

## Don't Forget to Take a Break When "Lyfting"!

By Dayne J. Rogers

January 8, 2024

Typically, Michigan drivers will look to their own personal policy of auto insurance when seeking to collect underinsured motorist ("UIM") benefits following a motor vehicle accident. However, in *Peter Duato v Denise Mellon, Indian Harbor Ins Co, and Progressive Marathon Ins Co*, \_\_\_ Mich App \_\_; \_\_\_ NW2d \_\_\_ (2023) (Docket No. 362823), the Court of Appeals analyzed whether an otherwise insured driver could collect UIM benefits from his own policy of insurance when operating a vehicle that was either owned by another person or was available for his "regular use" as stated within a policy exclusion. The Court of Appeals held that, where a driver operates a vehicle that is not designated on his insurance policy with exclusivity and continuity, that vehicle may be deemed as being available for the driver's "regular use."

In this case, Peter Duato ("Duato") rented a 2019 Hyundai Elantra ("Elantra") owned by Flexdrive Services, LLC ("Flexdrive"). Duato entered into a rental agreement that would automatically renew weekly, unless Duato canceled same. Plaintiff operated the Elantra as a Lyft rideshare driver at the time of the subject accident. Plaintiff was rear-ended by Defendant Denise Mellon ("Mellon") while stopped at a traffic signal.

Defendant Indian Harbor Insurance Company ("IHIC") insured the Elantra through a policy issued to Flexdrive. Duato had his own policy with Defendant Progressive Marathon Insurance Company ("Progressive"). Duato rented the Elantra on a weekly basis for eight months until the subject accident. The Progressive policy issued to Duato provided for UIM benefits with an exclusion. This exclusion "excluded UIM benefits for 'bodily injury sustained by any person' when using 'any vehicle that is owned by or available for the regular use of you, a relative, or a related driver.'" The exclusion contained the caveat that it "did not apply to a 'covered auto[.]'"

### SECRET WARDLE NOTES

*Duato* defines what it means for a motor vehicle that is not covered under a personal policy of insurance to be available for the regular use of an otherwise insured driver. The Court of Appeals considered a driver's uninterrupted use of the non-covered vehicle, the length of time the vehicle was at a driver's disposal, as well as the purpose for the use of the vehicle. When analyzing the contractual language of a policy, the plain and ordinary meaning of each word and how it is used is given weight to its interpretation.

Duato brought suit against Mellon, IHIC, and Progressive. Duato alleged: 1) Mellon was negligent in the operation of her vehicle;<sup>1</sup> 2) IHIC failed to pay Duato personal injury protection (“PIP”) and UIM benefits; and 3) Progressive failed to pay Duato UIM benefits. Progressive sought summary disposition arguing that the Elantra was available for Duato’s regular use for ridesharing purposes. Progressive further argued that Duato continuously used the Elantra for an extended uninterrupted period. Duato’s stance was that Progressive’s UIM benefits exclusion did not define “available for the regular use.” He believed that this phrase should be defined as “a vehicle that is ready for immediate and continuous use or a vehicle that is free and able to be used continuously. . . .”

According to Duato, Flexdrive exercised “sole dominion and control over the Elantra[.]” He further asserted that because he did not use the Elantra beyond the permitted personal use limit and that he was the sole operator, that his use of the Elantra was not regular. The trial court granted Progressive’s motion, holding that Duato’s use of the Elantra was ready, immediate, and continuous. The trial court reiterated that, although the Elantra was owned by Flexdrive, the rental agreement would renew automatically, thus Flexdrive continuously provided insurance coverage per the agreement. The trial court further held that where a vehicle was in an individual’s exclusive possession and control for a period, said vehicle is “available for the regular use” of that individual.

