No. _____

In the Supreme Court of the United States

SHANNON HYLAND,
as assignee of MIQUASHA SMITH,
Petitioner,

v.

LIBERTY MUTUAL
FIRE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals of the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals so far departed from the accepted and usual course of judicial proceedings when it deliberately removed relevant and uncontested facts from a breach of contract case, denied that a party made an extensive argument based upon those facts, and then vacated a $4.6 million judgment against the insurance company on grounds that relies upon the absence of those facts.

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

RULE 29.6 STATEMENT

The petitioner is not a nongovernmental corporation. The petitioner does not have a parent corporation or shares held by a publicly traded corporation.

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TABLE OF AUTHORITIES

Cases

Other

Petitioner Shannon Hyland respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit is reported at 885 F.3d 482. The opinion is reprinted in the appendix hereto ("App.") at App. 1. The order of the Seventh Circuit denying Shannon Hyland's timely petition for rehearing was entered April 3, 2018 and is found at App. 12. The opinion and order of the United States District Court for the Central District of Illinois of August 7, 2017, granting Petitioner's Motion for Summary Judgment is reported at 2017 WL 3388161, and is reprinted at App. 13.

JURISDICTION

The opinion of the Seventh Circuit was entered on March 15, 2018. App. 1. A Motion for rehearing was timely filed on March 29, 2018 and was denied by the Seventh Circuit on April 3, 2018. App. 12. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

None

INTRODUCTION

This case involves a horrible automobile collision caused by a teenager named Miquasha Smith while driving someone else's vehicle. A passenger in that vehicle, Monteil Hyland, suffered a severe, permanent brain injury. Monteil's family sued the driver, but the insurance company for the car, Liberty Mutual, denied coverage and a defense for the driver. This decision to deny a defense was later admitted by Liberty Mutual to have been a breach of a duty that it owed to the driver under Illinois law.

Because of the denial of coverage and a defense, the injured boy's family sought and received uninsured motorist payments from their own automobile policy, which was a larger policy than the Liberty Mutual one to begin with. When Liberty Mutual continued to deny a defense to the driver, the injured boy's family pursued a judgment against the driver for $4.6 million in state court. This case is a breach of contract case brought by the family of the injured boy as assignee of the driver for the failure to defend. The District Court entered summary judgment in favor of the plaintiff and determined that the full judgment in the state court was proximately caused by Liberty Mutual's breach.

This was vacated by the Court of Appeals which instead came to the exact opposite conclusion that the Plaintiff was not able to prove that the lack of a defense caused the judgment to be entered against the driver. The Court of Appeals opinion stands for the very unusual and unsupported conclusion that when an injured person collects uninsured motorist coverage for an injury claim, that they will always

then still proceed to a judgment anyway against the tortfeasor. The only way this conclusion can be made is by doing what the Court of Appeals opinion did – it refused to acknowledge the uncontested facts of the case that uninsured motorist coverage existed. The opinion is also bold because it denies that the Plaintiff made any argument on this issue when the issue of uninsured motorist coverage was actually the main argument made by the Plaintiff on causation.

This opinion by the Court of Appeals departs from acceptable and usual courses of judicial proceedings because it removes uncontested facts from the record and denies an argument was made in order to draw a conclusion that is patently illogical and unsupported by the evidence or common sense. The opinion also turns summary judgment standards upside-down by taking a remote possibility and just calling it "inevitable." In authoring this ruling, the Court of Appeals has now given a green light for insurance companies to deny claims on small policies in order to shift the burden to other companies who issue larger uninsured motorist insurance policies.

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STATEMENT OF THE CASE

On August 3, 2013, a teenage boy named Monteil Hyland was severely injured as a back-seat passenger in a car crash. The driver was a teenage girl and she wrecked the car while driving too fast on a residential street in Peoria, Illinois. The car itself was owned by another friend of these two teens and the car was insured by Liberty Mutual Insurance Company up to a liability limit of $25,000 per person.

The family of the injured boy sued the driver for negligently causing the collision. Liberty Mutual conducted a short investigation of the collision that consisted of interviews of both the driver and the owner of the vehicle. The owner told Liberty Mutual that she did not give the driver permission to use the car that night. However, the driver told them that she did have permission from the owner to use the car that evening. Based upon this contradiction, Liberty Mutual told the driver that it would not cover her, and it would not defend her in the lawsuit. The teenage girl herself had no insurance and was indigent.

When Liberty Mutual told the girl that it would not defend her in the lawsuit, it breached a duty it owed to her under Illinois law. If a company feels that it does not have coverage based upon facts outside of the lawsuit itself (like permission) it still has to defend under a reservation of rights, or file a declaratory judgment action. If the company does not do one of these things, it can be held liable for the damages it causes the driver because of that failure to defend.

The boy's family, luckily, did have an insurance policy on their own car and it included uninsured motorist coverage. Once Liberty Mutual denied a defense to the girl, Progressive Insurance sprang into action and paid the full limits of $100,000 to the boy's family for his injuries. Any payment under an uninsured motorist policy does come with the caveat that if the injured party can get any collection from the driver of the uninsured car, they have to pay the first $100,000 back to Progressive.

Not satisfied with what Liberty Mutual had done, or not done as the case may be, the injured boy's family then presses Liberty Mutual on its wrongful

conduct by telling them the action was wrong and that if they don't defend the lawsuit, the family will seek a judgment against the uninsured, indigent girl and then go after Liberty Mutual for those damages. Liberty Mutual then responded to that letter and reiterated that it will not defend her.

The family of the boy then followed-up on its promise and took a default judgment against the girl in state court. The family's lawyer told the judge why they were doing this. He said:

> "This is going to be a proceeding to prove up damages relative to the Hyland youth, and then what I plan to do is proceed with regard to a declaratory judgment concerning insurance because there was insurance on the vehicle, and Liberty Mutual failed to either provide this young lady a defense. They didn't defend and reneged on that."

The state court listened to the evidence presented on the boy's brain injury caused by the collision and awarded his family a judgment against the girl of nearly 4.6 million dollars. The girl has no ability to pay anything like that, and she assigns to the boy's family any causes of action she may have against Liberty Mutual for refusing to defend her. Furthermore, even if she had a little money to give the boy's family, that money would have to be paid back to Progressive Insurance under subrogation.

The boy's family then files this breach of contract lawsuit in the Central District of Illinois against Liberty Mutual. The basis for federal jurisdiction for this lawsuit was diversity of parties under 28 U.S.C. §1332. The boy's mom and the driver are both citizens

of the State of Illinois. Defendant Liberty Mutual is a Wisconsin corporation with its principle place of business in Boston, Massachusetts. This cause of action is not a "direct action" as contemplated in 28 U.S.C. §1332(c)(1)(A) because Illinois does not allow for direct action cases and because this is a first party action between the insured and the insurer.

While in front of the District Court, Liberty Mutual admitted in briefing that it had breached its duty to defend the driver. Both parties filed for summary judgment, with Hyland seeking a judgment against Liberty Mutual in the amount of the $4.6 million plus Illinois statutory interest of 9% and the insurance company seeking a judgment no greater than the policy limits of $25,000.

The District Court sided with the boy's family and awarded the full amount of the underlying state court judgment plus the interest on that judgment. In a 24-page opinion, the Court stated that:

> "The undisputed evidence shows that the Plaintiff pursued the default judgment and the judgment amount because Liberty Mutual did not defend or obtain a declaratory judgment. Thus, the default judgment entered against Smith was proximately caused by Liberty Mutual's breach, directly flowed from the breach, and was a natural consequence of the breach." App. 42.

Liberty Mutual appealed the District Court's decision and order to the Seventh Circuit Court of Appeals. Following oral arguments and supplemental jurisdictional memorandum, the Court of Appeals vacated the Order of the District Court and entered

judgment against Liberty Mutual for $25,000 plus interest. The reasoning on this decision was that the breach of the duty to defend did not cause the judgment to be entered against Miquasha Smith, because "some judgment against Smith was inevitable and the amount of the judgment must be taken as justified." App. 10-11.

The opinion states that there was no argument that if attorney had been present with the driver at a trial, the liability or damages findings would have been different and that Hyland never offered an alternative argument. The opinion does not make any reference to the existence of the uninsured motorist coverage from Progressive Insurance.

A petition for rehearing was filed with the Court of Appeals on the grounds that Hyland had offered an extensive alternative argument and the opinion does not acknowledge it or the facts from the record that the argument is based upon. The alternative argument is that no judgment would ever have been entered against the driver without the inaction of Liberty Mutual because the presence of uninsured motorist coverage makes such a move by Hyland completely contrary to her self-interest. The petition for rehearing was denied.

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REASONS FOR GRANTING THE WRIT

This Court should grant review of the Court of Appeals' decision because the Court greatly departed from the accepted and usual course of judicial proceedings by removing relevant, uncontested facts from the case and denying that arguments were made in order to craft a decision in line with an outcome that it desired.

A. UNDER ILLINOIS LAW, AN INSURER WHO BREACHES THE DUTY TO DEFEND IS LIABLE TO THE INSURED FOR DAMAGES THAT ARE MEASURED BY THE CONSEQUENCES PROXIMATELY CAUSED BY THE BREACH.

In order for this picture to be complete, it needs to be briefly explained how all of the pieces of a "duty to defend" case fit into place. Under Illinois insurance law, an insured contracts for and has a right to expect two separate and distinct duties from an insurer: (1) the duty to defend him if a claim is made against him; and (2) the duty to indemnify him if he is found legally liable for the occurrence of a covered risk. *Chandler v. Doherty*, 299 Ill. App. 3d 797, 801, 702 N.E.2d 634, 637 (4th Dist. 1998). An insurer may be required to defend its insured even when there will ultimately be no obligation to indemnify. *Id.* As expressed in *Landmark American Insurance Company v. Hilger*, 838 F.3d 821 (7th Cir. 2016), "an insurer's duty to defend is 'much broader' than its duty to indemnify. If the facts alleged in the underlying complaint fall within, or potentially within, the policy's coverage provisions, then the insurer has a duty to defend the insured in the underlying action." 838 F.3d at 824, citing *Crum & Forster Managers Corp. v. Resolution*

Tr. Corp., 156 Ill.2d 384, 393, 620 N.E.2d 1073, 1079 (1993).

