Mutual Insurance*, 2020 IL App (1st) 191123, ¶ 42, 440 Ill.Dec. 853, 155 N.E.3d 1109. We thus sever the consolidated appeals and dismiss the *Galarza* appeal (1-21-1595) for lack of jurisdiction. We now turn to the *Guiracocha* appeal (1-22-0281).

¶ 30 *Summary Judgment – General Principles*

¶ 31 The Guiracochas contend on appeal that the circuit court erred in granting summary judgment in favor of Direct Auto. Motions for summary judgment are governed by section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2020)). Summary judgment should be granted only where the pleadings, admissions, depositions, and affidavits on file, when viewed in the light most favorable to the nonmovant, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Id.*; *Thomsavath v. State Farm Mutual Automobile Insurance Co.*, 2018 IL 122558, ¶ 15, 423 Ill.Dec. 150, 104 N.E.3d 1239.

[3] ¶ 32 "The construction of the terms of an insurance policy and whether the insurance policy comports with statutory requirements present questions of law that are properly decided on a motion for summary judgment." *Id.* See also *Merx*, 2020 IL App (2d) 190050, ¶ 15, 443 Ill.Dec. 488, 161 N.E.3d 1140 (noting that "[p]ublic policy is necessarily a question of law").

*5 [4] [5] ¶ 33 The grant of summary judgment is subject to *de novo* review. *Thomsavath*, 2018 IL 122558, ¶ 16, 423 Ill.Dec. 150, 104 N.E.3d 1239. "In addition, the determination of whether a provision in a contract, insurance policy, or other agreement is invalid because it violates public policy also presents a question of law, which is reviewed *de novo*." *Id.* Accord *Phoenix Insurance Co. v. Rosen*, 242 Ill. 2d 48, 54, 350 Ill.Dec. 847, 949 N.E.2d 639 (2011). See *Goldstein v. Grinnell Select Insurance Co.*, 2016 IL App (1st) 140317, ¶ 10, 405 Ill.Dec. 518, 58 N.E.3d 779. Under *de novo* review, we perform the same analysis as a circuit court and give no deference to the circuit court's conclusions or specific rationale. *Freeburg Community Consolidated School District No. 70 v. Country Mutual Insurance Co.*, 2021 IL App (5th) 190098, ¶ 80, 451 Ill.Dec. 563, 183 N.E.3d 1020.

¶ 34 *Contracts and Public Policy Concerns*

¶ 35 The parties agree that the Direct Auto policy, as written, does not provide UM coverage for Cristopher's injuries. Among other things, the UM coverage in the policy is limited to damages caused by accident while the insured was an occupant in an "insured automobile." Cristopher was struck by a vehicle while riding his bicycle, not while in an insured automobile.

[6] [7] ¶ 36 The fact that the policy terms preclude UM coverage herein is not dispositive. *Merx*, 2020 IL App (2d) 190050, ¶ 15, 443 Ill.Dec. 488, 161 N.E.3d 1140. "If insurance policy terms are clear and unambiguous, they must be enforced as written unless doing so would violate public policy." *Schultz v. Illinois Farmers Insurance Co.*, 237 Ill. 2d 391, 400, 341 Ill.Dec. 429, 930 N.E.2d 943 (2010). The public policy of Illinois is reflected in its constitution, statutes, and judicial decisions. *Thomsavath*, 2018 IL 122558, ¶ 17, 423 Ill.Dec. 150, 104 N.E.3d 1239.

129031

[8] [9] [10] ¶ 37 The terms of an insurance policy that conflict with a statute are void and unenforceable. *Id.* Accord *Schultz*, 237 Ill. 2d at 400, 341 Ill.Dec. 429, 930 N.E.2d 943. Similarly, insurance policy terms cannot circumvent the underlying purpose of a statute in force at the time the policy is issued. *Id.* See also *Merx*, 2020 IL App (2d) 190050, ¶ 16, 443 Ill.Dec. 488, 161 N.E.3d 1140 (stating that insurers "have no right to depart from valid statutory requirements in their policies"). "It is axiomatic that a statute that exists for protection of the public cannot be rewritten through a private limiting agreement." *Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co.*, 215 Ill. 2d 121, 129, 293 Ill.Dec. 677, 828 N.E.2d 1175 (2005).

