NO. CV07-5006377

JOHN PALIUIS	:	SUPERIOR COURT
V.	:	JUDICIAL DISTRICT OF WATERBURY
SAFECO INSURANCE	:	November 20, 2009

MEMORANDUM OF DECISION

The issue before the court is whether public policy requires an insurance company to provide underinsured motorist coverage to a named insured's relative who is a member of the insured's household but who owns his own car, when such resident relative is injured as a pedestrian by a third-party underinsured motorist.

On October 19, 2005, while attempting to cross Congress Ave. in Waterbury, the plaintiff was struck by an automobile negligently driven by James Bush. As a result, the plaintiff suffered severe bodily injuries. Bush's insurance carrier, Liberty Mutual Insurance Company, paid the plaintiff $25,000, the limit of its liability. The plaintiff then turned to the underinsured motorist coverage provided by AIG on his own

automobile. AIG paid the plaintiff $75,000 under the terms of that policy.[1]

At the time of the accident, the plaintiff lived with his daughter, Anne Paliulis. Anne's vehicle was insured by defendant, and her policy, which was in effect at the time of the accident, contained provisions for uninsured and underinsured motorist coverage. The plaintiff sought underinsured motorist benefits from the defendant. The defendant declined, determining that the plaintiff was not an insured under the policy based on a provision in its policy that the plaintiff was not insured under his daughter's policy.[2] The

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[1]The policy limit was $100,000 minus the $25,000 the plaintiff recovered from Bush's insurance.

[2]A copy of the policy is attached to both the motion for summary judgment and the objection thereto. On page eight, section A, the policy provides in relevant part: "We will pay damages which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle or underinsured motor vehicle because of bodily injury:1.Sustained by an insured; and 2.Caused by an accident. Section B provides: *Insured* as used in this Part means: 1.You or any family member. 2. Any other person occupying your covered auto. 3. Any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person described in 1. or 2. above.

The term *family member* is defined on page one of the policy as " a person related to you by blood . . . who is a resident of your household. However, family member does not include a family member or a family member's spouse, *who owns an auto not insured under this policy, when not occupying an auto insured under this*

plaintiff thereafter commenced this action, alleging that the defendant is legally required to provide him with underinsured motorist coverage under General Statutes § 38a-336. [3]

The defendant moves for summary judgment on the grounds that the plaintiff is not legally entitled to coverage because he is neither a named insured, the spouse of the named insured, nor a *family member* as that term is defined in the policy inasmuch as he owned his own motor vehicle which was not insured under the policy and he was not occupying an auto insured under the policy at the time of the accident. The plaintiff argues that the defendant's exclusion of the plaintiff from its uninsured/underinsured motorist coverage violates Connecticut law and public policy.

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policy." (Emphasis added.)

[3] Sec. 38a-336 provides, in relevant part, that each automobile liability insurance policy shall provide insurance, herein called uninsured and underinsured motorist coverage, in accordance with the regulations adopted pursuant to section 38a-334, with limits for bodily injury or death not less than those specified in subsection (a) of section 14-112, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and underinsured motor vehicles

DISCUSSION

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show 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. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Provencher* v. *Enfield*, 284 Conn. 772, 790-91, 936 A.2d 625 (2007). "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue." (Internal quotation marks omitted.) *Zielinski* v. *Kotsoris*, 279 Conn. 312, 318-19, 901 A.2d 1207 (2006).

The plaintiff concedes, and the court agrees, that there is no genuine issue of material fact. The plaintiff also does not dispute that, under the terms of the policy, he was not entitled to coverage. Therefore, whether the defendant was required by law to provide coverage to the plaintiff is the dispositive issue.