An insurance company taking the position that it has no duty to defend usually cannot "simply refuse to defend the insured." *Emp'rs Ins. of Wausau v. Ehlco Liquidating Tr.*, 186 Ill.2d 127, 150, 708 N.E.2d 1122, 1134 (1999). As long as the underlying complaint even "potentially alleg[es] coverage," the insurer must either defend the suit under a reservation of rights or seek a declaratory judgment that there is no coverage. *Id.*

The damages to be assessed in such a breach of contract against the insurance company are measured by the consequences proximately caused by the breach. *Conway v. Country Casualty Ins. Co.*, 92 Ill.2d 388, 397-98, 442 N.E.2d 245, 249 (1982). This would include damages in excess of the policy limits as well if those damages were also proximately related to the beach. *Delatorre v. Safeway Ins. Co.*, 2013 IL App (1st) 120852, 989 N.E.2d 268 (2013). Liberty Mutual does not believe that Illinois law allows for the damages to exceed the policy limits absent bad faith on the part of the insurance company. The District Court did not agree with that argument and the Court of Appeals did not take a position.

In this case, Liberty Mutual has admitted that it breached the duty to defend Miquasha Smith. That leaves the issue of what damages were proximately caused by the breach.

B. HYLAND'S POSITION ON CAUSATION IS THAT THE ONLY REASON WHY A JUDGMENT WAS SOUGHT AGAINST SMITH WAS BECAUSE OF LIBERTY MUTUAL'S BREACH OF THE DUTY TO DEFEND.

There are four things that are relevant to understand the Petitioner's argument, and they are:

1. Liberty Mutual had a $25,000 liability policy on the car.

2. Progressive Insurance had a $100,000 uninsured/underinsured policy on the Hyland family vehicle.

3. Miquasha Smith is a teenager who is otherwise uninsured and indigent.

4. After Liberty Mutual's first refusal to do anything, Hyland explained exactly what path she would pursue.

The goal of the plaintiff in this or any case is to collect damages from all practical sources. Here, Hyland initially sought the Liberty Mutual coverage when she filed a lawsuit against the teen driver. If Hyland is able to collect the policy limits from Liberty Mutual, then the next step is to proceed to the underinsured coverage to attempt to collect the remaining $75,000 in coverage. (The UIM carrier gets a credit for what has already been collected). Once that is collected, the plaintiff has exhausted all forms of insurance.

Attempting to seek a judgment against the driver herself is a highly unlikely scenario because any collection from the driver would have to be repaid as

subrogation back to the uninsured or underinsured carrier. A person who makes a decision to personally go after the driver would be acting contrary to their own economic self-interest, *i.e.* spending time and resources to secure a judgment that will not have economic value to them personally.

The only reason that a judgment was taken against the driver in this case is because Liberty Mutual breached the duty to defend her. This gave the driver a cause of action for breach of contract that provided the incentive for the injured party to seek a judgment; this is because any judgment now could be potentially collectible against Liberty Mutual as damages in the breach of contract claim.

Hyland even gave fair warning to Liberty Mutual. After the first denial of coverage and a defense, Hyland was able to collect the policy limits from Progressive Insurance under the uninsured motorist coverage. The very same day, a letter was sent to Liberty Mutual which stated that if they do not enter an appearance on the case, then a default judgment would be sought and supplemental procedures would be started against the insurance company personally. The actions being taken on the default judgment were also explained to the state trial court judge as being the first step before pursuing Liberty Mutual directly for violating the contract. As the District Court correctly pointed out, "the plaintiff gave Liberty Mutual notice that she would travel the default judgment route, and that the plaintiff made this clear on the record in the underlying case." App. 40.

Hyland has zero economic incentive to otherwise take the driver to a judgment. The only reason it happened in this case is because Liberty Mutual did

not do any of the actions that Illinois law required it to do. This inaction created a breach of contract claim for the driver. Even after Liberty Mutual was warned that its inaction would lead the driver to a default judgment and a collection case against Liberty Mutual itself, it still did nothing.

C. THE COURT OF APPEALS MAKES THE DETERMINATION THAT THERE ARE NO DAMAGES BECAUSE THE JUDGMENT AGAINST THE DRIVER WAS INEVITABLE.

On appeal to the Seventh Circuit Court of Appeals, the judgment against Liberty Mutual was vacated based upon the issue of causation. The Court of Appeals stated that the admitted breach of the duty to defend by Liberty Mutual did not cause the judgment to be entered against Miquasha Smith. The only reasoning given is that:

> "some judgment against Smith was inevitable and the amount of the judgment must be taken as justified." App. 10-11.

The Court of Appeals opinion never mentions the existence of uninsured motorist coverage. Instead, to come to this conclusion, the Court of Appeals only examined a hypothetical scenario where instead of breaching the duty to defend, Liberty Mutual hired an attorney to defend the driver at a trial on the merits. This is a false comparison because hiring an attorney and taking the case to full trial was only one possible path that this case could have taken if Liberty Mutual had done its job.

Instead, it could have filed a declaratory judgment action to seek a determination of whether they would have to cover the claim at all. It could have offered to settle for the small policy limits. All of these options taken together produce a number of paths the case could have taken and, despite all of the possible permutations that could have occurred, the Court of Appeals chose to analyze the most unlikely path that the case could have taken, which is a trial and judgment. The court decided to call this path "inevitable."

This analysis by the Court of Appeals is an academic analysis, which really points to the conclusion that the ***fault*** of the driver in causing the collision is unquestionable. It goes too far though by concluding that a ***judgment*** against the driver was inevitable. A judgment would require that Hyland choose to take that route. Presumably, Hyland would need to have an incentive or reason to seek a worthless judgment.

The point of the analysis that crosses the line and departs from the accepted and usual course of judicial proceedings is that the Court of Appeals has manipulated the facts and arguments of the case to reach this conclusion. At no point in the opinion is the issue of uninsured motorist coverage mentioned or even acknowledged as a fact in the case. This is a critical omission because the existence of uninsured motorist coverage will drive all of the incentives and actions of the parties.

The Court of Appeals also refused to acknowledge that Hyland made an argument both in the written briefs and oral arguments on this issue. The Court again focused on the hypothetical of *what if Liberty*

Mutual hired a lawyer to take the case to trial. The Court then answers is own question by expressing that the Plaintiff never attempted to argue that this lawyer would have made a difference on the issue of liability or damages with a jury. But, the Court then doubled down on the analysis by stating that "nor, does she offer any alternative." App. 10.

With that statement, the Court denied that an argument that spanned 5 pages in the Appellee's Brief even existed. The alternative, the one that was argued as the only realistic scenario that existed, the one that was accepted by the District Court, is that no judgment or trial would ever have happened. There was no reason for any judgment to ever have been pursued against this driver because she had no assets and uninsured motorist coverage existed to take her place. As the District Court explained it:

> "The undisputed evidence shows that the Plaintiff pursued the default judgment and the judgment amount because Liberty Mutual did not defend or obtain a declaratory judgment. Thus, the default judgment entered against Smith was proximately caused by Liberty Mutual's breach, directly flowed from the breach, and was a natural consequence of the breach." App. 42.

If you add the omitted facts from the record back into the conclusion of the Court of Appeals, you then get this statement:

> A person who collects uninsured motorist coverage from their own policy of insurance will ***always*** continue to

> pursue an uninsured and indigent teenager to a court judgment, even if any money they could collect from the teenager would have to be returned to their own insurance company.

This statement becomes complete folly once the omitted facts are returned. The Court of Appeals is making the statement that a plaintiff will always pursue an uncollectable case to judgment. This statement does not follow how litigation occurs in the real world and assumes, nay demands, that an injured plaintiff will always act contrary to her own economic self-interest. Securing a judgment and proving the damages to a court requires resources to accomplish. These resources would not be recovered if the judgment is uncollectable or subject to subrogation by another insurance company.

The only way for the Court of Appeals conclusion to make sense is to remove the uncontested facts regarding the uninsured motorist coverage from the analysis, which is what it did. This is improper and denies the Plaintiff a fair analysis on the facts and merits of the case. The Court of Appeals created an outcome that it wanted to accomplish and changed the facts of the case to justify that outcome. For this reason, an exercise of this Court's supervisory power is needed.

D. THE COURT OF APPEALS HAS MISUSED SUMMARY JUDGMENT STANDARDS BY RELYING ON A SCENARIO THAT IS MERELY POSSIBLE.

The Court of Appeals uses the conclusion that a judgment against the driver was inevitable to grant summary judgment in favor of Liberty Mutual and

limit its exposure to the policy limits of $25,000. A more proper phrasing to the Court's conclusion could be that a judgment against the driver was ***possible***. It could be theorized that a plaintiff in some case might pursue a judgment against a defendant out of spite or revenge.

To defeat summary judgment, the non-movant is required to present evidence creating a reasonable inference, not a mere possibility. *Jenkins v. Heintz*, 124 F.3d 824, 831 (7th Cir. 1997). In this case, the Court of Appeals vacated the summary judgment entered in favor of the plaintiff based upon the opposite result being only metaphysically possible. The Court of Appeals just calls this mere possibility "inevitable" by changing the facts of the case.

The proper analysis on this case is the one that the District Court examined. Summary judgment in favor of the plaintiff is most appropriate because all of the evidence points to the conclusion that the judgment against the driver only occurred because of the failure of Liberty Mutual to do anything. At an absolute minimum, the question of causation should be an issue for a jury to decide.

Both parties to this dispute included a demand for a jury trial in their initial pleadings. Hyland's position in this Petition is that the issue of causation is clear because the question of whether anyone would have actually sought a judgment against Smith under these facts without the breach by Liberty Mutual is remote, only a mere possibility, and without economic justification.

The issue of causation is often determined by the trier of facts. In Illinois, civil jury instruction 700.11

states "You must decide whether (plaintiff) sustained damages as a result of (defendant) breach," and civil jury instruction 700.13V provides questions for the verdict form which include "Did (plaintiff) prove these damages were caused by (defendant's) breach of the contract?"