[11] [12] [13] ¶ 38 As our supreme court has a long tradition of upholding the rights of parties to freely contract, the power to declare a contract invalid on public policy grounds is exercised sparingly. *Rosen*, 242 Ill. 2d at 55, 350 Ill.Dec. 847, 949 N.E.2d 639; *Goldstein*, 2016 IL App (1st) 140317, ¶ 16, 405 Ill.Dec. 518, 58 N.E.3d 779. An agreement will not be invalidated as violative of public policy unless it is clearly contrary to what the constitution, statutes, or judicial decisions have declared to be the public policy or unless it is manifestly injurious to the public welfare. *Progressive Universal Insurance*, 215 Ill. 2d at 129-30, 293 Ill.Dec. 677, 828 N.E.2d 1175; *Rosen*, 242 Ill. 2d at 55, 350 Ill.Dec. 847, 949 N.E.2d 639. "Whether an agreement is contrary to public policy depends on the particular facts and circumstances of the case." *Progressive Universal Insurance*, 215 Ill. 2d at 130, 293 Ill.Dec. 677, 828 N.E.2d 1175.

¶ 39 *Illinois UM Coverage Requirements*

[14] ¶ 40 The public policy of Illinois is to protect members of the public injured in vehicular accidents. *Safe Auto Insurance Co. v. Fry*, 2015 IL App (1st) 141713, ¶ 11, 397 Ill.Dec. 184, 41 N.E.3d 595. "This public policy, as reflected in state statutes and well-established case law, includes mandatory liability insurance to compensate for injuries caused by the negligent operation of a vehicle by the owner or other permitted driver." *Id.* Specifically, section 7-601 of the Illinois Vehicle Code (625 ILCS 5/7-601 (West 2020)) requires liability insurance for all motor vehicles operated or registered in Illinois, with certain exceptions. The minimum amounts of liability coverage currently mandated are $25,000 per person and $50,000 per accident. 625 ILCS 5/7-203 (West 2020).

*6 [15] ¶ 41 The principal purpose of the liability insurance requirement is to protect the public by securing payment of their damages. *Rosen*, 242 Ill. 2d at 57, 350 Ill.Dec. 847, 949 N.E.2d 639; *Merx*, 2020 IL App (2d) 190050, ¶ 17, 443 Ill.Dec. 488, 161 N.E.3d 1140; *Goldstein*, 2016 IL App (1st) 140317, ¶ 21, 405 Ill.Dec. 518, 58 N.E.3d 779. "To further that end, the legislature requires uninsured motorist coverage to place the policyholder in substantially the same position he would occupy if the tortfeasor had the minimum liability insurance" required by Illinois law. *Thoumsavath*, 2018 IL 122558, ¶ 25, 423 Ill.Dec. 150, 104 N.E.3d 1239.

¶ 42 Section 143a of the Insurance Code thus requires a motor vehicle liability policy to also include UM coverage. 215 ILCS 5/143a (West 2020); *Merx*, 2020 IL App (2d) 190050, ¶ 18, 443 Ill.Dec. 488, 161 N.E.3d 1140. The UM coverage must be in an amount equal to the bodily-injury liability limits unless the insured has bodily injury coverage in excess of the statutory minimum and specifically rejects that additional amount of UM coverage. *Id.* In this case, the Guiracochas carried the minimum amount of UM coverage under Illinois law: $25,000 per person and $50,000 per accident.

¶ 43 *Direct Auto Policy and UM Coverage Public Policy*

[16] [17] ¶ 44 The key question we must consider is whether the denial of the Guiracochas' claim for UM coverage comports with section 143a of the Insurance Code and its underlying purpose. See *Merx*, 2020 IL App (2d) 190050, ¶ 15, 443 Ill.Dec. 488, 161 N.E.3d 1140. Section 143a provides, in part, as follows:

> "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 *** 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 Code for the

129031

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." 215 ILCS 5/143a (West 2020).

