

2013 IL App (1st) 110830-U

No. 1-11-0830

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FIFTH DIVISION
March 29, 2013

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

INDIANA INSURANCE COMPANY,)	
an Indiana corporation,)	Appeal from the
COUGLE COMMISSION COMPANY,)	Circuit Court of
an Illinois corporation,)	Cook County.
and NICHOLAS PANGALLO,)	
)	
Plaintiffs and)	
Counterdefendants-)	
Appellees,)	
)	No. 07 CH 33966
v.)	
)	
PHILADELPHIA INDEMNITY INSURANCE CO.,)	
a Pennsylvania corporation,)	
)	Honorable
Defendant and)	Rita M. Novak,
Counterplaintiff-)	Judge Presiding.
Appellant.)	
)	

JUSTICE HOWSE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

¶ 1 *HELD:* Trial court's order granting summary judgment affirmed because the record shows defendant insurance company based its decision to deny a defense and coverage on extrinsic evidence; therefore, when the insurer denied a defense without filing a declaratory judgment action, the insurer breached its duty to defend.

¶ 2 Defendant Philadelphia Indemnity Insurance Company (Philadelphia) appeals from a circuit court order granting summary judgment in favor of plaintiffs Indiana Insurance Company, Cogle Commission Company, and Nicholas Pangallo, finding Philadelphia owed a duty to defend plaintiffs in an underlying negligence lawsuit.

¶ 3 Philadelphia argues that the trial court's grant of summary judgment is in error because: (1) the plaintiffs are exempt from coverage under the policy at issue because they did not provide Chicago Truck with a certificate of insurance, (2) the policy is excess, not a primary policy, (3) plaintiffs are not the named insureds or permissive users under the policy at issue, and (4) the accident vehicle was not listed in the policy's schedule of covered vehicles. For the reasons set forth below, we affirm the decision of the circuit court.

¶ 4 BACKGROUND

¶ 5 Plaintiff Cogle Commission Company (Cogle) is in the business of distributing meat and poultry. Co-plaintiff Indiana Insurance Company (Indiana) insured the vehicles used in Cogle's

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delivery operation under a business auto policy up to \$1 million. Indiana's policy provided coverage for scheduled autos including leased vehicles and coverage for the lessor when a lease agreement required the lessee provide direct primary insurance for the lessor. Coverage for non-scheduled leased vehicles is excess insurance under the Indiana policy.

¶ 6 Cogle entered into a truck lease agreement with Chicago Truck Leasing, Inc. (Chicago Truck), a company that is in the business of leasing commercial motor vehicles. On the schedule of leased vehicles which is a part of the lease agreement is a 1995 International truck. Indiana provided coverage on the truck and for lessor Chicago Truck as an "insured" on the Cogle policy, as required by Chicago Truck's leasing agreement.

¶ 7 Chicago Truck is insured by Philadelphia under a business auto policy and also a contingent and excess policy. Both policies require the lessor to provide Chicago Truck with primary insurance coverage.

¶ 8 The Philadelphia business auto policy insured Chicago Truck up to \$1 million and supplied coverage to anyone operating a scheduled motor vehicle with Chicago Truck's permission. The 1995 International truck was not scheduled on the Philadelphia policy.

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¶ 9 The Philadelphia contingent and excess policy insured only the named insured, Chicago Truck, up to \$1 million. The policy covered vehicles with a gross weight of over 10,000 pounds leased by Chicago Truck to a lessee under a written contract for one year or more where the lessee obtained and kept in force primary coverage for Chicago Truck and provided it with a certificate of insurance.

¶ 10 The contingent portion provided primary coverage for Chicago Truck when the lessee of a motor vehicle had no insurance coverage. However, Chicago Truck was required to exercise due diligence to confirm that the lessee had obtained insurance. Coverage was only provided when "all other valid and collectible insurance *** has been exhausted."

¶ 11 The excess portion of the policy insured Chicago Truck for excess claims over the business auto policy limits.

¶ 12 On July 28, 2004, Chicago Truck replaced the 1995 International truck with a 2005 International truck. Cogle returned the 1995 truck to Chicago Truck and received the 2005 truck in exchange. Cogle, in turn, informed Indiana to remove the 1995 International truck from its insurance policy and replace it with the 2005 International truck.

