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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FARMERS INSURANCE EXCHANGE,

Plaintiff and Appellant,

v.

SUK JUNG KIM,

Defendant and Respondent.

G047169

(Super. Ct. No. 30-2010-00431078)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,  
Hugh Michael Brenner, Judge. (Retired judge of the Orange Super. Ct. assigned by the  
Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Berger Kahn, David B. Ezra, Mark F. Marnell; Susan Benson & Associates,  
and Susan M. Benson for Plaintiff and Appellant.

McNeil, Tropp, Braun & Kennedy, Jeff I. Braun and Tracy L. Breuer for  
Defendant and Respondent.

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## INTRODUCTION

An insured of Farmers Insurance Exchange (Farmers) was injured in an automobile accident caused by Suk Jung Kim (Suk Kim). Farmers's insured filed an uninsured motorist claim. Farmers paid the claim and then filed a subrogation action against Suk Kim to recover the payments made to its insured. Suk Kim filed a motion for summary judgment. He argued he was not an uninsured motorist, as he was driving an insured vehicle with the permission of a permissive user, and Farmers's complaint based on payment of an uninsured motorist claim was therefore barred. The trial court granted the motion; Farmers appeals.

We conclude the trial court erred in granting the motion for summary judgment. By statute, an uninsured motor vehicle is one with respect to which there is no bodily injury liability insurance *or* there is such insurance but the insurance company writing the applicable policy denies coverage or refuses to admit coverage, except conditionally or with reservation. (Ins. Code, § 11580.2, subd. (b).) (All further statutory references are to the Insurance Code.) In the motion for summary judgment, Suk Kim offered evidence to show he was covered by an insurance policy on the vehicle as a permissive user. However, Suk Kim failed to make the required prima facie showing that the insurer had not denied coverage, expressly or impliedly, or that the insurer had refused to admit coverage without condition or reservation. We therefore reverse the judgment.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

In October 2006, a car driven by Suk Kim collided with a car driven by Sang Nguyen. The car driven by Suk Kim was owned by Nam Kim (no relation). Dong Seon Lim, an employee of Nam Kim, was a passenger in the car, and Suk Kim declared he was driving the car with Lim's permission. Nam Kim's car was insured by a

commercial automobile policy issued by United Financial Casualty Company (United Financial). Nam Kim was the named insured under the United Financial policy.

Nguyen submitted a claim for bodily injuries in the amount of \$200,000 to his insurer, Farmers. In January 2010, Farmers paid Nguyen's claim.

In December 2010, Farmers filed an uninsured motorist subrogation action against Suk Kim to recover the money it had paid to Nguyen. Suk Kim filed a motion for summary judgment, arguing he was not uninsured at the time of the accident, and United Financial had never denied coverage for Nguyen's claim. After briefing and a hearing, the trial court granted the motion. Judgment was entered, and Farmers timely appealed.

#### DISCUSSION

“[T]he party moving for summary judgment bears the burden of persuasion” that there are no triable issues of material fact and that the moving party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving party also “bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.” (*Ibid.*) “A prima facie showing is one that is sufficient to support the position of the party in question.” (*Id.* at p. 851.)

“A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law.

[Citation.] We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports.

[Citation.] In the trial court, once a moving defendant has ‘shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,’ the

burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff ‘may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .’ [Citations.]” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

This case involves an analysis of section 11580.2, which addresses liability insurance for uninsured motor vehicles. “As used in this section, ‘uninsured motor vehicle’ means a motor vehicle with respect to the ownership, maintenance or use of which there is no bodily injury liability insurance or bond applicable at the time of the accident, or there is the applicable insurance or bond but the company writing the insurance or bond denies coverage thereunder or refuses to admit coverage thereunder except conditionally or with reservation, . . . or a motor vehicle used without the permission of the owner thereof if there is no bodily injury liability insurance or bond applicable at the time of the accident with respect to the owner or operator thereof . . . .” (§ 11580.2, subd. (b).) The purpose of section 11580.2 is “‘to protect one lawfully using the highway by assuring him of payment of a minimum amount of an award to him for bodily injury caused by the actionable fault of another driver.’ [Citation.]” (*Hartford Fire Ins. Co. v. Macri* (1992) 4 Cal.4th 318, 324.)