Based on section 143a, UM coverage "must extend to all who are insured under the policy's liability provisions." *Thomsavath*, 2018 IL 122558, ¶ 19, 423 Ill.Dec. 150, 104 N.E.3d 1239. "If a person constitutes an insured for purposes of liability coverage under a policy, the insurance company may not, either directly or indirectly, deny uninsured-motorist coverage to that person." *Schultz*, 237 Ill. 2d at 403, 341 Ill.Dec. 429, 930 N.E.2d 943.

[18] ¶ 45 The parties agree that, for purposes of our analysis, Cristopher was a pedestrian. According to Direct Auto, a pedestrian is not an insured under Part II (UM) of the policy. An "insured" is defined in the UM provisions of the policy to include the named insured and certain relatives. The UM coverage, however, is restricted to insureds who are occupants in an "insured automobile." Furthermore, the UM provisions require "actual physical contact between the insured automobile and the hit-and-run motor vehicle." In light of the foregoing, Cristopher – as a pedestrian – does not appear to be entitled to UM coverage under the Direct Auto policy.

¶ 46 As noted above, if an individual qualifies as an insured for purposes of the policy's bodily injury liability provisions, he or she must be treated as an insured for purposes of UM coverage. *Thomsavath*, 2018 IL 122558, ¶ 31, 423 Ill.Dec. 150, 104 N.E.3d 1239; *Merx*, 2020 IL App (2d) 190050, ¶ 41, 443 Ill.Dec. 488, 161 N.E.3d 1140. Direct Auto contends that Cristopher is not an insured under the liability provisions (Part I) of the policy. Although the "Insureds" definition in Part I includes multiple enumerated parties, the definition requires the use of an "owned automobile" or a "non-owned automobile," as defined therein. A pedestrian, by definition, would not be entitled to coverage under Part I, as written. Direct Auto suggests that the UM provisions are valid, as pedestrians are not insureds under Part I (liability) and thus need not be insureds under Part II (UM) of the policy.

*7 [19] ¶ 47 While Direct Auto's contention has facial appeal, it is contrary to both the language of section 143a and its underlying public policy. Section 143a is expressly designed to broadly mandate UM coverage for "the protection of persons insured" under an automobile liability policy. 215 ILCS 5/143a (West 2020). When drafting the policy at issue, Direct Auto effectively evaded this requirement by linking coverage to the insured's occupancy of an automobile. In the context of liability coverage, this restriction makes sense; Direct Auto is providing *automobile* liability insurance, not *pedestrian* liability insurance. In the UM context, however, the purpose of such coverage is thwarted if the coverage is effectively "whittled away" by unduly restrictive language. *Merx*, 2020 IL App (2d) 190050, ¶ 22, 443 Ill.Dec. 488, 161 N.E.3d 1140. Although we recognize that insurers "are not required to cover every possible loss and may legitimately limit their risks" (*Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 442, 341 Ill.Dec. 485, 930 N.E.2d 999 (2010)), an insurer may not directly or indirectly deny UM coverage to an insured.

[20] ¶ 48 "It is well established that uninsured-motorist coverage is required so that the policyholder is placed in substantially the same position he or she would occupy if injured or killed in an accident where the party at fault carried the minimum liability coverage required by law." *Merx*, 2020 IL App (2d) 190050, ¶ 22, 443 Ill.Dec. 488, 161 N.E.3d 1140. In the instant case, if Cristopher had been struck by a motorist carrying the minimum liability coverage mandated under Illinois law, he may be compensated for his injuries up to the $25,000 limit. Given that Cristopher allegedly was the victim of a hit-and-run driver, however, he is potentially left without compensation for his injuries in the absence of UM coverage. Depending on the Guiracochas' circumstances, Cristopher's damages may result in an unjust burden to the public at large if UM coverage is unavailable. See *Progressive Universal Insurance*, 215 Ill. 2d at 140, 293 Ill.Dec. 677, 828 N.E.2d 1175 (discussing the "goal of protecting the public" by the payment of damages under a UM policy provision). Such a result "would run afoul of Illinois's clear public policy of ensuring coverage for policyholders injured by uninsured motorists." *Merx*, 2020 IL App (2d) 190050, ¶ 31, 443 Ill.Dec. 488, 161 N.E.3d 1140.

