MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Great West Casualty Company, DTAK, LLC, and Matthew Ehlen,

Appellants-Defendants,

v.

Founders Insurance Company,

Appellee-Plaintiff.

December 9, 2022

Court of Appeals Case No. 22A-PL-1771

Appeal from the LaPorte Superior Court

The Honorable Jeffrey L. Thorne, Judge

Trial Court Cause No. 46D03-2109-PL-1824

Bailey, Judge.

Case Summary

[1] Great West Casualty Company; DTAK, LLC; and Matthew Ehlen (at times collectively referred to as "Great West") appeal the grant of summary judgment in favor of Founders Insurance Company ("Founders") declaring that Founders is not obligated to provide coverage under an automobile insurance policy procured by Brian K. Gates, Jr. ("Gates"). Great West presents the sole issue of whether summary judgment was improvidently granted because Founders waived its right to deny coverage by accepting a premium payment without contemporaneously ascertaining the status of Gates's driver's license. We affirm.

Facts and Procedural History

[2] On June 24, 2020, Gates applied to Founders for automobile insurance coverage. In the application form, Gates indicated that his driving privileges were suspended in the State of Indiana, and he was seeking SR 22 insurance coverage as required by the State during the driver's license reinstatement process. Founders issued an SR 22 policy, which included an exclusionary provision applicable if Gates failed to obtain a valid driver's license within sixty days ("the Policy").

[3] Seventy-six days later, on September 8, Gates was driving his insured vehicle when it collided with a tractor-trailer driven by Ehlen. The tractor-trailer was

owned by DTAK, LLC and insured by Great West. At that time, Gates had no valid driver's license.

[4] Gates had paid premiums to Founders in the amounts of $117.00 on June 24, 2020 and $83.40 on August 10, 2020. On September 14, Founders cancelled the Policy for non-payment of premiums.

[5] On August 10, 2021, Great West filed a complaint against Gates for damages resulting from the collision. On September 23, 2021, Founders filed a Complaint for Declaratory Judgment. Founders sought a declaration that it was not obligated to provide insurance coverage for Gates, pursuant to an exclusion in the Policy, because Gates had been driving without a valid driver's license at the time of the collision. Founders subsequently filed a motion for summary judgment. Great West filed a cross-motion for summary judgment, contending that Founders was obligated to provide coverage because it had accepted a premium payment for coverage from August 10, 2020 to September 10, 2020 without investigating whether Gates had his driver's license reinstated.

[6] On June 22, 2022, the trial court conducted a hearing at which argument of counsel was heard. On June 29, 2022, the trial court entered summary judgment in favor of Founders, denied the summary judgment motion of Great West, and directed the entry of final judgment pursuant to Indiana Trial Rule 54(B). Great West now appeals.

Discussion and Decision

[7] We review summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). Summary judgment is appropriate "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). We construe the evidence in favor of the nonmovant and resolve all doubts against the moving party. *Pfenning v. Lineman*, 947 N.E.2d 392, 397 (Ind. 2011) (quotation omitted).

[8] The party moving for summary judgment bears the initial burden to establish its entitlement to summary judgment. *Id*. at 396-97. Only then does the burden fall upon the nonmoving party to set forth specific facts demonstrating a genuine issue for trial. *Id*. at 397 (quotation omitted). The fact that the parties have filed cross-motions for summary judgment does not alter our standard for review, because we consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law. *Reed v. Reed*, 980 N.E.2d 277, 285 (Ind. 2012).

[9] "The interpretation of an insurance policy is primarily a question of law for the court, and it is therefore a question which is particularly suited for summary judgment." *Wagner v. Yates*, 912 N.E.2d 805, 808 (Ind. 2009). Contracts of insurance are generally governed by the same rules of construction as other contracts. *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985). Although ambiguities are construed in favor of the insured, clear and unambiguous policy language must be given its ordinary meaning. *Id.*

[10] Here, there is no dispute of fact. Rather, this matter distills to whether Founders is entitled to summary judgment as a matter of law based upon an exclusionary clause in the Policy. The relevant portions of the Policy are as follows:

> PART I – LIABILITY
>
> COVERAGE A – LIABILITY COVERAGE INSURING AGREEMENT
>
> Subject to the Limits of Liability, if you pay the premium for liability coverage, we will pay damages for bodily injury or property damage for which an insured person becomes legally liable because of the ownership or use of your insured car.