On appeal, Duato argued that the trial court’s ruling was in error as there existed a genuine issue of material fact as to whether the Elantra was available to him for “regular use.” Duato now claimed that the phrase “available for regular use” was “defined as a vehicle ready for immediate and continuous use or a vehicle free and able to be used continuously at any particular time, but is not available for ‘regular use’ if someone other than the policy holder has sole dominion and control over it.” Duato added “that Flexdrive owned the Elantra and maintained direct influence and control over how [Duato] used it under the terms of the rental agreement.” Duato contended that because he never used the Elantra beyond the permitted personal mileage limit, he did not use the Elantra for personal reasons. Thus, the Elantra was not available to him for regular use.

The Court of Appeals affirmed the trial court’s ruling. The panel first determined “whether the insurance agreement generally provides coverage for the occurrence and, if so, whether coverage is negated by an exclusion.” *Auto-Owners Ins Co v Harrington*, 455 Mich 377 (1997). The Court of Appeals went on to add that “[t]he insured bears the burden to demonstrate coverage, while the insurer bears the burden of proving the applicability of an exclusion.” *Auto-Owners Ins Co v Seils*, 310 Mich App 132 (2015). As a general rule, “[e]xclusionary clauses in insurance policies are strictly construed in favor of the insured,” however, “clear and specific exclusions must be enforced as written.” *Auto-Owners Ins Co v Churchman*, 440 Mich 560 (1992). To determine the meaning of a contract, “[a Court] give[s] the words used in the contract their plain and ordinary meaning.” *Id.*

Here, because the parties agreed that the Elantra was not considered a “covered auto” under Progressive’s policy, the Court determined the meaning of the phrase “available for the regular use.” The Court focused on the plain meaning of “available for regular use” given that it was not defined within the policy. The phrase “regular use” is defined as “[a] use that is usual, normal, or customary, as opposed to an occasional or incidental use.” *Black’s Law Dictionary* (11th ed.).

---

<sup>1</sup> Pursuant to MCL 257.401(1), “[t]he owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law.”

Upon its analysis of the plain meaning of “for regular use,” the Court noted the following: 1) Duato continuously rented the Elantra; 2) he drove the Elantra 34,500 miles; 3) he regularly used the Elantra for rideshare; 4) he drove 30 hours per week; and 5) he did not use the Elantra for personal use beyond the allotted personal limit. The Court went on to determine that Duato was granted a non-exclusive and non-transferable revocable license to use the Elantra.

The Court concluded that there was no genuine issue of material fact that the Elantra was available for Duato’s regular use as the plain language of the exclusion stated that it applied to “any vehicle . . . owned by or available for the regular use of you.” The use of “or” in the exclusion was determined to mean that only one of the qualifying elements needed to be satisfied.

**Please click below to sign up for Secret Wardle newsletters  
pertinent to other areas of the law**

**SIGN UP**

**We welcome your questions – please contact:**

**Motor Vehicle Litigation Practice Group Chairs**

[Anthony A. Randazzo](#) | [arandazzo@secretwardle.com](mailto:arandazzo@secretwardle.com) or 248-539-2812

[Renee T. Townsend](#) | [rtownsend@secretwardle.com](mailto:rtownsend@secretwardle.com) or 248-539-2859

**For questions pertaining to this article**

[Dayne J. Rogers](#) | [drogers@secretwardle.com](mailto:drogers@secretwardle.com) or 248-539-2819



Website



LinkedIn



Twitter



YouTube



Email

S E C R E S T  
**SW**  
W A R D L E

**Troy** | 248-851-9500

**Grand Rapids** | 616-285-0143

[www.secretwardle.com](http://www.secretwardle.com)

**Contributors**

**[Motor Vehicle Litigation Practice Group](#)**

## **Chairs**

Anthony A. Randazzo

Renee T. Townsend

## **Editors**

Sandie Vertel

Sue Willcock

Brenna Scyzoryk

This newsletter is for the purpose of providing information and does not constitute legal advice and should not be construed as such. This newsletter or any portion of the newsletter is not to be distributed or copied without the express written consent of Secrest Wardle.

*Copyright © 2024 Secrest Wardle. All rights reserved.*

*8614135\_1.docx*