Summary judgment will be proper under Fed. R. Civ. P. 56 when the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Rivera v. Grossinger Autoplex*, 274 F.3d 1118, 1121 (7th Cir. 2001). To make this evaluation, the court is to take the facts in the light most favorable to the non-moving party. *Hedrich v. Board of Regents of the University of Wisconsin*, 274 F.3d 1174, 1177 (7th Cir. 2001).

The Court of Appeals decision is improper because it cannot be concluded as a matter of law that Hyland would have sought judgment against Smith under any and all circumstances. The decision even hypothesizes "mak[ing] conditions as favorable to Smith as they could be," by imagining a tender of the $25,000 policy limits. App. 9. Unexplained though is why this ***must*** still lead to a judgment of $4.6 million against an indigent person when there is an underinsured motorist policy of $100,000 available through Progressive Insurance, no breach of contract claim asset owned by Smith, and no other discernable assets owned by Smith. A jury could easily conclude under these circumstances that no judgment would be pursued and the offer would have been accepted – because there is nothing to gain in refusing the offer.

This Court has explained the application of the summary judgment standard as whether a fair-

minded jury could return a verdict for the plaintiff on the evidence presented. *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986). In this case, the conclusion that a jury could rule for the plaintiff can be made easily. The sole issue is would a jury rule in favor of a plaintiff who simply acts consistent with her own economic self-interest. Clearly a genuine issue exists and judgment as a matter of law in favor of Liberty Mutual is incorrect.

E. THE DECISION OF THE COURT OF APPEALS GIVES INSURANCE COMPANIES THE ABILITY TO DENY CLAIMS WITH IMPUNITY.

Without being responsible for the damages caused by its breach of contract, an insurance company could deny any contested coverage case with the sole threat that one day, maybe, they would have to pay up to the policy limits. In this case alone, three teenagers were injured in the car. After Liberty Mutual denied the claims of these injured teens, two apparently gave up when they were told there would be no coverage. If Liberty Mutual's position were to prevail here, it would result in an incentive to a liability insurer to not spend money on a defense or a declaratory judgment action and then only pay up to the policy limits if ordered to do so. The company would only need to show some piece of extraneous evidence that goes to the issue of coverage.

This case highlights an even more dangerous scenario. If the physically-injured person holds uninsured motorist protection, then a liability insurer who breaches the contract could effectively shift the entire coverage to that UM carrier. The injured party, as assignee of the tortfeasor, would have no incentive to hold the liability carrier to their obligations under

the contract as any recovery in an action against the liability carrier would just have to be reimbursed to the UM carrier as subrogation. Such incentives to breach a contract should not exist.

The amount of the judgment in this case is only related to the severity of the injury. The law is the same if the judgment only amounted to several thousand dollars above the Liberty Mutual policy limits. The Court of Appeals decision has shifted the burden of legal action to the innocent accident victim when the insurance company has always been required to seek declaratory judgment and defend if coverage exists on the vehicle.

CONCLUSION

The Court of Appeals' decision involves the deliberate omission of facts and argument. Petitioner believes that this is an issue that greatly exceeds an erroneous factual finding or the misapplication of a properly asserted rule of law. Instead, it is a decision that begs for the exercise of this Court's supervisory power.

WHEREFORE, Petitioner prays that this Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX

1. OPINION, UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, MARCH 15, 2018.

In the United States Court of Appeals For the Seventh Circuit

No. 17-21123

SHANNON HYLAND,

Plaintiff-Appellee,

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois
No. 1:15-cv-01264-JES-JEH – James E. Shadid,
Chief Judge

ARGUED FEBRUARY 22, 2018 –
DECIDED MARCH 15, 2018

Before BAUER, EASTERBROOK, and ROVNER, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Monteil Hyland was a passenger in a car owned by Kimberly Perkins and driven by Miquasha Smith—who, at age 16, was not lawfully behind the wheel when she smashed the car at 12:46 a.m. one Saturday into two parked vehicles,

seriously injuring Hyland. Smith has been convicted of aggravated reckless driving. Neither Smith nor her parents had auto insurance. But Perkins had a policy of insurance with Liberty Mutual. It covered her family, including her daughter Michiah Risby, plus anyone else driving the car with the family's permission. Smith told Liberty Mutual that Risby gave her the car's keys during a party; Risby denied doing that and said that she had given the keys to "Rob," who was never identified.

The police reported that Smith had told many incompatible stories about the events. Liberty Mutual believed its insured, Risby, and when Shannon Hyland (Monteil's mother, acting as his next friend) sued Smith it told Shannon's lawyer that it would not provide a defense or indemnity. (From now on, all references to "Hyland" are to Shannon Hyland, the plaintiff in both the state and federal suits.) Eventually Smith defaulted, and a state court entered a judgment for about $4.6 million. Smith assigned to Hyland whatever claim she had against Liberty Mutual. In this suit under the diversity jurisdiction, the district court concluded that Liberty Mutual's failure either to defend Smith or to seek a declaratory judgment of non-coverage violated Illinois law, making it liable for the entire tort judgment, even though the policy provided only $25,000 per person in coverage. 2017 U.S. Dist. LEXIS 124374 (C.D. Ill. Aug. 7, 2017). Liberty Mutual now concedes that it should have defended Smith while reserving a right to decline indemnity, but it contends that its liability cannot exceed the policy's cap.

Appellate jurisdiction is the first problem we must address. The district court entered this judgment:

> IT IS ORDERED AND ADJUDGED that the Plaintiff, Shannon Hyland's, Motion for Summary Judgment [19] is GRANTED in full. The Defendant, Liberty Mutual Fire Insurance Co.'s, Motion for Partial Summary Judgment on Damages [20] is DENIED. Judgment is entered in favor of the Plaintiff and against the Defendant. Case closed.

A judgment providing that "[j]udgment is entered" is circular. Judgments under Fed. R. Civ. P. 58 must provide the relief to which the prevailing party is entitled. See, e.g., *Cooke v. Jackson National Life Insurance Co.*, 882 F.3d 630 (7th Cir. 2018) (collecting authority). This document does not do so. Judgments must not recite the pleadings and other papers that led to the decision. See Fed. R. Civ. P. 54(a). So this judgment omits what must be included and includes what must be omitted.

We dismissed the appeal in *Cooke*, where a similar document had been entered, because the district judge had yet to decide how much the defendant must pay. In this case the judge's opinion contains the principal amount ($4,594,933.85) plus a formula (9% per annum) for determining interest. The judge called this post-judgment interest, 2017 U.S. Dist. LEXIS 124374 at *35, by which he apparently meant post the state judgment of July 28, 2014. The process of adding interest should be sufficiently mechanical that the parties can agree on what Liberty Mutual owes under the district court's decision.

The judge's opinion and the "Case closed" line in the judgment show that the district court is done with this litigation. This makes the decision appealable

notwithstanding the lack of a judgment conforming to Rules 54(a) and 58. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978), permits an appeal when the case is over but the court has failed to enter a proper judgment. So we have jurisdiction—but once again we urge district courts to comply with these rules. "Courts enforce the requirement of procedural regularity on others, and must follow those requirements themselves." *Hollingsworth v. Perry*, 558 U.S. 183, 184, 130 S.Ct. 705, 175 L.Ed.2d 657 (2010).

Having appellate jurisdiction, we now must ask whether the district court had subject-matter jurisdiction, a question that the judge and the parties alike ignored. Jurisdiction depends on diversity of citizenship, and until oral argument of this appeal everyone had assumed that the citizenships of Monteil Hyland (Illinois) and Liberty Mutual (Massachusetts and Wisconsin) were all that mattered. (Shannon Hyland's citizenship is irrelevant under 28 U.S.C. § 1332(c)(2).) But 28 U.S.C. § 1332(c)(1) contains a special rule for suits against insurers:

> in any direct action against the insurer of a policy or contract of liability insurance ... to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—
>
> > (A) every State and foreign state of which the insured is a citizen;
> >
> > (B) every State and foreign state by which the insurer has been incorporated; and
> >
> > (C) the State or foreign state where the insurer has its principal place of business[.]

Perkins, Risby, and Smith, all arguably among the insureds, have not been joined as defendants, and as all three appear to be citizens of Illinois complete diversity is missing if this suit is a "direct action against the insurer" within the scope of paragraph (c)(1).

Because Liberty Mutual is the only defendant, and Hyland seeks money directly from it, it is tempting to call this suit a "direct action" and order its dismissal. But because the original state suit named as the defendant Smith, who might have called on Liberty Mutual for defense and indemnity (though she never did), things are not so easy. Hyland sues as Smith's assignee, and a dispute between Smith and Liberty Mutual about its obligations to Smith would not be a direct action as insurance law uses that term.

In 1964, when this part of paragraph (c)(1) was enacted, two states (Louisiana and Wisconsin) allowed what they called "direct actions" against insurers. These states permitted people who sought damages to sue the alleged wrongdoers' insurers, bypassing the need to get a judgment against the supposed tortfeasor. The other 48 states insisted that plaintiffs sue the supposed wrongdoers. See Donald T. Weckstein, *The 1964 Diversity Amendment: Congressional Indirect Action Against State "Direct Action" Laws,* 1965 Wis. L. Rev. 268, 269–70. Some permitted plaintiffs to add insurers as additional defendants, while other states not only forbade this but also prohibited juries from learning whether a defendant had insurance. See Steven Plitt, *et al., 7A Couch on Insurance* § 104:13 (3d ed. 2013).

Justice Frankfurter was among those who noticed that the approach taken in Louisiana and Wisconsin

allowed suit against an insurer under the diversity jurisdiction, even though both the injured party and the asserted injurer were citizens of the same state. He called for a legislative fix. See Lumbermen's *Mutual Casualty Co. v. Elbert*, 348 U.S. 48, 56, 75 S.Ct. 151, 99 L.Ed. 59 (1954) (concurring opinion). The Wright and Miller treatise is among many sources understanding the enactment of paragraph (c)(1) as a response to that suggestion. Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 13F *Federal Practice & Procedure* § 3629 (3d ed. 2009).