¶ 13 On July 30, 2004, an agent from Cogle contacted Chicago Truck to get an extra truck because Cogle had a heavy

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business day on July 31. Cogle and Chicago Truck entered into a one-day oral lease agreement for an extra truck. The vehicle provided by Chicago Truck was the 1995 International truck, which had been removed from the lease two days earlier and was not scheduled as a covered vehicle under any of the Indiana or Philadelphia policies.

¶ 14 On July 31, 2004, Illinois Department of Transportation employee Richard Donovan was assisting a disabled motorist on the shoulder of the Dan Ryan Expressway (Interstate 94) in Chicago when he was struck by the 1995 International truck driven by Cogle employee Nicholas Pangallo.

¶ 15 Subsequently, Richard and Celia Donovan filed a complaint for negligence against Pangallo and Cogle on August 30, 2004. In the two-count complaint, the Donovans alleged: (1) Pangallo negligently drove his vehicle at a dangerous rate of speed, (2) the vehicle contained insufficient brakes, (3) Pangallo negligently drove into a parked vehicle that was clearly visible from a safe distance, (4) Pangallo's negligence was the proximate cause of serious injuries suffered by Richard Donovan, and (5) loss of consortium.

¶ 16 Pangallo and Cogle, in turn, filed a third-party complaint against Chicago Truck, alleging it failed to inspect, maintain and repair the accident vehicle prior to leasing it to

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Cogle. The record shows that the attorney for Pangallo and Cogle argued in a letter to Philadelphia that the allegations of the Donovan complaint trigger a duty to defend.

¶ 17 Pangallo and Cogle sought a defense from the Donovan lawsuit and coverage from Philadelphia under Chicago Truck's business auto policy and contingent and excess policy. Philadelphia claims supervisor Kevin Gray drafted a letter on February 7, 2005, denying coverage to Chicago Truck.

Philadelphia denied coverage based on the requirements under both Chicago Truck policies that the lessee, Cogle, provide primary coverage. Philadelphia also denied coverage because the 1995 International truck had never been scheduled on either of Chicago Truck's policies.

¶ 18 Gray testified in a discovery deposition that his decision to deny coverage was based upon an investigation looking beyond the "four corners of the [Donovan] complaint." He used a police report to obtain the vehicle identification number (VIN) and to identify the accident vehicle as a 1995 International truck, which was not a scheduled vehicle.

¶ 19 On July 14, 2006, the Donovans filed an amended complaint adding Chicago Truck as a defendant. In count I of the amended complaint, the Donovans essentially make the same negligence claims from their original complaint, adding

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allegations that Pangallo was under the influence of drugs and operated his vehicle in violation of federal and state law.

¶ 20 In count II, the Donovans allege basically the same allegations from count I, adding that Pangallo was not qualified to drive a commercial motor vehicle. In count III, the Donovans allege that Cogle negligently hired and retained Pangallo in its employ. Count IV alleges wilful and wanton misconduct. Count V alleges loss of consortium. Count VI alleges Chicago Truck negligently failed to properly maintain the accident vehicle.

¶ 21 Pangallo's and Cogle's defense in the Donovan lawsuit was undertaken by Indiana. Cogle's policy with Indiana provides excess coverage for vehicles it does not own.

¶ 22 On November 11, 2007, Indiana, Cogle, and Pangallo filed a two-count complaint for declaratory judgment in the circuit court of Cook County against defendants Philadelphia, Chicago Truck, and the Donovans.

¶ 23 In count I of their complaint for declaratory judgment, the plaintiffs sought a declaration that Philadelphia breached a duty to defend Cogle and Pangallo in the Donovan lawsuit based on Chicago Truck's business auto policy. The plaintiffs allege the business auto policy provides "permitted user" coverage for anyone using an automobile owned by and leased by Chicago Truck. The plaintiffs also allege the "Other Insurance Conditions"

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section of the policy provides primary coverage for autos owned and leased by its insured, Chicago Truck.

¶ 24 In count II, plaintiffs sought a declaration that Philadelphia owed a duty to defend the Donovan lawsuit under Chicago Truck's contingent and excess policy.