¶ 49 We further observe that the Direct Auto policy, as written, is inconsistent with Illinois case law. For example, in *Dontaier v. State Farm Mutual Automobile Insurance Co.*, 8 Ill. App. 3d 547, 552, 290 N.E.2d 284 (1972) – which involved an injured motorcyclist – this Court opined that our supreme court "would interpret Section 143a of the Insurance Code as a direction to insurance companies

129031

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." The Illinois Supreme Court in *Squire v. Economy Fire & Casualty Co.*, 69 Ill. 2d 167, 179, 13 Ill.Dec. 17, 370 N.E.2d 1044 (1977), subsequently invalidated an exclusion in an insurance policy as violative of section 143a, thus allowing an injured pedestrian to recover under the UM coverage provisions in both her primary automobile insurance policy and an endorsement to that policy.

¶ 50 In *Direct Auto Insurance Co. v. Merx*, 2020 IL App (2d) 190050, 443 Ill.Dec. 488, 161 N.E.3d 1140, the appellate court recently considered the exact policy language as at issue in this case. Direct Auto filed a declaratory judgment action against the insured, alleging that there was no UM coverage for an accident in which the insured was a passenger in a vehicle where the at-fault driver was an uninsured motorist. *Id.* ¶¶ 3-4. Direct Auto argued that the insured was not an "occupant in an 'insured automobile' " under the UM provisions of the policy. *Id.* ¶ 4. The appellate court affirmed the grant of the insured's motion for judgment on the pleadings and the denial of Direct Auto's motion for summary judgment. *Id.* ¶ 44. The appellate court concluded that "[t]o deny uninsured-motorist coverage to Merx simply because she did not occupy her insured automobile at the time of the accident *** would contravene public policy and the legislative purpose behind section 143a of the Insurance Code by foreclosing her from being placed in substantially the same position she would have occupied had she been injured in an automobile accident where the party at fault carried the legal minimum amount of liability coverage." *Id.* ¶ 42.

*8 ¶ 51 Direct Auto concedes that *Merx* effectively alters the UM coverage language by deleting the word "insured" from "occupant in an 'insured automobile.' " Direct Auto maintains, however, that a pedestrian, *i.e.*, Cristopher, is different from a vehicle passenger. Based on our review of *Merx* and related case law, we are unable to discern any meaningful basis for distinguishing between a pedestrian and a passenger under the limited circumstances herein. *Merx* supports the inclusive coverage sought by the Guiracochas in the instant case. While Direct Auto observes that the Illinois Department of Insurance allowed the instant policy to be issued, the *Merx* decision plainly indicates that such approval does not preclude an insured from successfully challenging the validity of the policy provisions.

¶ 52 We further note that the cases cited by Direct Auto are inapposite. For example, in *Rosenberg v. Zurich American Insurance Co.*, 312 Ill. App. 3d 97, 105, 244 Ill.Dec. 433, 726 N.E.2d 29 (2000), the appellate court stated, in *dicta*, that the "Illinois statute pertaining to uninsured motorist coverage does not specify that pedestrians must be included in underinsured and uninsured motorist coverage as Massachusetts statute does." *Rosenberg*, however, addressed a wholly different issue than the case at bar, *i.e.*, whether the resident of a retirement community was entitled to UM coverage under the retirement community's automobile insurance policy. *Id.* at 98, 244 Ill.Dec. 433, 726 N.E.2d 29. More significantly, as noted above, section 143a broadly mandates protection for insured persons under the policy, thus obviating any need to delineate "pedestrians" as a protected group. Direct Auto also relies on isolated language in *Stark v. Illinois Emcasco Insurance Co.*, 373 Ill. App. 3d 804, 811, 311 Ill.Dec. 944, 869 N.E.2d 957 (2007), wherein the appellate court found that the defendant insurance company "never contemplated undertaking the risk of insuring plaintiff, as a pedestrian, for purposes of underinsured motorist coverage." The court's finding in *Stark*, however, was unrelated to the insured's status as a pedestrian; the appeal addressed whether the policy issued to a company provided certain coverage to the company's sole officer, director, and shareholder. *Id.* at 810, 311 Ill.Dec. 944, 869 N.E.2d 957.