When an insurer pays a claim made by its insured for damages caused by an uninsured motorist, section 11580.2 gives the insurer the right to make a claim against the uninsured motorist who caused the accident: “The insurer paying a claim under an uninsured motorist endorsement or coverage shall be entitled to be subrogated to the rights of the insured to whom the claim was paid against any person legally liable for the injury or death to the extent that payment was made. The action may be brought within three years from the date that payment was made hereunder.” (§ 11580.2, subd. (g).) This provision is to be interpreted liberally to allow subrogation. (*Mills v. Farmers Ins. Exchange* (1964) 231 Cal.App.2d 124, 128.)

The key issue in this case is whether United Financial denied coverage or refused to admit coverage without condition or reservation, and, therefore, whether Nguyen's claim against Farmers was an uninsured motorist claim. Denial of coverage may be express or implied. In *Katz v. American Motorist Ins. Co.* (1966) 244 Cal.App.2d 886, 891 (*Katz*), the court concluded, "an insurer who becomes insolvent 'denies coverage' within the meaning of section 11580.2, subdivision (b)."<sup>1</sup> The court quoted with approval *State Farm Mut. Auto Ins. Co. v. Brower* (1964) 204 Va. 887 [134 S.E.2d 277] (*Brower*). In *Brower*, the Virginia Supreme Court interpreted a Virginia statute similar to section 11580.2, subdivision (b), which provided, "the term "uninsured motor vehicle" means a motor vehicle as to which there is no (i) bodily injury liability insurance and property damage liability insurance both in the amounts specified by [the statute], or (ii) there is such insurance but the insurance company writing the same denies coverage thereunder." (*Katz, supra*, at p. 889, fn. 1.)

In *Brower*, the Virginia Supreme Court held, in relevant part, the insurer's insolvency and the failure by the insolvent insurer or its receiver to defend the lawsuit against its insured, much less pay any part of the judgment against the insured, were "an effective denial of coverage." (*Katz, supra*, 244 Cal.App.2d at p. 889.) The Virginia Supreme Court concluded that an express denial of coverage was not required: "[The statute] does not say that the denial must be express. It says only that the automobile is an uninsured vehicle if the insurance company "denies coverage." There is nothing in the letter of the statute nor, as we believe, in the spirit and purpose of the statute, that requires the denial to be expressed. Denial of coverage clearly may be as effectively made by the conduct of the insurer as by its spoken or written word. . . . [¶] 'An insurer denies coverage to its insured when it fails or refuses to accord him the protection it contracted

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<sup>1</sup> Since the opinion in *Katz* was issued, section 11580.2, subdivision (b) has been amended to include insolvency of an insurer as a situation when a motor vehicle is uninsured.

to give. Here National has failed to give Mazza protection against the damages he has “become legally obligated to pay” which National specifically promised to pay for him. Its failure to appear, to defend and to pay was a denial of coverage within the meaning of [the statute], and Mazza’s car was therefore “an uninsured motor vehicle.”” (Katz, *supra*, at pp. 889-890.)