¶ 25 The plaintiffs alleged: (1) Illinois law mandates that vehicle owners must provide primary coverage for "permitted users" of their vehicles, (2) the contingent portion of the policy provides coverage for leased automobiles for "bodily injury" caused by an accident involving a leased auto, and (3) no facts in the Donovan complaint clearly rule out any possibility of coverage.

¶ 26 Under both counts, the plaintiffs alleged: (1) Philadelphia wrongfully denied coverage to Pangallo and Cogle in violation of "the [four]-corners rule," which forbids coverage denials based on information outside the underlying complaint, (2) Philadelphia neglected its duty to provide coverage under a reservation of rights or file a complaint for declaratory judgment seeking a determination of coverage, (3) Philadelphia is estopped from asserting any coverage defenses and is liable to provide coverage and a defense to Pangallo and Cogle, and (4) Philadelphia acted vexatiously and unreasonably in delaying coverage and defense in the Donovan lawsuit, therefore, the

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plaintiffs requested the court award damages under section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2006)).

¶ 27 On May 13, 2008, Philadelphia filed a counterclaim for declaratory judgment alleging: (1) under count I that Pangallo and Cogle are not insureds under Chicago Truck's business auto or contingent and excess policies, (2) under count II that the "Expected Damages Exclusion" barred coverage for Pangallo and Cogle, (3) under count III that Pangallo and Cogle are not entitled to a defense under the excess portion of Chicago Truck's contingent and excess policy because only the named insured is covered, and (4) under count IV that Cogle and Pangallo are not entitled to a defense under the contingent liability coverage part of the contingent and excess policy covering leased vehicles because the truck was not a "leased vehicle" as defined by the policy.

¶ 28 Indiana filed a motion for summary judgment on both counts of its declaratory complaint, arguing that it was entitled to summary judgment because Philadelphia denied coverage based on: (1) matters outside the complaint, and (2) an incorrect assumption that the truck involved in the accident was subject to a written lease and covered under a policy issued by Indiana.

¶ 29 Philadelphia filed a response to Indiana's motion combined with its own motion for summary judgment on counts I,

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III, and IV of its counterclaim. Philadelphia claimed that the Donovan complaint did not trigger a duty to defend under the business auto policy because it alleged no facts creating a potential for coverage or facts suggesting Pangallo and Cogle were permissive users of a covered auto. Philadelphia further argued that it owed no duty to defend Cogle and Pangallo because neither was an insured under the terms of the contingent and excess policy with Chicago Truck.

¶ 30 Philadelphia argued that if it were allowed to consider facts outside the complaint to determine whether there was any potential for coverage, the extrinsic evidence would confirm the business auto policy did not apply.

¶ 31 Philadelphia also argued that it was not estopped from asserting its coverage defenses because the Donovan complaint raised no potential for coverage. As to the Donovan amended complaint, Philadelphia argued that estoppel should not apply because a declaratory action was already pending by the time Philadelphia learned of the amended complaint.

¶ 32 On September 29, 2010, the trial court granted summary judgment in favor of Indiana as to count I of its complaint for declaratory judgment. The trial court found that nothing in the Donovan complaint clearly excluded the possibility that Cogle and Pangallo were insureds entitled to coverage under Chicago

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Truck's business auto policy. Based on *Uhlich Children's Advantage Network v. National Union Fire Co.*, 398 Ill. App. 3d 710 (2010), the trial court found that Philadelphia's counterclaim for declaratory judgment and its motion for summary judgment did not excuse its duty to defend under the business auto policy.

¶ 33 The trial court then granted summary judgment in favor of Philadelphia in respect to Indiana's claim for section 155 penalties, finding a *bona fide* coverage dispute existed, thus, penalties were not warranted.

¶ 34 On March 9, 2011, the trial court granted summary judgment in favor of Indiana on count II of its complaint for declaratory judgment. Relying on section 7-317(b)(2) of the Illinois Vehicle Code (625 ILCS 5/7-317(b)(2) (West 2010)) and *State Farm Mutual Auto Insurance Co. v. Universal Underwriters Group*, 182 Ill. 2d 240 (1998), the court held that an omnibus permissive user clause would be read into the contingent portion of Chicago Truck's contingent and excess policy with Philadelphia to extend coverage to Cogle and Pangallo. In reaching this conclusion, the trial court held that the contingent portion of the contingent and excess policy is a primary, rather than excess coverage.