¶ 53 As recognized by our supreme court, "Illinois' present insurance scheme does not eliminate the possibility that drivers will take to the road without liability insurance, nor does it guarantee that injured parties will have their own policies to draw from," as is the case with the Guiracochas. See *Progressive Universal Insurance*, 215 Ill. 2d at 140, n.3, 293 Ill.Dec. 677, 828 N.E.2d 1175. While there may be circumstances in which an injured party may be left without any kind of coverage, such coverage gaps should ultimately be addressed by the legislature. *Id.*

¶ 54 For the reasons discussed herein, we find that the circuit court erred in granting summary judgment in favor of Direct Auto. Although we recognize that an insured seeking to invalidate an insurance policy provision as against public policy bears a heavy burden (*Merx*, 2020 IL App (2d) 190050, ¶ 16, 443 Ill.Dec. 488, 161 N.E.3d 1140), such burden has been satisfied in the instant case.

129031

¶ 55 CONCLUSION

¶ 56 We sever the consolidated appeals in *Galarza* (1-21-1595) and *Guiracocha* (1-22-0281). The *Galarza* appeal is dismissed for lack of jurisdiction. The judgment of the circuit court in *Guiracocha* is reversed, and this matter is remanded for further proceedings.

¶ 57 1-21-1595: Dismissed.

¶ 581-22-0281: Reversed and remanded.

Presiding Justice McBride concurred in the judgment and opinion.

Justice Gordon specially concurred, with opinion.

¶ 59 JUSTICE GORDON, specially concurring:

¶ 60 I agree with the well-written decision of the majority, but I must write separately to expand on the majority's finding that the Direct Auto Insurance policy for uninsured motorist coverage violates the public policy of Illinois. This decision is a case of first impression and interprets the public policy of Illinois as to uninsured motorist coverage. Generally, only our Supreme Court of Illinois has the final say in the creation and interpretation of the public policy of the state (citations omitted), but before our Supreme Court rules, it is the job of the lower courts to interpret public policy when the issue of public policy is presented by a party litigant in a lawsuit.

*9 ¶ 61 Based on Section 143(a) of the Insurance Code, uninsured motorist coverage "must extend to all who are insured under the policy's liability provisions." *Thounsavath v. State Farm Mutual Automobile Insurance Company*, 2018 IL 122558, ¶ 19, 423 Ill.Dec. 150, 104 N.E.3d 1239. Direct Auto, in its pleadings, alleged that Cristopher is "not even a person 'insured' under the policy." However, at oral argument, Direct Auto agreed that Cristopher was a named insured because his father was a named insured together with all of the members of his household, but argued that he was not insured for an accident where he sustained injuries when he was struck by a motor vehicle, while riding his bicycle, in a hit and run accident. The policy states that in order for uninsured motorist coverage to be applicable, persons insured for an accident must be occupying a motor vehicle, and Direct Auto argues that Cristopher's status in being on a bicycle was that of a pedestrian and Section 143(a) does not require or apply to pedestrians. Direct Auto further argues that the Illinois Department of Insurance approved the language of the policy and if the language was contrary to public policy, they would not have done so. However, it is the courts that provide the final decision as to whether an insurance policy violates the public policy of Illinois. Statutes that exist for the protection of the public cannot be rendered unenforceable because the language of an insurance policy deviates from the statute. *Progressive Universal Insurance of Illinois v. Liberty Mutual Fire Insurance Company*, 215 Ill. 2d 121, 129, 293 Ill.Dec. 677, 828 N.E.2d 1175 (2005).