(App. Vol. II, pg. 33.)

> PART VI – GENERAL PROVISIONS
>
> VALID DRIVER'S LICENSE
>
> No coverage is afforded under any Part of this policy if, at the time of the accident, your insured car or a temporary substitute car is being operated by a person who:
>
> a. Is not a licensed driver; or
>
> b. Is without a valid driver's license; or
>
> c. Whose driver's license is revoked or suspended;

d. Whose driver's license has been expired for more than 30 days; or

e. Is in violation of any condition of their driving privileges; or

f. Is not legally entitled to drive under Indiana law. . . .

This coverage exclusion also does not apply to any rated driver, including the named Insured as respects coverage other than liability for bodily injury or property damage, who has disclosed to the company that his/her driver's license was invalid at the time of initial application for insurance or as of the effective date of the endorsement when the coverage applied for is submitted as part of a state-required financial responsibility filing (SR22/SR50), but only during the 60-day period immediately following the inception date of the policy, or for the 60-day period immediately following the date the policy is endorsed to provide an SR22/SR50 financial responsibility for that rated driver. If the driver's license of the Named Insured or any other rated driver remains or becomes invalid for any reason outside of the 60-day underwriting period, this exclusion shall apply as described.

(*Id.* at 46.)

[11] Gates was driving without a valid driver's license on the date of the collision, September 8, 2020, outside the 60-day underwriting period applicable to the Policy, which had been issued seventy-six days earlier. The trial court concluded that, by the plain terms of the Policy, insurance coverage was excluded. Great West does not argue that the exclusionary clause of the Policy is ambiguous but rather that it should be given no effect under the

circumstances. Specifically, Great West argues that Founders waived its right to enforce the exclusionary clause because it conducted no investigation as to the status of Gate's driver's license before taking his final premium payment.

[12] Great West claims that investigation is required "to avoid taking premiums without any risk of paying claims against Gates." Appellant's Brief at 9. According to Great West, the trial court should have focused upon:

> how the failure to cover a claim against Gates was against the interest of Gates, since he could have to pay a claim out of his own pocket; the traveling public would have diminished protection for damages, with a driver having a policy with no payment risk by the insurance company for an insured driver accident; and how, under the trial court's rule, an insurance company could take months or even years' worth of payments, without any risk of paying a claim against the named insured driver.

Appellant's Brief at 11. Great West points to no contractual or statutory obligation imposed upon Founders to investigate the status of its insured's driver's license upon the tender of a premium payment, or at any other time interval. At bottom, Great West asserts that Founders cannot equitably enforce the Policy's plain and unambiguous exclusionary clause because Founders accepted money without incurring risk. According to Great West, "Founders took money for coverage after the initial sixty-day period, with no risk of paying on a claim involving the insured driver, and without acting like a reasonable person and investigating whether the license was reinstated, to see if it could have liability on an insured driver claim." Appellant's Brief at 5.

Notwithstanding Great West's reference to a claim "involving the insured driver," Great West has not disputed that the Policy provided coverage for permissive use of the covered vehicle by a licensed driver other than Gates. In other words, there was not an absence of risk.

[13] In presenting its equitable argument, Great West directs our attention to a footnote in the landlord-tenant dispute case of *Page Two, Inc. v. P.C. Mgmt., Inc.*, 517 N.E.2d 103 (Ind. Ct. App. 1987).

> Waiver is "the intentional relinquishment of a known right." *Lafayette Car Wash, Inc. v. Boes* (1972), 258 Ind. 498, 501, 282 N.E.2d 837, 839. Thus we must determine the intent of the party holding the right. Waiver is ordinarily a question of fact. *Salem Community Sch. Corp. v. Richman* (1980), Ind. App., 406 N.E.2d 269, 274. The general rule is that if a party to a contract performs acts that recognize the contract as still subsisting, such as accepting rent payments, specific performance of the terms of the contract is waived and there can be no forfeiture. *Snyder v. International Harvester Credit Corp.* (1970), 147 Ind. App. 364, 371, 261 N.E.2d 71, 74. This rule is founded on principles of common honesty: a landlord cannot take the position a lease is valid for one purpose, e.g., collection of rent, and yet declare it invalid for other purposes. *See Waukegan Times Theatre Corp. v. Conrad* (1945), 324 Ill. App. 622, 632, 59 N.E.2d 308, 312 ("Any act done by a landlord knowing of a cause of forfeiture by his tenant, affirming the existence of the lease, and recognizing the lessee as his tenant, is a waiver of such forfeiture."). *See also* 51 C.J.S. § 117(4) (1968) ("[T]he acceptance by a landlord of rent which accrues after the breach of a condition contained in the lease generally implies a waiver of the right to declare a forfeiture of the lease and re-enter because of such breach, whatever may be the ground of forfeiture...." (footnotes omitted))