¶ 35 The court granted summary judgment in favor of

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Philadelphia on count IV of its counterclaim, finding Cogle and Pangallo were not omnibus insureds under the excess portion of the contingent and excess policy.

¶ 36 Philadelphia filed a timely appeal of the trial court's orders granting summary judgment for Indiana.

¶ 37 ANALYSIS

¶ 38 We review a trial court's grant of summary judgment under the *de novo* standard. *Chandler v. Doherty*, 299 Ill. App. 3d 797, 801 (1998). Summary judgment is proper when the pleadings, affidavits, and depositions on file reveal no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Lorenzo v. Capitol Indemnity Corp.*, 401 Ill. App. 3d 616, 619 (2010). The construction of an insurance policy is a question of law and is also reviewed *de novo*. *United Services Automobile Association v. Dare*, 357 Ill. App. 3d 955, 963 (2005).

¶ 39 Under Illinois law, an insured contracts for and has a right to expect two separate and distinct duties from an insurer: (1) the duty to defend him if a claim is made against him; and (2) the duty to indemnify him if he is found legally liable for the occurrence of a covered risk. *Doherty*, 299 Ill. App. 3d at 801. The duty to defend an insured is much broader than the duty to indemnify. *Id.* In Illinois, an insurer may be required to

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defend its insured even when there will ultimately be no obligation to indemnify. *Id.*

¶ 40 Our preliminary inquiry is: (1) whether the insurer had a duty to defend, and (2) whether the insurer breached that duty. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 151 (1999). Illinois law requires an omnibus permissive users clause in Philadelphia's business auto policy. *State Farm Mutual Automobile Insurance Co. v. Universal Underwriters Group*, 182 Ill. 2d 240, 244 (1998) ("[A] liability insurance policy issued to the owner of a vehicle must cover the named insured and any other person using the vehicle with the named insured's permission").

¶ 41 Two conditions must be met before an insurer's duty to defend arises: (1) the action must be brought against an insured, and (2) the allegations of the complaint must disclose potential coverage under the policy. *Employers Mutual Companies/Illinois Emcasco Insurance Co. v. Country Companies*, 211 Ill. App. 3d 586, 591 (1991). If the allegations of the complaint reveal that the action was not brought against an insured or that there was no potential for coverage under the policy, there is no duty to defend the underlying action, and the insurer can justifiably refuse to defend. *Id.*

¶ 42 To determine whether the underlying suit alleges a

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situation potentially within the insurance coverage, the court compares the bare allegations of the complaint to the relevant provisions of the insurance policy. *Lorenzo v. Capitol Indemnity Corp.*, 401 Ill. App. 3d 616, 619 (2010). If any theory of recovery in the underlying complaint falls within the insurance coverage, the insurer will have a duty to defend. *Id.* Any doubts about potential coverage and the duty to defend are to be resolved in favor of the insured. *Id.*

¶ 43 The duty to defend is not annulled by the knowledge on the part of the insurer the allegations are untrue or incorrect or the true facts will ultimately exclude coverage. *Id.* A court will look to the four corners of the complaint brought against the insured to determine if there is a potential for coverage. *Illinois National Insurance Co. v. Universal Underwriters Insurance Co.*, 261 Ill. App. 3d 84, 88 (1994).

¶ 44 When the insurer has a duty to defend, it may not simply refuse to defend, rather, the insured must: (1) defend the suit under a reservation of rights, or (2) seek a declaratory judgment that there is no coverage. *Id.* Extrinsic evidence is allowed in a declaratory action initiated by the insurer. *American Economy Insurance Co. v. Holabird and Root*, 382 Ill. App. 3d 1017, 1028 (2008).