As far as we have been able to find, in 1964 no one knowledgeable about insurance law would have used the phrase "direct action" to mean anything other than a suit, by the purported victim of a tort, that omitted the supposed tortfeasor as a defendant. It is always possible that legislators and the President used the phrase "direct action" more colloquially to include every suit in which an insurance company is the only defendant, but no contemporaneous evidence supports that reading.

Since 1964 thousands of suits in which an insurer is the sole defendant—often suits among insurers seeking to allocate liability between primary and excess layers of coverage—have been adjudicated without anyone thinking the practice incompatible with paragraph (c)(1). Many decisions hold that suits based on the insurer's liability for its own conduct are not "direct actions" that fall under § 1332(c)(1). See, *e.g., Velez v. Crown Life Insurance Co.*, 599 F.2d 471, 473 (1st Cir. 1979); *Rosa v. Allstate Insurance Co.*, 981 F.2d 669, 674–75 (2d Cir. 1992); *Beckham v. Safeco Insurance Co.*, 691 F.2d 898, 902 (9th Cir. 1982).

Surprisingly, however, only one precedential appellate decision has addressed the question whether a suit following assignment of an insured's claim against the insurer is a statutory "direct action." *Kong v. Allied Professional Insurance Co.*, 750 F.3d 1295, 1299–1301 (11th Cir. 2014), holds that it is not. We agree with both the reasoning and the conclusion of that decision. Because Hyland obtained a judgment against Smith and sues only as her assignee, this suit is unaffected by paragraph (c)(1). Complete diversity of citizenship exists, and the amount in controversy comfortably exceeds $75,000.

Although the controversy exceeds $75,000, the *judgment* should not have exceeded $25,000. That's the maximum Liberty Mutual promised to pay and all Smith lost when the insurer declined to defend or indemnify.

The district court gave two reasons for awarding Hyland more than the policy limit. One is that, under Illinois law, an insurer that fails to defend or seek a declaratory judgment is estopped to assert any policy defense. 2017 U.S. Dist. LEXIS 124374 at *18–25. Relying principally on *Clemmons v. Travelers Insurance Co.*, 88 Ill. 2d 469, 58 Ill.Dec. 853, 430 N.E.2d 1104 (1981), the district court saw the maximum indemnity as just another defense that the insurer cannot assert. The second theory is that any damages proximately caused by an insurer's neglect are recoverable, without regard to the policy limit. 2017 U.S. Dist. LEXIS 124374 at *25–35. Here the court relied principally on *Conway v. Country Casualty Insurance Co.*, 92 Ill. 2d 388, 65 Ill.Dec. 934, 442 N.E.2d 245 (1982), and *Delatorre v. Safeway Insurance Co.*, 2013 IL App (1st) 120852, 370 Ill.Dec. 880, 989 N.E.2d 268. In this court Hyland disclaims

the estoppel theory, recognizing that *Clemmons* has nothing to say about the circumstances under which a judgment may exceed the policy's limit. But Hyland defends the proximate-cause approach.

Liberty Mutual insists that Illinois law limits damages to the policy limit, plus a maximum of $60,000 extra if the plaintiff shows that the refusal to defend or indemnify arose from bad faith. See 215 ILCS 5/155. It quotes this passage from Conway: a "mere failure to defend does not, in the absence of bad faith, render the insurer liable for [the] amount of the judgment in excess of the policy limits." 92 Ill. 2d at 397, 65 Ill.Dec. 934, 442 N.E.2d 245. As Liberty Mutual sees things, bad faith and injury proximately caused by the insurer's conduct are both necessary for a judgment to exceed the policy limit; proof of one but not the other won't do. And the insurer adds that Hyland has never alleged—and the district judge did not find—that it acted in bad faith. Smith was neither a named insured nor a member of Perkins's family, and Hyland's state-court complaint did not allege that Smith had Risby's permission to drive the car. Because an insurer's responsibilities under Illinois law depend on whether the complaint as drafted arguably comes within the policy's coverage, see *U.S. Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73, 161 Ill.Dec. 280, 578 N.E.2d 926 (1991), it would not be possible to say that an insurer displays bad faith by not defending when the complaint omits a fact (Risby's consent) essential to the policy's coverage. What's more, Smith never asked Liberty Mutual to defend her. If Liberty Mutual is right that bad faith (or some equivalent, such as fraud) is essential to any award exceeding a policy's limit, then recovery is capped at $25,000.

Hyland observes that Conway said that "damages for a breach of the duty to defend are ... measured by the consequences proximately caused by the breach." 92 Ill. 2d at 397–98, 65 Ill.Dec. 934, 442 N.E.2d 245. This language does not directly address the insurer's contention that both bad faith and proximate cause are essential. Liberty Mutual maintains that *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 221 Ill.Dec. 473, 675 N.E.2d 897 (1996), reinforces its view that Illinois requires bad faith plus proximate cause. For her part, Hyland does not so much as cite *Cramer*.

We are reluctant to get into this dispute about the meaning of Illinois insurance law, for we lack the remit to supply an authoritative answer. It is enough for current purposes to say that, even if proximate cause by itself suffices, Hyland has not shown how the insurer's conduct could have caused Smith any loss exceeding $25,000—and recall that Hyland is Smith's assignee, so only Smith's injury matters.

The best situation for Smith would have been Liberty Mutual's provision of a defense lawyer plus the tender of the policy limit toward a settlement or judgment. Then Smith would have been at least $25,000 to the good. A tender of cash would have been unlikely compared with a reservation of rights to decline indemnity later, but let us make conditions as favorable to Smith as they could be.

The provision of a lawyer to defend Smith would have been valuable to her, independent of a policy-limit tender, only if a vigorous defense might have defeated Hyland's claim or at least held damages under $4.6 million. Yet Hyland has not argued in this court—and the district judge did not find—that either outcome was plausible. Smith had a restricted license,

see 625 ILCS 5/6-113, yet was behind the wheel after the 11 p.m. curfew to which Illinois subjects 16-year-old drivers. 625 ILCS 5/6-110(a-1). Smith had too many passengers (the limit is one person under 20, 625 ILCS 5/6-107(g)), crashed into two parked cars at high speed, and was criminally convicted for her behavior. Smith's liability was too clear for argument; counsel could not have hoped to defeat Hyland's suit. There was no difference between what counsel could have achieved and what actually happened (a default judgment when Smith did not defend herself).

As for damages: the state judge awarded Hyland the amount that she proved after the default was declared. Hyland has not argued that she asked for too much and pulled the wool over the state judge's eyes. She's in no position to contend that Liberty Mutual must pay her $4.6 million precisely because that sum represents more money than her entitlement—and she does not say anything of the sort. Nor does she offer any alternative. She does not contend, for example, that a vigorous defense could have held damages to, say, $2 million, and that $2.6 million (the $4.6 million awarded less $2 million that should have been awarded) thus is the loss, from Smith's perspective, proximately caused by the lack of a defense. Instead Hyland wants the whole $4.6 million, which is proper only if it is the right judgment—and thus not proximately caused by the absence of a lawyer dispatched by Liberty Mutual to defend Smith.

If Smith had a plausible defense, either to liability or to the amount of Hyland's claim, then the insurer's failure to send a lawyer to help Smith make those arguments could be seen as a proximate cause of the state-court judgment. But some judgment against Smith was inevitable and the amount of the judgment

must be taken as justified. Hyland has not argued otherwise. The maximum loss caused by the failure to defend thus is $25,000, and the award in this suit cannot exceed that sum.

Liberty Mutual is not satisfied with this conclusion. It also maintains that it does not owe interest on even the $25,000. That's wrong. Illinois provides for post-judgment interest at 9% per annum. 735 ILCS 5/2-1303. The district judge found that Liberty Mutual should have paid the judgment against Smith in July 2014, and Liberty Mutual does not contest that decision to the extent that the principal obligation is capped at $25,000. Thus Smith's substantive entitlement, as a matter of Illinois law, is $25,000 plus interest from July 2014. This is what Hyland now holds by assignment. That the insurer later offered to pay $25,000 is irrelevant; § 5/2-1303 provides that interest stops only with tender of payment. (Liberty Mutual's reliance on the policy's language does not help it, because the policy limits interest only in suits that Liberty Mutual defended.) And Liberty Mutual does not contend that interest after the date of the federal judgment should run at the federal post-judgment rate rather than the state post-judgment rate; we do not decide whether a change from one rate to the other would be appropriate.

The judgment is vacated, and the case is remanded for the entry of a judgment for $25,000 plus interest at 9% per annum from July 28, 2014, until the date of payment.

2. THE ORDER OF THE SEVENTH CIRCUIT DENYING HYLAND'S TIMELY PETITION FOR REHEARING, ENTERED APRIL 3, 2018.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 3, 2018

Before

WILLIAM J. BAUER, *Circuit Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

No. 17-21123 SHANNON HYLAND, *Plaintiff-Appellee*, v. LIBERTY MUTUAL FIRE INSURANCE COMPANY, *Defendant-Appellant*.	Appeal from the United States District Court for the Central District of Illinois No. 1:15-cv-01264-JES-JEH James E. Shadid, Chief Judge

Order

Plaintiff-appellee filed a petition for rehearing on March 29, 2018. All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

3. THE AUGUST 7, 2017 OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT.

2017 WL 3388161
Only the Westlaw citation is currently available.
United States District Court,
C.D. Illinois,
Peoria Division.

Shannon HYLAND, as assignee of Miquasha Smith, Plaintiff,
v.
LIBERTY MUTUAL FIRE INSURANCE COMPANY, Defendant.

Case No. 1:15-cv-01264-JES-JEH
|
Signed August 7, 2017

ORDER AND OPINION

James E. Shadid, Chief United States District Judge

Now before the Court is the Plaintiff, Shannon Hyland's, Motion for Summary Judgment (Doc. 19), and the Defendant, Liberty Mutual Fire Insurance Company's ("Liberty Mutual"), Motion for Partial Summary Judgment on Damages (Doc. 20). The Motions are fully briefed. For the reasons stated below, the Plaintiff's Motion for Summary Judgment is GRANTED and the Defendant's Motion for Summary Judgment is DENIED.

