

<p>DISTRICT COURT, ADAMS COUNTY, STATE OF COLORADO Adams County Justice Center 1100 Judicial Center Dr. Brighton, CO 80601</p> <hr/> <p>SENTRY INSURANCE, a MUTUAL COMPANY, Plaintiff,</p> <p>v.</p> <p>IMELDA BARRAGAN SANCHEZ, KARINA BARRAGAN, LOUANNA JONES, MARION JONES, CITY OF COMMERCE CITY, Defendant.</p>	<p style="text-align: right;">DATE FILED: May 5, 2017 2:08 PM CASE NUMBER: 2016CV31486</p> <p>COURT USE ONLY</p> <hr/> <p>Case No. 2016CV31486</p> <p>Division: W Courtroom: 507</p>
<p>ORDER ON PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT</p>	

Before the Court is Plaintiff Sentry Insurance’s (“Sentry”) Motion for Summary Judgment, filed February 24, 2017. Defendants Louanna Jones and Marion Jones (“Jones”) filed their response on March 24, 2017. Defendant City of Commerce City (“Commerce City”) also filed a response on March 24, 2017. Defendants Imelda Barragan Sanchez and Karina Barragan were defaulted in this action by way of an Order dated December 21, 2016, and therefore have not submitted a response to the pending motion. Sentry filed its reply on March 31, 2017. The Court, being fully informed on the premises, finds and orders the motion is granted.

Background

This lawsuit arises from a motor vehicle accident that occurred on December 19, 2015, resulting in a personal injury lawsuit that is also before this Court as case number 16CV30893. According to the complaint in 16CV30893, Defendant Karina Barragan was driving an automobile owned by Defendant Imelda Barragan Sanchez, when Karina Barragan collided with another vehicle which was owned and operated by Marion Jones according to the response filed by Jones. Plaintiff Louanna Jones was a passenger in the vehicle and she filed suit as the only one who allegedly suffered injuries.

In response to the personal injury lawsuit, Sentry filed a complaint for declaratory relief in this case, seeking a determination that it owes no duty to defend or indemnify its insured, Imelda Barragan Sanchez, because of the language contained within the policy of insurance. As stated above, Imelda Barragan Sanchez and Karina Barragan have failed to appear in this litigation to date. Commerce City’s consents to the instant motion in its response, with the exception being that it objects to any claim Sentry may have to an award of fees and costs. Jones opposes.

Standard of Review

Summary judgment is appropriate when the pleadings and supporting documents clearly demonstrate that no issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 819 (Colo. 2004). The moving party bears the initial responsibility of informing the court of the basis for the motion and identifying those portions of the record and of the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of material fact. *Quist v. Specialties Supply Co., Inc.*, 12 P.3d 863, 868 (Colo. App. 2000).

Once this initial burden of production is met, the burden shifts to the opposing party to demonstrate that there exists a triable issue of fact. *City of Aurora v. ACJ P'ship*, 209 P.3d 1076, 1082 (Colo. 2009). The nonmoving party is entitled to the benefit of all favorable inferences that may be drawn from the undisputed facts, and all doubts as to existence of a triable issue of fact must be resolved against the moving party. *Martini v. Smith*, 42 P.3d 629, 632 (Colo. 2002).

Analysis

An insurance policy is a contract which should be interpreted consistently with the well-settled principles of contractual interpretation. *Miller v. Hartford Cas. Ins. Co.*, 160 P.3d 408 (Colo. App. 2007), citing *Chacon v. Am. Fam. Mut. Ins. Co.*, 788 P.2d 748, 750 (Colo. 1990). The Court reads the insurance policy as a whole, including the declarations page, rather than read each section in isolation. *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 4 P.3d 294 (Colo. 2003). A Court may not look beyond the plain words of an insurance contract to interpret it based on the contracting parties' underlying intent unless the contract terms are ambiguous or are used in a special or technical sense not defined in the contract. *TerraMatrix, Inc. v. U.S. Fire Ins. Co.*, 939 P.2d 483 (Colo. App. 1977). The Court will give the word their plain meaning and avoid strained and technical interpretations construing the contract as would a reasonable person of ordinary intelligence. *Simon v. Shelter Gen. Ins. Co.*, 842 P.2d 236 (Colo. 1992).