¶ 45 If the insurer fails to defend the suit under a

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reservation of rights or seek a declaratory judgment that there is no coverage, the insurer is estopped from raising policy defenses to coverage. *Employers Insurance of Wausau*, 186 Ill. 2d at 150-51. Application of the estoppel doctrine is not appropriate if the insurer had no duty to defend, or if the insurer's duty to defend was not properly triggered. *Id.* at 151. These circumstances include where the insurer was given no opportunity to defend; where there was no insurance policy in existence; and when the policy and the complaint are compared, there clearly was no coverage or potential for coverage. *Id.*

¶ 46 The court must resolve all doubts concerning the scope of coverage in favor of the insured. *Illinois Emcasco Insurance Co. v. Northwestern National Casualty Co.*, 337 Ill. App. 3d 356, 359 (2003). Insurance policies are to be liberally construed in favor of coverage, and where an ambiguity exists in the insurance contract, it will be resolved in favor of the insured and against the insurer. *United Services Automobile*, 357 Ill. App. 3d at 963. Provisions in an insurance policy that limit or exclude coverage are also construed liberally in favor of the insured and against the insurer. *Id.* at 964.

¶ 47 Philadelphia argues that since Pangallo and Cogle are not parties to the insurance contract with Chicago Truck, they do not have standing to seek enforcement of the Chicago Truck

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policy. Philadelphia suggests that case law holding that a duty to defend is owed to a "potential insured" is "contrary to long-established contract law and should not be followed."

¶ 48 Philadelphia's claims are not persuasive because under long-established rules of contract law, whether someone is a third-party beneficiary depends upon the intent of the contracting parties, as evidenced by the contract language. *Martis v. Grinnell Mutual Reinsurance Co.*, 388 Ill. App. 3d 1017, 1020 (2009); *Cherry v. Aetna Casualty & Surety Co.*, 372 Ill. 534, 542 (1939).

¶ 49 Evidence that the contracting parties here intended coverage for permissive users of Chicago Truck's vehicles is the inclusion of a "permitted users" clause in the business policy. In addition, both the business auto policy and the contingent and excess policy provide coverage for "leased vehicles." The record shows that Cogle and Chicago Truck entered into a long-term lease for a truck. With the inclusion of the permitted users clause along with coverage for leased vehicles, we cannot say there is no potential for coverage here. See *Illinois Emcasco Insurance Co. v. Northwestern National Casualty Co.*, 337 Ill. App. 3d 356, 359-60 (2003) (An insurer must defend if the insurance contract might possibly cover the alleged source of liability).

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¶ 50 Philadelphia maintains there was no potential for coverage for Pangallo and Cogle because the underlying Donovan complaint was not brought against its insured, Chicago Truck.

¶ 51 In support of this claim, Philadelphia cites *Federal Insurance Co. v. Economy Fire & Casualty Co.*, 189 Ill. App. 3d 732 (1989). In that case, Jay Michael was involved in an accident while driving an automobile owned by his employer Michel Masonry Company. *Federal Insurance Co.*, 189 Ill. App. 3d at 734. A passenger in Jay's vehicle, Marirose Johnson, filed a personal injury lawsuit against Jay, Michel Masonry, and the drivers of two other vehicles involved in the accident. Jay sought and was denied coverage under his father Elwood Michel's umbrella policy with Economy Fire and Casualty Company. *Id.* Jay was ultimately defended by Federal Insurance Company. Federal and Johnson brought a declaratory judgment action contending that Economy breached its duty to defend. In a motion for summary judgment, Economy argued it had no duty to defend Jay because he was not a named insured under his father's policy. *Id.* The trial court agreed.

¶ 52 On appeal, the plaintiffs argued: (1) that Economy should be estopped from denying coverage since it failed to defend under a reservation of rights or file a declaratory action as to coverage, (2) Jay was potentially insured pursuant to a

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clause in Elwood's policy providing coverage to any person using an automobile owned by, loaned to or hired for use in behalf of the named insured, and (3) Economy owed a duty to defend Jay pursuant to a clause in Elwood's policy providing coverage to any relative with permission to use the insured's automobile. *Id.* at 735-36.

¶ 53 The appellate court found that Economy had no duty to defend Jay because Elwood, the named insured, was not identified or named in any manner in the plaintiffs' complaint. *Id.* at 736. The court stated that "the potential for 'coverage cannot be inferred merely because the son of the insured is named in a lawsuit.'" *Id.* (quoting *Murphy v. Peterson*, 128 Ill. App. 3d 952, 958 (1984)).

¶ 54 *Federal Insurance Co.* can be distinguished. First, in making its finding, the appellate court in *Federal Insurance Co.* noted that in addition to not being named in the underlying action, no third party-action was ever filed against Elwood. Here, unlike *Federal Insurance Co.*, Pangallo and Cogle filed a third-party complaint against Chicago Truck. The record shows that the third-party complaint was tendered to Philadelphia. Chicago Truck even sought coverage from the third-party complaint, which Philadelphia denied.