Background

The following facts are undisputed. On August 3, 2013, a 2004 Pontiac Grand Prix was involved in a one-car accident in Peoria, Illinois. The vehicle was insured by Kimberly Perkins through the Defendant, Liberty Mutual, from June 29, 2013 to May 11, 2014; the policy also included Michiah Risby, Perkins's daughter. However, during the accident, the driver of that car was Miquasha Smith. Monteil Hyland was a passenger in that car during the August 3, 2013 accident. Hyland was severely injured. Monteil Hyland's mother, Shannon Hyland, filed suit in Peoria County against Smith, the driver, for negligence in *Hyland vs. Smith*, No. 13 L 220.

1. The Accident

On the night of August 2, 2013, Risby drove the car to a party in Peoria. Her friend wanted to leave, but Risby did not. Somehow, Smith obtained the keys to the car and dropped off the friend, with another person in the car. Risby maintained that she did not give Smith permission, but Smith stated that she had permission to drive the car. After dropping off the friend, Smith picked up two additional passengers. One of those passengers was Monteil Hyland. Smith crashed the car into a curb and two legally parked cars at 12:46 a.m. on August 3, 2013. The passengers were injured, and Monteil Hyland suffered a severe traumatic brain injury.

The Peoria Police Department prepared a crash report. Smith received 12 traffic citations. She was 16-years-old and therefore had a restricted driver's license; she was driving after curfew and had more under-aged passengers in the car than was allowed.

The police reported that Smith's version of the events "continue to change." Doc. 20, p. 9. Smith's family did not have a car or car insurance.

2. The Insurance Investigation

The 2004 Pontiac Grand Prix is a "covered auto" listed in the Policy's Declarations; the Policy provides liability coverage for bodily injury with a $25,000 limit per person. Kanisha Scott, Miquasha Smith's mother, submitted a copy of the lawsuit to Liberty Mutual on August 15, 2013. She informed Liberty Mutual that she was sued by Hyland. She was asked if she drove the car with permission, for which she responded that she did. Heather Duehlmeyer, an employee of Liberty Mutual, referred the Hyland Complaint against Smith to an attorney working for Liberty Mutual on August 22, 2013.[1] Liberty Mutual investigated the claim.

Liberty Mutual claims they received a call from Perkins and relayed the information that her daughter "adamantly states that she did not give her permission for anyone to use vehicle." Doc. 20, p. 10. Liberty Mutual took recorded statements from both Miquasha Smith, and Michiah Risby and Kimberly Perkins together. Smith, the driver during the crash, and Risby, the named insured, gave conflicting statements to Liberty Mutual on the issue of whether Risby gave Smith permission to drive the car that evening. According to Smith, Risby gave her permission to drive the car and gave her the keys.

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[1] Parties dispute whether it was forwarded to in-house attorneys for defense (Doc. 19, p. 5, ¶ 8), or Liberty Mutual's Legal Staff, the Law Offices of Lawrence Cozzi (Doc. 22, p. 7, ¶ 8).

According to Risby, when Smith asked if she could drive the car, Risby told her she could not. Instead, Risby gave the keys to a person named "Rob." Liberty Mutual did not take a statement from "Rob." Based upon the statements from Smith and Risby, Liberty Mutual denied coverage because it concluded that Smith was a non-permissive driver.

Robyn Brown from Liberty Mutual authored a coverage referral form, concluding that Smith was not credible and Smith did not have permission to drive the insured vehicle. Therefore, Smith was not covered under the policy. The form did not discuss the duty to defend. Michael Schlegel from Liberty Mutual made the final decision to deny coverage. In making this determination, Schelgel testified that he also looked to the following: "The credibility of those parties or the apparent credibility based on those who spoke with them and the police report." After this decision was made, Schlegel advised Robyn Brown to send a denial letter to the Plaintiff's attorney and inform the insured that Liberty Mutual will not be defending her. After confirming that the named insureds were not named in the lawsuit, she advised that the file should be closed. Brown then sent a denial letter to counsel for Shannon Hyland on September 23, 2013.

3. The Peoria County Awards

Shannon Hyland, individually and as next friend of Monteil Hyland, filed suit against Smith in the Circuit Court of the Tenth Judicial Circuit of Illinois, Peoria County. The Complaint was silent on whether Smith had permission to use the car or whether Smith had a reasonable belief that she was entitled to use the car. On September 23, 2013, Liberty Mutual notified counsel for Smith and Hyland that it was denying

coverage for Smith. Liberty Mutual explained the following:

> It is our understanding that, at the time of the accident, our insured nor her daughter Michiah Risby gave permission to Miquasha Smith to drive the vehicle. Accordingly, she could not have had a reasonable belief that she was entitled to drive the vehicle. Therefore, Exclusion A.8 applies to bar liability coverage for the accident.

Doc. 20, p. 14.[2] Liberty Mutual, in a letter from claims specialist Robyn Brown, also stated "If you have any information you believe may affect Liberty's coverage determination, please bring it to my attention immediately." Doc. 20-5, p. 12. Neither Smith nor her counsel ever provided Liberty Mutual with contrary information.

On December 11, 2013, the Peoria County Circuit Court approved an uninsured motorist settlement between Shannon Hyland and Progressive Insurance.[3] On December 11, 2013, counsel for Hyland sent a certified letter to Brown with a copy of the lawsuit. The letter stated the following: "This office will proceed to a prove up of judgment against Miquasha A. Smith and issue supplementary process

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[2] Exclusion A.8 under the Policy is the following:

> A. We do not provide Liability Coverage for any "insured":
>
> 8. Using a vehicle without a reasonable belief that that "insured" is entitled to do so.

Doc. 20, p. 7.

[3] The Hylands received $100,000 in uninsured motorist insurance coverage from their insurance company, Progressive.

to Liberty Mutual Insurance Company concerning coverage of the vehicle in question." Robert Feldhaus from the Claims Department sent a letter stating the following:

> Based on our investigation of this claim we have determined there is no liability coverage for Miquasha Smith as she was specifically denied permissive use of the vehicle involved in the loss. Therefore we will not be affording liability coverage or a defense for Miquasha Smith.

Doc. 19-10. When asked if he separately analyzed the duty to defend from the duty to indemnify, he testified that he views duty to defend and duty to indemnify as the same. Doc. 19-12, p. 37. Robyn Brown of Liberty Mutual testified to the same. Doc. 19-11, p. 36-37. The Defendant argues that this statement is immaterial to the duty to defend issue.

Liberty Mutual, relying on the statements of their insured and determining Smith was not credible, did not provide an attorney, and no attorney from Liberty Mutual made an appearance or took any other action in the personal injury lawsuit. See Doc. 20-2, p. 59-60 (Smith stating that Risby gave her permission to drive the car); Doc. 20-2, p. 45 (Perkins and Risby stating that Smith did not have permission). Smith never retained her own attorney, and on the record at the hearing, stated that she represented herself. Smith never again contacted Liberty Mutual.

Smith offered no evidence at the hearing. The court found her liable and entered judgment in favor of Hyland and against Smith. Counsel for Hyland

informed Liberty Mutual that he intended to seek a default. The Plaintiff never made a demand to Liberty Mutual to settle. The Plaintiff filed a Motion to Prove up Default Judgment and Damages and noticed the hearing for June 26, 2014. The hearing on default was held in Peoria County on June 26, 2014 and July 8, 2014. Importantly for the instant case, Liberty Mutual did not provide a defense for Smith in the Peoria County case. Nor did Liberty Mutual file a declaratory judgment action seeking a determination on the issue of the duty to defend or the duty to insure. No one appeared in the defense of Defendant Miquasha Smith. A judgment order was entered on July 28, 2014 by Judge Stephen Kouri in favor of the Plaintiff and against Miquasha Smith for $4,594,933.85. Smith assigned Hyland any claims against Liberty Mutual for failure to defend Smith in the Peoria County case.[4]

The Plaintiff objects to a number of the Defendant's facts pertaining to the issue of permission. Generally, the Plaintiff's objection is that the permissive use issue is not material to the Motions before the Court. However, the Plaintiff concedes that these facts may be material to the argument that Liberty Mutual had the option of pursuing a declaratory judgment instead of defending Smith.

Procedural History

On June 26, 2015, Plaintiff Shannon Hyland filed a Complaint in this Court against Defendant Liberty

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[4] Smith pleaded guilty to one count of aggravated reckless driving, and received 45 days in jail and 30 months of probation. She hired an attorney to represent her in the criminal proceedings.

Mutual for breach of insurance contract and duty to defend. The Complaint does not contain any allegations of bad faith or tortious conduct against Liberty Mutual. According to the Plaintiff, the Defendant had a duty to defend Miquasha Smith in the Peoria County case where she was driving an automobile belonging to the named insureds. The Plaintiff argues that Liberty Mutual owed a duty to defend Smith in the underlying lawsuit and breached that duty by failing to defend Smith or defend Smith under a reservation of rights, or file a declaratory judgment action regarding its duty to defend or indemnify. The Plaintiff argues that the underlying personal injury lawsuit made no reference to the issue of permission. The Plaintiff alleges that as a direct and proximate result of this breach of duty, a judgment has been entered against Miquasha Smith in the amount of $4,594,933.85.

The Plaintiff filed a Motion for Summary Judgment on January 31, 2017. In response, the Defendant filed a Motion for Partial Summary Judgment on Damages (Doc. 20) on January 31, 2017, arguing that the policy liability coverage should be limited to $25,000 for each person. In making that argument, the Defendant points to its Policy covering the vehicle in question, argues that Hyland did not allege bad faith, argues that Smith did not incur out-of-pocket expenses, and argues that their refusal to defend did not cause the default judgment. Further, the Defendant argues that the more than $4.5 million judgment would be an impermissible windfall because it is far beyond the $25,000 that Smith would be entitled to had the Defendant not breached the contract. The Motions are fully briefed. This order follows.