¶ 62 Based on Section 143(a), uninsured motorist coverage "must extend to all who are insured under the policy's liability provisions." *Thounsavath*, 2018 IL 122558, ¶ 19, 423 Ill.Dec. 150, 104 N.E.3d 1239. Since Cristopher was a named insured under the policy, uninsured motorist coverage must extend to him. If the courts would find that an uninsured motorist policy as written that requires an insured to be an occupant of a vehicle as a condition precedent to coverage, then people on bicycles and other pedestrians would have no recourse for injuries caused by an uninsured driver of a motor vehicle or from a hit and run accident caused by a motor vehicle. A homeowner's policy normally excludes motor vehicle accidents, and if auto policies require the insured to be an occupant of an "insured vehicle," then the pedestrian has no avenue to obtain insurance, unless the pedestrian obtains a special policy of insurance that may be economically infeasible. Generally, as the majority has pointed out, "if insurance policy terms are clear and unambiguous, they must be enforced as written unless doing so would violate public policy." *Schultz v. Illinois Farmers Insurance Company*, 237 Ill. 2d 391, 400, 341 Ill.Dec. 429, 930 N.E.2d 943 (2010). In the case at bar, Direct Auto's condition for coverage requiring an insured to be an occupant of a motor vehicle for coverage to occur is a violation of section 143(a) of the Illinois Insurance Code under the law as made and provided.

All Citations

--- N.E.3d ----, 2022 IL App (1st) 211595, 2022 WL 4590760

129031

Footnotes

1 Although the statute refers to both uninsured motor vehicles and hit-and-run motor vehicles, this distinction has no effect on our analysis. For purposes of clarity, we refer solely to "UM" coverage.

129031

IN THE SUPREME COURT OF ILLINOIS

Direct Auto Ins Co

Petitioner,

v.

Fredy Guiracocha, et al

Respondent.

CERTIFICATE OF SERVICE

I, Samuel A. Shelist, counsel for Direct Auto Ins Co, hereby certify that on this 24th day of October, 2022, there was electronically filed and served upon the Clerk of the above court the Petition for Leave to Appeal. Service of this Petition will be accomplished by mailing 13 copies of the Petition for Leave to Appeal (Rule 315) to the IL Supreme Court Clerk and my emailing/filing manager, Odyssey EfilelL to the following counsel of Record:

DISPARTI Law Group
Jonel Metaj
JMetaj@dispartilaw.com

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

/s/ Samuel A. Shelist
Samuel A. Shelist

SUBMITTED - 20016740 - Mariela Carreno - 10/24/2022 3:14 PM

SUBMITTED - 21678136 - Mariela Carreno - 3/1/2023 2:27 PM

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

DIRECT AUTO INS CO.
Plaintiff/Petitioner

v.

FREDY GUIRACOCHA
Defendant/Respondent

Reviewing Court No: 1-22-0281
Circuit Court/Agency No: 2021CH02447
Trial Judge/Hearing Officer: SOPHIA HALL

CERTIFICATION OF RECORD

The record has been prepared and certified in the form required for transmission to the reviewing court. It consists of:

1 Volume(s) of the Common Law Record, containing 214 pages
1 Volume(s) of the Report of Proceedings, containing 22 pages
0 Volume(s) of the Exhibits, containing 0 pages

I hereby certify this record pursuant to Supreme Court Rule 324, this 31 DAY OF MARCH, 2022

Iris Martinez

(Clerk of the Circuit Court or Administrative Agency)

IRIS MARTINEZ, CLERK OF THE COOK JUDICIAL CIRCUIT COURT ©
CHICAGO, ILLINOIS 60602

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Table of Contents

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
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DIRECT AUTO INS CO.
Plaintiff/Petitioner

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FREDY GUIRACOCHA
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COMMON LAW RECORD - TABLE OF CONTENTS

Page 1 of 2

Table of Contents

COMMON LAW RECORD - TABLE OF CONTENTS

Page 2 of 2

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

CARMEN GALARZA,	)	
	)	
Appellee,	)	
	)	
v.	)	No. 129031
	)	
DIRECT AUTO INSURANCE COMPANY,	)	
	)	
Appellant,	)	
v.	)	
	)	
FREDY GUIRACOCHA, et a.,	)	
	)	
Appellees.	)	

The undersigned, being first duly sworn, deposes and states that on March 1, 2023, there was electronically filed and served upon the Clerk of the above court the Brief and Appendix of Appellant. On March 1, 2023, service of the Brief will be accomplished through the filing manager, Odyssey EfileIL, to the following counsel of record:

Jonel Metaj
DISPARTI LAW GROUP, P.A.
jmetaj@dispartilaw.com

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

/s/ Samuel A. Shelist
Samuel A. Shelist

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

/s/ Samuel A. Shelist
Samuel A. Shelist