Id. at 106, n.1. According to Great West, the decisions in *Page Two, Inc.*, and *Snyder*, cited therein, stand for the proposition that "accepting payment waives specific performance of the terms of the contract." Appellant's Brief at 9. For example, a landlord is not permitted to accept rent and at the same time deny access to the tenant on grounds that there is no existing lease. *See id.*

[14] But here Great West has identified no like circumstances and indeed, no dispute of material fact. It is uncontested that, at the time Gates tendered his August premium, the Policy remained in full force and effect. Founders did not contend otherwise. Founders had issued no notice of cancellation at that time and did not do so until Gates failed to tender a September premium payment. Here, there were no circumstances akin to a landlord accepting rent while denying the validity of a lease or a continued acceptance of payments with knowledge of a tenant's act of forfeiture.

[15] Additionally, Great West discusses misrepresentation in the procurement of an insurance policy and directs our attention to *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664 (Ind. 1997). The *Guzorek* Court recognized a "general rule" providing that "the insurer may rely on representations of fact in the application without investigating their truthfulness, unless there is some reason to believe the representations are false." *Id.* at 674. But the Court simultaneously recognized that "an insurer cannot avoid coverage where it had knowledge of the facts notwithstanding the material misrepresentations, or where a reasonable person would have investigated further and the investigation would have uncovered the truth." *Id.* Ultimately, "when the insurer had sufficient

information to place it on inquiry notice of possible falsity, whatever facts a reasonably diligent investigation would have discovered are imputed to the insurer." *Id.* One example is that an insurer's independent knowledge of the named insured's spouse's driving record has been held to waive the right to avoid coverage. *Id.* (citing *American Family Mut. Ins. Co. v. Kivela*, 408 N.E.2d 805 (Ind. Ct. App. 1980).

[16] Great West argues "the point of the holding [in *Guzorek*] is that Founders had notice of the lack of license by Gates, and that notice of the license issue has been held to waive the right to avoid coverage." Appellant's Reply Brief at 6. Indeed, when Gates applied for automobile coverage, he reported his lack of a valid driver's license. Thus, no material misrepresentation was made. Founders did not seek to avoid coverage on the basis of a material misrepresentation. *Guzorek* does not support Great West's contention of waiver.

[17] Finally, Great West argues that Founders should have made additional inquiry after the Policy was issued as a matter of fair dealing. That is, Great West insists that it was incumbent upon Founders to follow up with Gates and ascertain whether he had obtained a valid driver's license during the coverage period. But, as previously observed, Great West relies upon no statutory or contractual basis for a duty of inquiry. And such inquiry would have corrected no material misrepresentation relied upon in the issuance of the Policy. Great West stops short of arguing that the Policy is an illusory contract because Founders assumed no obligation. Rather, the Policy coverage was not limited

only to Gates; it also included the operation of the insured vehicle. Great West simply insists that Founders "should" have investigated "to avoid a situation where the insurer takes premiums, but has no risk of paying claims against an insured named driver." Appellant's Brief at 11

[18] The right of a third party to recover through liability insurance is not absolute; the source and means of recovery is grounded in the insurance contract itself. *Founders Ins. Co. v. May*, 44 N.E.3d 56, 64 (Ind. Ct. App. 2015), *trans. denied*. Here, the Policy contains an unambiguous exclusionary clause plainly applicable to the uncontested facts. We discern no basis upon which the plain language of the exclusionary clause should be disregarded.

Conclusion

[19] Founders is entitled to judgment as a matter of law, and there is no genuine dispute of material fact. Accordingly, the trial court did not err in granting summary judgment to Founders and denying summary judgment to Great West.

[20] Affirmed.

Riley, J., and Vaidik, J., concur.