Legal Standard

A motion for summary judgment will be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A material fact is one that might affect the outcome of the suit. *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 598-99 (7th Cir. 2000). The moving party may meet its burden of showing an absence of material facts by demonstrating "that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party meets its burden, the non-moving party then has the burden of presenting specific facts to show there is a genuine issue of material fact. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

On summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 588. Any disputed issues of fact are resolved against the moving party. *GE v. Joiner*, 552 U.S. 136, 143 (1997). The moving party has the responsibility of informing the Court of portions of the record or affidavits that demonstrate the absence of a triable issue. *Celotex Corp.*, 477 U.S. at 323. Federal Rule of Civil Procedure 56(e) requires the non-moving party to go beyond the pleadings and produce evidence of a genuine issue for trial. *Id.* at 324. Where a proposed statement of fact is supported by the record and not adequately rebutted, a court will accept that statement as true for purposes of summary judgment; an adequate rebuttal requires a citation to specific support in the record. *Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 887 (7th Cir. 1998). This Court must then determine whether

there is a need for trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may be reasonably resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Further, the "interpretation of an insurance policy is a matter of state law." *Westfield Ins. Co. v. Vandenberg*, 796 F.3d 773, 777 (7th Cir. 2015). In Illinois, "an insurance policy is a contract, and the general rules governing the interpretation of other types of contracts also govern the interpretation of insurance policies." *Id.*, citing *Hobbs v. Hartford Ins. Co. of the Midwest*, 214 Ill.2d 11, 17, 291 Ill. Dec. 269, 823 N.E.2d 561 (2005).

Analysis

I. The Duty to Defend

When an insurer receives notice of suit against its insured, it must determine its course of action from the following options: 1) defend without reservation, 2) defend while reserving its rights, 3) seek a declaratory judgment concerning the scope of coverage, or 4) decline to defend—such as when the allegations in the complaint fall outside the scope of the insurance policy—but at its peril. *Title Indus. Assurance Co., R.R.G. v. First Am. Title Ins. Co.*, 853 F.3d 876, 880 (7th Cir. 2017).

In Illinois, "an insurer's duty to defend is much broader than its duty to indemnify." *Id.* at 883, quoting *Landmark American Ins. Co. v. Hilger*, 838 F.3d 821, 824 (7th Cir. 2016). Therefore an insurer may have the duty to defend even if ultimately, there

will be no obligation to indemnify. The duty to defend "is determined by comparing the allegations in the underlying complaint to the policy at issue," and when "the allegations in the underlying complaint fall within, or potentially fall within, the policy's coverage." *Westfield Ins. Co. v. Nat'l Decorating Serv., Inc.*, No. 16-1439, 2017 WL 2979654, at *3 (7th Cir. July 13, 2017); citing *Taco bell Corp. v. Cont'l Cas. Co.*, 388 F.3d 1069, 1073 (7th Cir. 2004). Sometimes, an insurer must determine whether it will defend claims against its insured "before it has time to investigate all the relevant facts." *Title Indus. Assurance Co., R.R.G. v. First Am. Title Ins. Co.*, 853 F.3d 876, 883 (7th Cir. 2017).

The underlying complaint and insurance policies are liberally construed in favor of the insured. *Id.* This also includes instances where the allegations are "groundless, false, or fraudulent." *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 223 Ill.2d 352, 307 Ill. Dec. 653, 860 N.E.2d 307, 315 (2006). Illinois courts compare the underlying complaint with the insurance policy "to determine whether facts alleged in the underlying complaint fall within or potentially within coverage," known as the "eight corners" rule. *Title Indus. Assurance Co., R.R.G. v. First Am. Title Ins. Co.*, 853 F.3d 876, 883 (7th Cir. 2017), citing *American Alternative Ins. Corp. v. Metro Paramedic Services*, Inc., 829 F.3d 509, 513-14 (7th Cir. 2016) (internal quotations omitted).

The Plaintiff argues that based upon the allegations in the underlying complaint and the insurance policy, the Liberty Mutual had a duty to defend Miquahsa Smith, the driver of the car during the accident, and Liberty Mutual breached its duty to defend. The Plaintiff argues that there is nothing in the

underlying complaint that states or infers that Smith was a nonpermissive driver; therefore, the allegations in the complaint either fell within or potentially within the policy coverage. According to the Plaintiff, Liberty Mutual equated the duty to defend with the duty to indemnify and denied coverage based upon inconsistent evidence. Specifically, the Plaintiff contends that Liberty Mutual improperly relied upon the extraneous evidence—an accident report—and conflicting statements of the insured and the driver contesting whether Smith had permission to drive the car.

The Defendant replied with the following:

> Plaintiff focuses her brief on whether Liberty Mutual breached the duty to defend. Liberty mutual no longer contests that issue. (In fact, months ago it offered to settle this case for the $25,000 per-person limit.) This case is about the damages a putative additional insured can recover if the insurer erroneously—but not in bad faith—failed to defend. Liberty Mutual's response concentrates on this main issue.

Doc. 22, p. 17.

According to the Liberty Mutual Policy that covered Kimberly Perkins and Michiah Risby, Miquasha Smith could possibly fall within the policy as an "insured." The Policy states the following:

Part A—Liability Coverage

> A. We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the "insured." We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted by payment of judgments or settlements. We have no duty to defend any suit or settle any claim for "bodily injury" or "property damage" not covered under this policy.
>
> B. "Insured" as used in this Part means:
>
> 1. You or any "family member" ...
>
> 2. Any person using "your covered auto".

Doc. 20-2, p. 9. The underlying personal injury case complaint (Doc. 19-2, Case No. 13 L 220) states that "Defendant Miquasha Smith drove her vehicle" and described the vehicle as "a 2004 Pontiac Grand Prix driven by Defendant Miquasha Smith." *Id.* at p. 1-2. The 2004 Pontiac Grand Prix involved in the accident was a "covered auto" listed in the Policy's Declarations. (Doc. 20, p. 6). It is undisputed that the lawsuit was silent on the issue of permissive use. Therefore, Miquasha Smith could have fallen within

the policy into the "Any person using 'your covered auto' " category. Under "Exclusions", the Policy states that a person is not covered under the policy when:

> 8. Using a vehicle without a reasonable belief that the "insured" is entitled to do so....

(Doc. 20-2, p. 10). Smith potentially fell within the policy coverage, triggering Liberty Mutual's duty to defend. *Westfield Ins. Co. v. Nat'l Decorating Serv., Inc., No. 16-1439*, 2017 WL 2979654, at *3 (7th Cir. July 13, 2017). See also, *Title Indus. Assurance Co., R.R.G. v. First Am. Title Ins. Co.*, 853 F.3d 876, 886 (7th Cir. 2017), citing *National American Ins. Co. v. Artisan and Truckers Cas. Co.*, 796 F.3d 717 (7th Cir. 2017) ("The presence of a theory excluded from coverage does not excuse an insurer from its duty to defend its insured."). Moreover, the complaint and insurance policies are liberally construed in favor of the insured. *Title Industry*, 853 F.3d at 884. Liberty Mutual argues to great length that Risby was adamant she did not give Smith permission to drive her car; however, when faced with two separate and conflicting versions of events, the claim potentially fell within the Policy's coverage. Liberty Mutual took no further action after their investigation.

Because the Defendant does not contest the issue (Doc. 22, p. 17), and it is clear from the policy and complaint that the claim potentially fell within the policy, the Court will not spend more analysis on the duty to defend. The Court will next address whether damages should be limited to the $25,000 policy limit.

II. Damages

The Liberty Mutual Policy provides liability coverage for bodily injury with a limit of $25,000 per person. (Doc. 20, p.7). In the Motion for Partial Summary Judgment on Damages (Doc. 20), Liberty Mutual argues that this case is about damages, and the damages for the breach of the duty to defend are limited to the amount the insured would have received under the policy. Liberty Mutual argues that where there is no bad faith, the insured is entitled to recover out-of-pocket defense costs and the limits of the policy. Also, according to Liberty Mutual, there was no bad faith where it handled the claim reasonably and thoroughly. In their Motion for Partial Summary Judgment on Damages (Doc. 20), the Defendant states the following: "Even if Liberty Mutual unjustifiably refused to defend Smith, which it does not concede and will address in opposition to Plaintiff's motion for summary judgment and at trial, Plaintiff's damages are $25,000, the per-person limit of the policy." Doc. 20, p. 6.[5] It contends that the evidence supported its conclusion that Smith did not have permission to drive the car and fell within the Policy Exclusion. Moreover, its refusal to provide a defense did not

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[5] The Court interprets Liberty Mutual's argument—that it does not concede that their breach was unjustifiable—as part of its overall argument that there is no bad faith and it handled the claim reasonably. The argument would therefore pertain to the Parties' arguments on damages and not the duty to defend. Liberty Mutual previously stated that it does not contest that it breached the duty to defend. (Doc. 22, p. 17). Also, according to the Seventh Circuit, the breach is unjustifiable when the complaint alleges facts that potentially fall within coverage. See *Title Indus. Assurance Co., R.R.G. v. First Am. Title Ins. Co.*, 853 F.3d 876, 885-86 (7th Cir. 2017).

proximately cause the default judgment, because an attorney would not have affected Smith's action or inaction that lead to the default. Liberty Mutual further asserts that there were no out-of-pocket expenses. If the Plaintiff receives the entire judgment in excess of the Policy limit, it argues, it would place the Plaintiff in a better position than she would have been had the contract been fully performed; also, to award the Plaintiff nearly $5 million would be an impermissible windfall.[6]

The Plaintiff argues that the damages should not be limited to the policy limits, but should be for the full amount of the default judgment award. The Plaintiff relies on the *Conway* and *Delatorre* cases in arguing that an insured may recover an excess judgment in a breach of the duty to defend case on a tort-based theory or a contract-based theory. *Conway v. Country Cas. Ins. Co.*, 92 Ill. 2d 388, 442 N.E.2d 245 (1982); *Delatorre v. Safeway Ins. Co.*, 2013 IL App (1st) 120852, 989 N.E.2d 268 (2013). Under either of these theories, the Plaintiff argues, the Plaintiff should prevail. Because Liberty Mutual wrongfully denied Smith a defense, the Plaintiff was led to announcing that it would pursue default and collect from Liberty Mutual, and proceeded with the hearing against Smith. Otherwise, the Plaintiff argues, the Hylands would have stopped pursuing the claim after they received uninsured motorist coverage from

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[6] Liberty Mutual also makes the argument that its denial was reasonable because in Illinois, there is no reasonable belief that one is entitled to drive in the state without a valid license. Doc. 22, p. 31-32. However, whether Liberty Mutual's investigation and denial of coverage was reasonable is not part of the Court's analysis. Additionally, Smith had a restricted, not invalid, license.