Insurance policy exclusionary clauses exempting the insurer from providing coverage in certain circumstances must be written in clear and specified language and construed in favor of coverage. *McGowan v. State Farm Fire & Cas. Co.*, 100 P.3d 521 (Colo. App. 2004). If an insurer does not clearly express the limitation, or if the policy provisions are inconsistent or ambiguous, the contract must be construed in favor of coverage and against the limitation. *Farmers Alliance Mut. Ins. Co. v. Ho*, 68 P.3d 546 (Colo. App. 2002). If a provision of an insurance policy violates public policy by attempting to dilute, condition or limit statutorily mandated coverage, then it is to that extent unenforceable. *DeHerrera v. Sentry Ins. Co.*, 30 P.3d 167 (Colo. 2001).

A duty to defend arises from when the underlying complaint against the tortfeasor alleges any facts that might fall within the coverage of the policy. *Cyprus Amax Mineral Co. v. Lexington Ins. Co.*, 4 P.3d 294, 300 (Colo. 2003). The insurer has the burden of establishing that the claims asserted in the complaint are not covered by the policy because they are "solely and entirely within the exclusions in the insurance policy" and the exclusions "are not subject to any other reasonable interpretations." *Hecla Mining Co. v. N. Hamp. Ins. Co.*, 811 P.2d 1083,

1090 (Colo. 1991). A trial court restricts its examination of whether a duty to defend exists to the four corners of the complaint. *Compass*, 984 P.2d 606. Where there is no duty to defend, there is no duty to indemnify. *Cyprus Amax*, 74 P.3d 294.

In its motion, Sentry argues that the insurance policy should be interpreted based on the plain language of the policy. Here, the policy states that there is no coverage if the vehicle is being operated by someone other than Imelda Barragan Sanchez. Motion at 5, ¶ 5; at 6, ¶ 1. Sentry also asserts that because the complaint in 16CV30893 alleges that the vehicle which caused the accident was operated by someone other than Imelda Barragan Sanchez, (specifically, Karina Barragan) coverage is not available under the Sentry policy. *Id.* at 6, ¶ 1. Finally, Sentry states, Imelda Barragan Sanchez cannot be liable under the family doctrine or negligent entrustment theories because of the exclusionary language in the policy regarding same. *Id.* ¶ 2.

In response, Jones points out the differences between owner and operator policies in the context of automobile insurance. Response at 5, ¶¶ 2-4. Jones further argues that despite Sentry's efforts to limit liability through the use of a broad form operator's policy in this case, its policy language fails to conform to the requirements set forth in Colorado law and therefore does not exclude coverage under Imelda Barragan Sanchez's policy. *Id.* at 7, ¶¶ 1-2.

In its reply, Sentry states that Jones does not dispute that the policy contains the necessary cautionary language, as required by the statute, but simply argues that it was not in a conspicuous location and font. Reply at 5, ¶ 6. Finally, Sentry attaches an executed "Applicant's Statement" as an exhibit, which it offers as additional evidence of Sentry's conformity with the statutory requirements regarding broad form operator's policies. *Id.* ¶ 7.

C.R.S. § 10-4-619 describes the requirement of insurance coverage for every owner of a motor vehicle who operates same on the public highways of this state. This is the so-called 'owner's policy' statutory section. C.R.S. § 10-4-640 is the 'operator's policy' section and details the ways in which a person can avoid the purchase of an owner's policy. C.R.S. § 10-4-640(2) states that an operator's policy of liability insurance shall provide coverage and shall state in a conspicuous type face and font on the face of the policy, that:

- (a) The insurer is only liable under the policy for liability or damages incurred by the insured while the named insured is the operator of a motor vehicle or while a motor vehicle owned by the insured is not being operated by any other person;
- (b) The policy does not provide coverage for any vicarious liability imposed on the owner of the motor vehicle as a result of the operation by another person of a motor vehicle owned by the insured;
- (c) The coverage provided by the policy may not meet the requirements of the mandatory motor vehicle insurance or financial responsibility laws of another state.