Automobile insurance is regulated by General Statutes § 38a-334 et seq. and § 38a-334-1 et seq. of the Regulations of Connecticut State Agencies. Under § 38a-336, the uninsured and underinsured motorist statute, "[a]n insurer's responsibility to provide uninsured and underinsured motorist coverage is mandatory, not discretionary. . . . [A]n insurer may not, by contract, reduce its liability for . . . uninsured or underinsured motorist coverage, except as authorized by § 38a-334-6 of the Regulations of Connecticut State Agencies." (Internal quotation marks omitted.) *Orkney* v. *Hanover Ins. Co.*, 248 Conn. 195, 201, 727 A.2d 700 (1999). Section 38a-336 itself, however, "does not require automobile insurance policies to provide underinsured motorist benefits to any particular class or group of insureds." *Middlesex Ins. Co.* v. *Quinn*, 225 Conn. 257, 264, 622 A.2d 572 (1993). An exclusion from coverage may be held invalid if it violates the public policy underlying § 38a-336. See, e.g., *Harvey* v. *Travelers Indemnity Co.*, 188 Conn. 245, 249, 449 A.2d 157 (1982). As the plaintiff was not entitled to underinsured motorist coverage under the terms of the policy or under the language of § 38a-336, his only means to prevail on this motion is to demonstrate that the defendant's exclusion of him from coverage violated public policy.

The defendant argues that, under *Middlesex Ins. Co.* v. *Quinn*, supra, 225 Conn. 257, public policy did not require it to cover the plaintiff because he owned his own car that was not insured by the defendant. The plaintiff makes two arguments supporting his position that his exclusion was unlawful: First, because the defendant improperly excluded the plaintiff from liability coverage under General Statutes § 38a-335 (d), [4] it improperly excluded him from underinsured motorist coverage. Second, since no statute or regulation explicitly permitted his exclusion, the defendant was required to extend coverage to the plaintiff. Specifically, he argues that General Statutes § 38a-336 (a) (1)[5] barred the defendant's attempt to exclude him

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[4]General Statutes § 38a-335 (d) provides: "With respect to the insured motor vehicle, the coverage afforded under the bodily injury liability and property damage liability provisions in any such policy shall apply to the named insured and relatives residing in his household unless any such person is specifically excluded by endorsement."

[5]General Statutes § 38a-336 (a) (1) provides: "Each automobile liability insurance policy shall provide insurance, herein called uninsured and underinsured motorist coverage, in accordance with the regulations adopted pursuant to [§] 38a-334, with limits for bodily injury or death not less than those specified in subsection (a) of [§] 14-112, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and underinsured motor vehicles and insured motor vehicles, the insurer of which becomes insolvent prior to payment of such damages, because of bodily injury, including death resulting therefrom. . . . No insurer shall be required to provide uninsured and underinsured motorist coverage to (A) a named

because the language of neither subparagraph (A) nor subparagraph (B) of subsection (a) (1) permitted the exclusion and that § 38a-334-5 (c) (8)[6] of the Regulations of Connecticut State Agencies did not permit the exclusion because he was not operating a motor vehicle at the time he was injured.

In *Middlesex Ins. Co.* v. *Quinn*, supra, 225 Conn. 264-65, the Supreme Court determined that public policy requires an insurer to provide uninsured and underinsured motorist coverage to anyone who is covered for purposes of liability. Public policy does not, however, require the provision of such coverage to a resident relative who is permissibly not covered for purposes of liability, and who owns his or her own automobile, because the legislature did not specifically mandate such coverage. Id., 265. The court also determined that anyone

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insured or relatives residing in his household when occupying, or struck as a pedestrian by, an uninsured or underinsured motor vehicle or a motorcycle that is owned by the named insured, or (B) any insured occupying an uninsured or underinsured motor vehicle or motorcycle that is owned by such insured."

[6]The plaintiff actually cites subsection (b) rather than subsection (c), but it is apparent from his argument that he is citing the language of subsection (c) and that his references to subsection (b) are typographical errors. Section 38a-334-5 (c) provides: "Exclusions: The insurer's obligation to pay and defend may be made inapplicable . . . (8) to the operation of a motor vehicle by an individual or individuals specifically named by endorsement accepted by the insured, the form of which has been accepted for filing by the insurance commissioner . . . ."

impermissibly excluded from liability coverage is entitled to uninsured and underinsured motorist coverage. See id., 268. Finally, according to the court, public policy provides that an insured's resident relative who owns his own automobile is not legally entitled to liability coverage under the insured's policy. Id., 268-69. The purpose of this public policy rule, the court explained, is to prevent resident relatives from purchasing inadequate coverage for their own vehicles knowing that they could recover under the insured's policy. Id.

The exclusion of the plaintiff is permissible under *Quinn*. The plaintiff did not qualify for liability coverage under the language of the policy.[7] The plaintiff was neither a named insured nor a "family member" under the policy. Also, the

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[7]Page two of the policy provides in relevant part: "We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident." *Insured* is defined in Part B as: "1. You or any family member for the ownership, maintenance or use of any auto or trailer. 2. Any person using your covered auto.