Progressive Insurance that Hyland had on her vehicle. Similarly, the Plaintiff argues that it would succeed under a tort law theory because Liberty Mutual equated the duty to defend with indemnification constituted negligence or bad faith. The Court will address the Parties' arguments in turn.

A. Estoppel

When a court finds that an insurer breached its duty to defend, the insurer is estopped from asserting policy exclusions or defenses to coverage. *Chandler v. Doherty*, 299 Ill. App. 3d 797, 804, 702 N.E.2d 634, 639 (1998); *Title Indus. Assurance Co., R.R.G. v. First Am. Title Ins.* Co., 853 F.3d 876, 883 (7th Cir. 2017), citing *Edward T. Joyce & Associates, P.C. v. Professionals Direct Ins. Co.*, 816 F.3d 928, 932 (7th Cir. 2016) ("Under Illinois law 'an insurer's duty to defend under a liability insurance policy is so fundamental an obligation that a breach of that duty constitutes a repudiation of the contract.' [Citations.] A breach of the duty to defend estops the insurer from raising policy defenses to coverage."); and *Employers Ins. of Wausau v. Ehlco Liquidating Trust*, 186 Ill.2d 127, 237 Ill.Dec. 82, 708 N.E.2d 1122, 1135 (Ill. 1999).

The insurer is also estopped from limiting damages to policy limits. In *Clemmons*, for example, a default judgment was entered against a driver in a car accident and the insurer breached its duty to defend. *Clemmons v. Travelers Ins. Co.*, 88 Ill. 2d 469, 430 N.E.2d 1104 (1981). In *Clemmons*, the insurer failed to defend the driver in circuit court when sued by the plaintiff for injuries from a car accident. The defendant insured the car involved in the accident. A default judgment was entered against the driver. The plaintiff sued the insurer for the judgment amount,

and the circuit court granted summary judgment to the plaintiff. The court determined that the defendant insurance company's "failure to defend [the driver] estopped it from denying that its policy coverage extended to [the] accident." *Clemmons v. Travelers Ins. Co.*, 88 Ill. 2d 469, 472-73, 430 N.E.2d 1104, 1106 (1981).

The *Clemmons* case is analogous to the instant case; *Clemmons* involved a car accident where the car was owned by the American National Red Cross, and the driver was an employee of Red Cross. The insurer determined that the driver was driving "without permission and outside the scope of his employment and was therefore not covered by the policy." *Id*. at 473, 1106. The insurer denied liability and informed the plaintiff and the driver that it would not defend any suit against the driver.

In *Clemmons*, the Illinois Supreme Court ultimately determined that although the insurer used an unsworn accident report where the driver stated he did not have permission to drive the car, the duty to defend arises solely from the language of the complaint and the policy. If there is a possibility that the driver had permission, that is, if the complaint alleges facts potentially within the coverage of the policy, then the insurer has the duty to defend. The court stated that the "accident report was not enough to dispel the potential for coverage raised by [the] complaint." *Id.* at 857, 1108. The court stated:

> If [Defendant] wanted to preserve its right to later contest permission, it had the choice of defending under a reservation of rights or seeking a declaratory judgment of no coverage. By

> doing neither, [Defendant] was estopped from later denying coverage when [Plaintiff], standing in [the driver]'s shoes, asked it to pay the judgment in the underlying suit.

Id. at 479, 1109. The Illinois Supreme Court expanded upon this, stating the following:

> The general rule of estoppel is equitable in nature. In this context, its roots lie in the theory that because the insurer breached one of its duties under the contract of insurance (of which the putative insured is an intended third-party beneficiary), the insurer cannot later turn around and enforce another clause of the contract, to its complete protection. [Citation.] The court will not enforce the insurer's protections under the policy where the insurer failed to act equitably, that is, failed to defend under a reservation of rights or to bring a declaratory judgment action to determine whether there was coverage under the policy. [Citation.] The circuit court was correct in finding [Defendant] estopped.

Id.

Here, Liberty Mutual is attempting to enforce its exclusion, although it breached one of its duties under the contract. The Illinois Supreme Court found that the insurer in *Clemmons* was estopped from enforcing a provision of the contract even where the accident report stated that the driver admitted that he did not

have permission. Thus, there was stronger evidence in *Clemmons* than there is in the present case that the driver did not have permission. Here, Smith maintained that she had permission.

Similarly, in *Chandler*, a judgment was enforced and the insurer was estopped from arguing that the car was not insured because it breached its duty to defend. *Chandler v. Doherty*, 299 Ill. App. 3d 797, 801, 702 N.E.2d 634, 637 (1998). In the *Chandler* case, an individual had an accident in his modified car, known as a "replicar." The insurer of his other vehicles initially refused to insure the replicar because it was a modified vehicle, and he did not obtain coverage before the accident. The replicar owner was sued in a tort action by the plaintiff, who was injured in the accident. The insurer notified the parties that it would not provide coverage and did not file a declaratory judgment action, and did not defend the owner. The complaint in that case stated that the owner was driving his motor vehicle, which met the threshold of alleging potential coverage and triggered the duty to defend. A jury awarded the injured plaintiffs for over $1.6 million; the trial court entered judgment for the $300,000 policy limits plus interest on the entire judgment. The Illinois Appellate Court affirmed the judgment of the trial court against the insurer for the policy limit and interest on the total award. The court determined that the insurer was estopped from raising policy defenses—that the car was not insured—because it breached its duty to defend. *Id.* at 640, 805.

Lastly, the Seventh Circuit recently addressed a similar issue on the duty to defend issue in *Title Indus. Assurance Co., R.R.G. v. First Am. Title Ins. Co.*, 853 F.3d 876 (7th Cir. 2017). In *Title Industry*, the

insurer declined to defend the insured and the cases against its insured continued for years. After one of the plaintiffs filed a fourth amended complaint, the insurer made an appearance and filed a declaratory judgement action in federal court and asked the federal court to find that coverage was unavailable due to two exclusions in the policy. The district court entered summary judgment in favor of the state court plaintiffs in the declaratory judgment action. The Seventh Circuit affirmed, determining that there was a possibility of coverage under the policy and complaint. The Court found that the complaint did not "compel the conclusion" that there was intentional wrongdoing that would place the insured outside the policy. *Id.* at 887. The Court also limited its analysis of whether there was a breach of the duty to defend to the insurance policy and the underlying complaint, noting "absent unusual circumstances." *Id.* at 884. The Court cited to the following:

> Compare *Hilger*, 838 F.3d at 824 ("[W]hen an insurer tries to deny coverage *without* seeking a declaratory judgment *or* defending under a reservation of rights ... the relevant question is whether the insurer justifiably refused to defend the action based solely on the allegations in the complaint, so the court's inquiry is necessarily limited to those allegations."), with *Bartkowiak v. Underwriters at Lloyd's, London*, 395 Ill.Dec. 709, 39 N.E.3d 176, 179, 182 (2015) (trial court did not err in taking account of tortfeasor's primary insurance coverage that was not

> specifically referenced in underlying complaint or in defendant's policy but that was known to defendant at the time it denied coverage, was the basis for that denial, and was an objective, undisputed fact).

Id. at 884 (7th Cir. 2017).

The Court of Appeals emphasized that Illinois provides two options if an insurer is uncertain of its duty: 1) to defend under a reservation of rights, or 2) to seek a declaratory judgment that there is no coverage. *Id.* at 883. The Circuit Court reasoned that because the insurer breached its duty to defend, it was "therefore estopped from asserting at this very late stage any policy defenses to coverage that might have been available if [the insurer] had made a different choice when the complaints were first tendered." *Id.* at 880. The Court added that the insurer's "hasty abandonment of its Insured may cost it far more than it would have spent if it had simply honored its duty to defend." *Id.* at 892. Therefore, Illinois' law supports the Plaintiff's contention that Liberty Mutual is estopped from raising the Policy exclusion because Liberty Mutual breached the duty to defend.

B. Damages

The Parties cite *Delatorre* and *Conway* in their arguments on damages. *Delatorre v. Safeway Ins. Co.*, 2013 IL App (1st) 120852, 989 N.E.2d 268 (2013); *Conway v. Country Cas. Ins. Co.*, 92 Ill. 2d 388, 442 N.E.2d 245 (1982). In *Conway*, the Illinois Supreme Court described the two situations where an insurer must pay in excess of the policy amount. The first is where "the insurer acted in bad faith by refusing to

defend its insured." *Id.* at 398, 249. The second is where there is no bad faith, but where the damages "are measured by the consequences proximately caused by the breach." *Id.*

In *Conway*, the insured was sued in a personal injury suit, and insurer paid the bodily injury liability limit—$10,000—to the injured plaintiff. However, the injured did not execute a release and the case remained pending. The insurer refused to defend the insured in the suit. The insured settled with the injured for $10,000. The insured brought suit against the insurer, but did not recover the $10,000 in excess of the policy limit. The Illinois Supreme Court affirmed, finding that the insured failed to establish that the $10,000 settlement was caused by the insurer's breach of the duty to defend.

Conway cited the *Reis* case and stated the following:

> The mere failure to defend does not, in the absence of bad faith, render the insurer liable for that amount of the judgment in excess of the policy limits. [Citations.] Nevertheless, damages for a breach of the duty to defend are not inexorably imprisoned within the policy limits, but are measured by the consequences proximately caused by the breach.

Id. at 397–98 (1982) (alteration in original), quoting *Reis v. Aetna Casualty & Surety Co.*, 69 Ill.App.3d 777, 790 (1978). The *Conway* court stated that the settlement "cannot be said to have been proximately caused by [the insurer]'s breach absent a showing that there could have been a settlement for a lesser amount

if [the insurer] had defended the action." *Id.* at 398, 249.