Imelda Barragan Sanchez's insurance application is attached to Jones' response as exhibit

3. It is two pages long, executed by Imelda Barragan Sanchez and contains a statement near the top of the first page which states:

BROAD FORM NAMED DRIVER POLICY: If this policy type is indicated above, this policy provides coverage for only the named insured while driving either owned or non-owned cars. Owned cars will not be listed.

This language is in the same size font as found on the rest of the application. It is also located in a conspicuous place. The declarations page of the subject insurance policy, which is attached to Jones' response as exhibit 4, contains the following statement near the middle of the first page:

The coverages listed on this Declarations Page apply for only the named insured while driving owned or non-owned cars.

This language is in the same size font as found on the rest of the declarations page. It is also located in a conspicuous place. In Sentry's reply, it attached an "Applicant's Statement" as exhibit A, which is signed and dated by Imelda Barragan Sanchez. The Applicant's Statement contains all of the necessary cautionary language prescribed by C.R.S. § 10-4-640(2). The language is conspicuous and in the same size font as the rest of the wording on the document. The broad form policy language is located in its entirety on page 20 of Jones' exhibit 4. A review of this page reveals it occupies a full page of text. The required statutory language consumes approximately one quarter of this same page, with the remainder consisting of restrictions, definitions and terms.

Jones' argument is that because exhibit 5, which is the first page of a thirteen page policy, does not make a reference to an operator's policy, the policy fails to conform with Colorado law and is therefore unenforceable. The Court is not persuaded by this position. C.R.S. § 10-4-640(2) does not specify what the legislature meant as the 'face' of the policy. Based on the amount of space the necessary language requires, it is not practical to conclude that it can only exist on the first page of the policy.

Jones also argues that "[t]he requirements of C.R.S. 10-4-640 indicate the intent of the Colorado legislature to ensure that any consumer purchasing an operator's policy would have an opportunity to read and understand the limitations of such a policy." Response at 6, ¶ 6. The Court agrees. However, in this case, Imelda Barragan Sanchez was put on notice of exactly what she was contracting for as evidenced by the cautionary language found on exhibits 3 and 4 to Jones' response and exhibit A to Sentry's reply. The fact that cautionary language is conspicuously located in the middle of the declaration's page¹, which could be considered the 'face' of the policy, is also persuasive. While the Court acknowledges this is not the "complete" language, when it is viewed in the totality of the circumstances as described above², it is sufficient to meet the statutory requirements.

¹ Sentry's exhibit C to motion and the first page of Jones' exhibit 4 to response.

² Space constraints, lack of definition regarding 'face of the policy', and legislative intent.

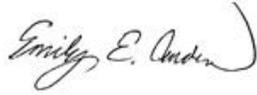
Conclusion

The Court finds that ¶ 9 of the complaint filed in 16CV30893 alleges that Karina Barragan was driving the vehicle that caused the accident giving rise to that lawsuit. Under the third claim for relief, ¶ 73, it is alleged that the vehicle driven by Karina Barragan was owned by Imelda Barragan Sanchez at the time of the accident. Imelda Barragan Sanchez owned an operator's policy; thus, Sentry would only have a duty to defend Imelda Barragan Sanchez if she were driving the vehicle at the time of the accident, which is not the case. (See 16CV30893). Where there is no duty to defend, there is no duty to indemnify.

For the foregoing reasons, Sentry's Motion for Summary Judgment is **GRANTED**.

SO ORDERED THIS 5th DAY OF MAY, 2017.

BY THE COURT:



DISTRICT COURT JUDGE