3. For your covered auto, any person or organization but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under 1. and 2. above.
4. For any auto or trailer, other than your covered auto, any other person or organization but only with respect to legal responsibility for acts or omissions of you or any family member for whom coverage is afforded under this Part. This provision (B.4.) applies only if the person or organization does not own or hire the auto or trailer."

plaintiff was not operating Paliulis' car. Finally, neither Paliulis herself nor anyone who qualified as a "family member" incurred any legal liability for which the plaintiff might be held responsible. Therefore, the plaintiff met none of the criteria to qualify as an "insured." Moreover, because the plaintiff owned his own car, he was not entitled under public policy to liability coverage. Since the plaintiff was permissibly not covered for purposes of liability, public policy did not require that he be provided underinsured motorist coverage.

Contrary to the plaintiff's first argument, the defendant was not required to cover him, as a resident relative, for liability purposes under § 38a-335 (d). That subsection requires coverage for resident relatives when a vehicle insured under the policy is involved in the incident that caused the injury, except for those resident relatives who have been excluded by endorsement. *Middlesex Ins. Co.* v. *Rady*, 34 Conn. App. 679, 682-83, 642 A.2d 1217, cert. denied, 231 Conn. 908, 648 A.2d 154 (1994). No automobile insured under the policy was involved in the incident in which the plaintiff was injured. Therefore, the defendant did not need to exclude the plaintiff by endorsement.

Regarding his second argument, the plaintiff states that the other permitted statutory and regulatory exclusions do not apply to him-namely, the exclusions in subparagraphs (A) and (B) of § 38a-336 (a) (1) and the "excluded driver" provision, relating to liability coverage, found in § 38a-334-5 (c) (8).[8] Therefore, the plaintiff contends, absent an applicable permitted exclusion, public policy required that he be extended underinsured motorist coverage, either directly or as someone entitled to liability coverage.

The rule that "an insurer may not, by contract, reduce its liability for . . . uninsured or underinsured motorist coverage . . ."; (Internal quotation marks omitted.) *Orkney* v. *Hanover Ins. Co.*, supra, 248 Conn. 201; presupposes that the insurance company actually has the liability it is seeking to reduce. Rejecting an argument similar to the plaintiff's, the court in *Quinn* held that the legislature did not, in the first place,

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[8]Subparagraph (A) of § 38a-336 (a) (1) allows an exclusion when an insured or a resident relative is occupying or is struck as a pedestrian by an uninsured or underinsured vehicle owned by the named insured. Subparagraph (B) allows an exclusion when an insured is occupying an uninsured or underinsured vehicle that he or she owns. Finally, § 38a-334-5 (c) (8) allows the exclusion from liability coverage of a person who is operating a vehicle, who has been specifically excluded through an endorsement. That regulation does not concern uninsured or underinsured motorist coverage.

specifically mandate uninsured and underinsured motorist coverage for resident relatives who own their own automobiles. See *Middlesex Ins. Co.* v. *Quinn*, supra, 225 Conn. 261, 265. Therefore, since neither the law nor public policy affirmatively mandated underinsured motorist coverage for the plaintiff, the defendant did not need to rely on § 38a-336 (a) (1) (A) or (B) or any other statutory exclusion in order to deny the plaintiff such coverage.

Similarly, the fact that the plaintiff did not fit the exclusion under § 38a-334-5 (c) (8), does not lead to the conclusion that the plaintiff must have been therefore entitled to liability coverage. In that regulation, the listed exclusions merely divest the insurance company of a preexisting obligation to provide coverage. See Regs., Conn. State Agencies § 38a-334-5 (c) ("The insurer's obligation to pay and defend may be made inapplicable [in certain cases].").

CONCLUSION

The parties agree that there is no genuine issue of material fact. It is evident from the undisputed facts that the plaintiff was not entitled to underinsured motorist benefits under the policy. Under *Middlesex Ins. Co.* v. *Quinn*, supra, 225 Conn. 257, the defendant is entitled to judgment as a matter of

law. Public policy does not require that the defendant cover the plaintiff because he was permissibly excluded from coverage for liability purposes. Therefore, the motion for summary judgment is granted.

GALLAGHER J.