In *Delatorre*, the court discussed *Conway's* tort-based and contract-based theories of recovery for the insurer's breach of the duty to defend. According to the court in *Delatorre*, the first way an insured may recover an excess judgment in a duty to defend case is a tort-based theory, which is punitive and requires bad faith. On the other hand, a contract-based theory is compensatory, and can occur where "the insured's damages are proximately caused by the insurer's breach of duty." *Delatorre v. Safeway Ins. Co.*, 2013 IL App (1st) 120852, ¶ 33, 989 N.E.2d 268, 275.

Ultimately, the *Delatorre* court determined that the default judgment in excess of the policy limits was proximately caused by the breach, directly flowed from the breach of contract, and was a natural consequence of the breach of contract; therefore, the court upheld the damages in excess of the policy limit. *Id.* at 275-76. Although the breach in *Delatorre* is distinguishable because the insurer provided an attorney and ignored the fact that the attorney continuously failed to provide the insured with a meaningful defense, the *Delatorre* court's discussion of damages is helpful here. For example, the court found that "[t]he plaintiff's evidence established that the original default and the subsequent default judgment both resulted entirely from the defendant's breach, and the defendant put forth no contrary evidence." *Id.* at 276. The court limited its decision "on the suitability of the default judgment entered ... to the precise facts of this case." *Id.*

Liberty Mutual distinguishes *Delatorre* as bad faith case. Liberty Mutual argues that the default

judgment did not flow from the breach but was instead a result of the Plaintiff's litigation decision to pursue a judgment. According to Liberty Mutual, the judgment would have been the same; Smith was solely liable and her liability was never in question and the injuries to Hyland were severe. Therefore, no defense would have affected the judgment amount. Also, Smith never expected Liberty Mutual to defend her and never inquired about the defense. The Defendant points out that in *Conway*, the Illinois Supreme Court stated that the settlement was not proximately caused by the breach "absent a showing that there could have been a settlement for a lesser amount if [the insurer] had defended the action." *Conway* at 398, 249. Hyland admits she never attempted to settle the case and does not contend that the judgment could have been for a lesser amount if Liberty Mutual had not breached its duty to defend. Liberty Mutual relies upon the argument that the lack of an attorney provided by the Defendant is not what led to the default judgment.

The Plaintiff cites *Delatorre* in her argument that in the absence of bad faith, damages in excess of the policy limits are still recoverable if the amount is legally traceable to the breach. The Plaintiff argues that the breach caused the default judgment to be entered against Smith. Also, the Plaintiff maintains that the question is whether any judgment would have entered without the breach of the duty to defend, not whether a defense would have changed the judgment. The Plaintiff points out that with a successful declaratory judgment, there might not have been a default hearing on damages. The Plaintiff acknowledges that both the Defendant's theory that the judgment was inevitable and the Plaintiff's theory

to the contrary "rely on speculation to some degree in the analysis." Doc. 21, p. 8.

The Plaintiff nevertheless argues that the undisputed material facts support the conclusion that the default judgment was caused by the failure to defend. For example, counsel for the Plaintiff informed Liberty Mutual and to the state court judge that he was going to proceed to a prove up of a judgment and damages. The Plaintiff argues that her counsel informed the court that he would bring a motion to seek an assignment of any cause of action against Liberty Mutual, and that Liberty Mutual failed to provide Smith with a defense. Therefore, the Plaintiff argues the facts on the record show that the default hearing happened in response to Liberty Mutual's denial of a defense.

First, the Court will briefly address bad faith. There are no allegations of bad faith in the Plaintiff's Complaint. Rather, the Plaintiff brings a breach of insurance contract and duty to defend action. (Doc. 1, p. 2). In the Motion for Summary Judgment, the Plaintiff attempts to make a breach of duty and tort law argument. The Plaintiff implies that Liberty Mutual's confusion between the duty to defend and duty to indemnify constitutes either negligence or bad faith. (Doc. 19, p. 22-23). However, a new claim raised at the summary judgment stage is too late for the Court to consider. See *Komperda v. Hartfor Life and Accident Ins. Co.*, 2003 WL 21148023, *3 (May 14, 2003), citing *Auston v. Schubnell*, 116 F.3d 251, 255 (7th Cir. 1997). Moreover, the Plaintiff does not dispute that the Complaint does not contain any allegations of negligence, bad faith, or tortious conduct on the part of Liberty Mutual. See Doc. 22, p. 16; Doc. 23, p. 1. The Court does not need to make a

bad faith determination here because absent bad faith, the Defendant may nonetheless remain liable for the judgment in excess of the policy limits.

As stated above, even absent bad faith, damages for a breach of the duty to defend may be in excess of the policy limits and are "measured by the consequences proximately caused by the breach." *Conway v. Country Cas. Ins. Co.*, 92 Ill. 2d 388, 398, 442 N.E.2d 245, 249 (1982), citing *Reis v. Aetna Casualty & Surety Co.*, 69 Ill.App.3d 777, 790 (1978). Here, the Court's determination on damages is whether the breach of duty to defend proximately caused the judgment. In *Conway*, the court applied this rule to the facts of that case and determined that the settlement paid by the tortfeasor to the injured was not proximately caused by the insurer's breach "absent a showing that there could have been a settlement for a lesser amount if [the insurer] had defended the action." *Id.* at 398. The *Conway* court's determination is distinguishable from the instant case because there is a default judgment rather than a settlement. The Plaintiff claims that judgment was sought because of Liberty Mutual's breach, making the causal connection clearer.

Liberty Mutual admits that if it defended, "it would control the defense and be fully aware of any judgment entered" (Doc. 22, p. 25) and while it laments that without the Policy's sensible conditions, it "could be exposed to unforeseeable, unpredictable, and inequitable interest amounts" (*Id.* at 26), there is nothing unpredictable here. Because Liberty Mutual breached its duty to defend, the circuit judge found the damages to be $4,594,933.85. And that amount was not "unforeseeable" because due to the breach, the Plaintiff pursued a default judgment, and put the Defendant on notice that she was planning on

pursuing a default judgment in the absence of a defense for Smith.

The legal question for the Court to answer is: was this consequence, a default judgment in excess of $4.5 million, proximately caused by the breach? Although the Defendant argues that Smith did nothing at the default hearing to help her case, according to the Defendant's assertions, no defense would have made a difference. Liberty Mutual also argues that if it had defended and paid the Policy limit in indemnity to satisfy the judgment, the Plaintiff would be left with the unrecoverable judgment. However, in addition to defending under a reservation of rights, the option of seeking a declaratory judgment was available to the Defendant; because the Defendant is adamant that Smith did not have permission, it is likely that the Defendant would have pursued a declaratory judgment or defended under a reservation of rights. Therefore, that argument is not persuasive. The Plaintiff has supported the contention with facts in the record that she would not have pursued the default judgment if Liberty Mutual had pursued the declaratory judgment route and limited the damages to $25,000. Due to Liberty Mutual's inaction, the Plaintiff gave Liberty Mutual notice that she would travel the default judgment route, and that the Plaintiff made this clear on the record in the underlying case.

An argument that there is a window of discretion on the question of causation certainly exists. However, the Court chooses not to force that window open when the undisputed material facts demonstrate that the Plaintiff pursued the default judgment because the Defendant provided no defense or indemnity to the driver of the car in the underlying state court personal

injury case. The Plaintiff even went so far as to write Liberty Mutual a letter that stated:

> As of September 13, 2013 defendant, Miquasha A. Smith, driving a vehicle insured by Liberty Mutual Insurance Company is in default and is presently in default as no responsive pleading has been filed on behalf of Miquasha A. Smith.
>
> This office will proceed to a prove up of a judgment against Miquasha A. Smith and issue supplementary process to Liberty Mutual Insurance Company concerning coverage of the vehicle in question.

Doc. 20-5, p. 17. See also, Doc. 19, p. 21-22 (where the Plaintiff explains why Liberty Mutual's denial of a defense opened the door to a judgment becoming collectable). Whether or not the Court determines it was the default judgment itself or the amount of the judgment, the breach was the proximate cause of both.

Illinois law offers a strong remedy for insureds who are left to their own defense. See *Title Industry*, 853 F.3d at 892 ("[t]his Illinois rule of estoppel is strong stuff"). The difference between $25,000 and $4.5 million is substantial, but permissible under Illinois law, and resulted from Liberty Mutual's inaction. Liberty Mutual relied on the statement from their insured teenager that she did not give Smith permission to drive the car. Regardless of whether Liberty Mutual's credibility determination was reasonable, or whether the employees of the Defendant confused the duty to defend with the duty

to indemnify, these facts do not factor into the causation analysis. The Plaintiff obtained a default judgment against Smith, the driver, and received an assignment of the judgment. The undisputed evidence shows that the Plaintiff pursued the default judgment and judgment amount because Liberty Mutual did not defend or obtain a declaratory judgment. Thus, the default judgment entered against Smith was proximately caused by Liberty Mutual's breach, directly flowed from the breach, and was a natural consequence of the breach. The damages, therefore, are $4,594,933.85.

C. Post-Judgment Interest

Finally, the Parties argue the issue of interest on the judgment amount. Liberty Mutual argues that its denial of a defense did not cause the default judgment, and therefore it did not cause post-judgment interest on the judgment to accrue. Liberty Mutual also argues that the Policy provides that Liberty Mutual's defense is a condition precedent to its obligation to pay post-judgment interest. According to the Plaintiff, the judgment and the 9% Illinois statutory interest is accruing pursuant to 735 ILCS 5/2-1303 (2014). Doc. 19, p. 21. Also, the Plaintiff argues that post-judgment interest is a damage that is traceable to the breach. Damages are measured by the consequences proximately caused by the breach. This would include interest. *Conway*, 92 Ill.2d at 397-398. Accordingly, the Plaintiff is entitled to post-judgment interest on the entire judgment amount.

Conclusion

For the reasons set forth above, the Plaintiff, Shannon Hyland's, Motion for Summary Judgment [19] is

GRANTED in full. The Defendant, Liberty Mutual Fire Insurance Co.'s, Motion for Partial Summary Judgment on Damages [20] is DENIED.

All Citations

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