¶ 55 *Federal Insurance Co.* is also distinguishable from the

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instant case based on the type of insurance at issue. The policy in dispute in *Federal Insurance Co.* was a "personal estate protector umbrella policy" issued to an individual whose son was seeking coverage. Here, unlike *Federal Insurance Co.*, the policy in dispute is a commercial auto insurance policy issued to a truck leasing company for the purpose of protecting it from liability incurred by its lessees. In keeping with the underlying purpose of Chicago Truck's policy, the entity seeking coverage here is a lessee of the named insured truck leasing company, someone the parties contemplated in contracting the policy - not "merely" the son of the individual insured, as in *Federal Insurance Co.*

¶ 56 As stated in *Illinois Emcasco*:

"The insurer's duty to defend does not depend upon a sufficient suggestion of liability raised in the complaint; instead, the insurer has the duty to defend unless the allegations of the underlying complaint demonstrate that the plaintiff in the underlying suit will not be able to prove the insured liable, under any theory supported by the complaint, without also proving facts that show the loss falls outside the coverage

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of the insurance policy." *Id.*

¶ 57 Nevertheless, Philadelphia claims there is nothing in the Donovan complaint to suggest coverage. In response, Indiana argues there is nothing in the complaint to suggest the accident vehicle was not covered. Indiana contends that Philadelphia looked outside the "four corners of the complaint" to deny coverage, a violation of a rule espoused by our supreme court in *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 153 (1999); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992); and *Valley Forge Insurance Co. v. Swiderski Electronics Inc.*, 223 Ill. 2d 352, 363 (2006).

¶ 58 We reiterate that in determining whether there is a duty to defend, an insurer is limited to comparing the pleadings, including the underlying complaint, with the face of the insurance policy. *Lorenzo*, 401 Ill. App. 3d at 621; *American Economy Insurance Co. v. Holabird and Root*, 382 Ill. App. 3d 1017, 1024 (2008) ("The trial court should be able to consider all the relevant facts contained in the pleadings, including a third-party complaint, to determine whether there is a duty to defend. After all the trial court 'need not wear judicial blinders' and may look beyond the complaint at other evidence appropriate to a motion for summary judgment").

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¶ 59 In Philadelphia's denial letter, claims supervisor Kevin Gray stated that defense and coverage was denied because the 1995 International Truck was not scheduled in the policy and Chicago Truck did not comply with the terms of the lease agreement requiring the lessee to provide a certificate of insurance showing prior to rental that Cogle named Chicago Truck in its own primary insurance policy. In addition, in Gray's deposition, he admitted that he viewed a police report to learn the VIN and the exact make and model of the truck driven by Pangallo in the accident.

¶ 60 The insurer may consider the content of the underlying pleadings in making its determination on whether it has a duty to defend. The VIN was not contained in the pleadings. The Donovan complaint merely alleges that Cogle, through its agent Pangallo, negligently operated "a certain motor vehicle" striking and severely injuring Richard Donovan. Thus, it was not clear from the pleadings that there was no duty to defend.

¶ 61 An insured contracts for and has a right to expect an insurer has a duty to defend him if a claim is made against him. *Doherty*, 299 Ill. App. 3d at 801. Under Illinois law, Philadelphia may not deny coverage based on extrinsic evidence. Instead, Philadelphia is required to either defend the suit under a reservation of rights, or (2) seek a declaratory judgment that

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there is no coverage. *Illinois National Insurance Co.*, 261 Ill. App. 3d at 88. At the declaratory judgment stage, Philadelphia may present extrinsic evidence to argue no coverage. *American Economy Insurance Co.*, 382 Ill. App. 3d at 1028.

¶ 62 The record shows that Philadelphia neither defended under a reservation of rights nor sought a declaratory judgment as to its rights and responsibilities. Therefore, Philadelphia is estopped from presenting any coverage defenses such as the one they present here that the vehicle is not scheduled on the policy. *Employers Insurance of Wausau*, 186 Ill. 2d at 150-51.