A leading treatise on insurance law provides the following analysis of uninsured motorist claims arising from the denial of coverage by the tortfeasor’s insurer: “In Ins[urance] Code § 11580.2(b), the definition of ‘uninsured vehicle’ includes a motor vehicle that has applicable insurance if the insurer either denies coverage or refuses to admit coverage except conditionally or with reservation. The purpose of this definition is to give the injured party a right to proceed under an uninsured motorist provision if there is a coverage dispute between the tortfeasor and his or her insurer. [¶] An insurance company’s refusal of a written claim is not synonymous with a denial of coverage, as ‘coverage’ and ‘claim’ are not synonymous. An insurer may concede the existence of coverage, but deny the claim, in which case the insured would not have an uninsured claim against his or her own insurer. . . . [¶] . . . [¶] . . . If the adverse driver’s liability insurer maintains that its policy does not furnish coverage for the accident, the ‘insured’ vehicle is an ‘uninsured’ motor vehicle.” (1 Clifford, Cal. Uninsured Motorist Law (6th ed. 2012) § 6.70, pp. 6-28.5 to 6-29; see *Page v. Insurance Co. of North America* (1967) 256 Cal.App.2d 374, 380 [refusal of claim is not the same as denial of coverage for purposes of section 11580.2].) In a comment, the Clifford treatise recommends the following: “Counsel for an insured who is making an uninsured motorist claim on the basis of denial of coverage should request that the adverse party’s insurer put that denial of coverage in writing, in order to facilitate proving that the adverse vehicle was ‘uninsured.’” (Clifford, *supra*, § 6.70, p. 6-29.) In another comment, the treatise notes: “The denial of coverage by the tortfeasor’s insurer is sufficient to establish the fact that the vehicle is ‘uninsured,’ whether or not the basis for the denial is valid. From the

injured insured's point of view, once the tortfeasor's insurer denies coverage there is no source of recovery and he or she should not have the added obstacle of proving the validity of the insurer's position." (*Id.* at p. 6-31.)

In support of his motion for summary judgment, Suk Kim submitted the declaration of Lindsay Carpio, a claims specialist with United Financial. Carpio's declaration states, in relevant part: "United Financial Casualty Company never denied coverage for the claim brought by the driver and passenger of [Farmers]'s insured, Sang Minh Nguyen and Lan Cao, respectively."

In order to make a prima facie showing of the nonexistence of a triable issue of material fact sufficient to meet his initial burden of production, Suk Kim was required to offer admissible evidence that United Financial did not expressly or impliedly deny coverage and did not refuse to admit coverage conditionally or with reservation. Suk Kim failed to meet his initial burden of production. To say United Financial did not deny coverage does not address whether it admitted coverage, or whether it refused to admit coverage without condition or reservation. Suk Kim's motion also fails to address whether United Financial, by its conduct, impliedly denied coverage. The accident occurred in October 2006. Payment of the uninsured motorist claim was made in January 2010. Suk Kim's moving papers failed to show United Financial's lengthy inaction was not an effective denial of coverage, or at least a refusal to admit coverage without condition or reservation.

Because Suk Kim failed to meet his initial burden of production, the burden never shifted to Farmers to present evidence. The trial court erred by granting Suk Kim's motion for summary judgment.

Even if the burden had shifted, Farmers offered sufficient evidence to create a triable issue of material fact regarding an effective denial of coverage by United Financial. The declaration of Maureen Schultz, a subrogation claims supervisor for Farmers, established the following facts: (1) the insurance policy covering Nam Kim's

car was a commercial automobile insurance policy; (2) in Nguyen's case against Suk Kim and others, Nam Kim had filed a declaration stating Nam Kim did not know Suk Kim, had never employed him, and had never given Suk Kim permission to drive his car; (3) the attorney representing Nguyen in the case against Suk Kim and others advised Farmers that United Financial was disputing coverage; (4) United Financial never informed Farmers that it would provide coverage to Suk Kim as a permissive user; (5) Nam Kim's declaration, under penalty of perjury, that Suk Kim did not have his permission to drive the vehicle was the only information available to Farmers regarding coverage for Suk Kim; and (6) state-mandated insurance regulations and Farmers's policies and practices prohibited Farmers from delaying payment to Nguyen on the uninsured motorist claim or making payment contingent on a determination of liability or distribution of loss costs between various insurers.

#### DISPOSITION

The judgment is reversed. Appellant shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.