¶ 63 Philadelphia claims that Illinois law allows for extrinsic evidence showing it owed no duty to defend Pangallo and Cogle, whether or not it filed a declaratory action. In support of this claim, Philadelphia cites *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446 (2010). In *Pekin*, Terry Johnson filed a complaint against Jack Wilson for assault, battery and intentional infliction of emotional distress, resulting from an incident where Wilson attacked and injured Johnson while he was in a warehouse owned and operated by Wilson. *Pekin*, 237 Ill. 2d at 449. Wilson sought coverage from Pekin in Johnson's assault lawsuit through a commercial general liability policy where he was the named insured. *Id.*

¶ 64 Pekin's policy excluded intentional bodily injury. *Id.*

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at 451. An endorsement limited coverage for bodily injury to occurrences "arising out of *** [t]he ownership, maintenance[,] or use of the premises." *Id.* at 451.

¶ 65 Pekin filed a declaratory action claiming it did not owe Wilson a duty to defend. *Id.* Wilson filed a counterclaim to Johnson's underlying complaint, alleging that Johnson was the aggressor during the incident at the warehouse while he was merely defending himself. *Id.* Pekin then filed a motion for judgment on the pleadings. *Id.* at 452.

¶ 66 The trial court found Pekin did not have a duty to defend Wilson because the claims in the underlying lawsuit were not covered in its policy. *Id.* at 453. The appellate court reversed, finding the trial court could consider Wilson's counterclaim in the underlying lawsuit in ruling on Pekin's duty to defend.

¶ 67 Our supreme court agreed, finding that the only way to determine the judgment on the pleadings in *Pekin* was to review all the pleadings in the underlying action, including Wilson's counterclaim where he alleges he was acting in self-defense. *Id.* at 462-63. In finding that Pekin owed Wilson a duty to defend, the court found that a genuine issue of material fact existed concerning whether the intentional bodily injury exception to the policy applies. *Id.* at 463. Accordingly, the supreme court

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ruled that a circuit court may, under certain circumstances, look beyond the underlying complaint to the other pleadings to determine an insurer's duty to defend. *Id.* at 459.

¶ 68 *Pekin* is distinguishable from the instant case because our supreme court found that the trial court may look to other court pleadings to determine whether *Pekin* owed Wilson a duty to defend. *Id.* Here, unlike *Pekin*, Philadelphia looked to the police report from the accident in the underlying complaint, not a pleading. We cannot say *Pekin* authorizes the court to consider a police report in determining a duty to defend.

¶ 69 Therefore, because Philadelphia did not file a declaratory judgment to show the 1995 International truck was not a scheduled vehicle, Philadelphia owed Cogle and Pangallo a duty to defend under Illinois law.

¶ 70 Contingent and Excess Policy

¶ 71 Noting that neither Cogle or Pangallo are potential insureds under the express terms of the contingent and excess policy, the trial court found an omnibus clause is required to be inserted into the contingent policy under section 7-317(b)(2) of the Illinois Vehicle Code (625 ILCS 5/7-317(b)(2) (West 2006)) and *State Farm Mutual Insurance Co. v. Universal Underwriters Group*, 182 Ill. 2d 240 (1998).

¶ 72 Illinois law requires an omnibus permissive users

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clause in Philadelphia's business auto policy and in its contingent and excess policy.

¶ 73 Section 7-317(b)(2) of the Code provides:

"Such owner's policy of liability insurance:

2. Shall insure the person named therein and any other person using or responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured." 625 ILCS 5/7-317(b)(2) (West 2006).

¶ 74 In *State Farm Mutual*, a customer of an automobile dealership was involved in an accident while test-driving one of the dealer's vehicles. *Id.* at 241. The dealer's insurer denied coverage for the test-driver. *Id.* at 242.

¶ 75 Our supreme court found that under section 7-317(b)(2) of the Vehicle Code, a car dealer's liability policy must provide coverage for test-drivers. *Id.* at 243. This type of insurance is called an "omnibus clause" and it requires coverage for permissive users. *Id.*

¶ 76 The court found that section 7-317 requires the insertion of an omnibus clause into a vehicle owner's insurance policy - regardless of whether an exemption listed in the policy applies. *Id.* at 244-46.

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¶ 77 Based on section 7-317(b)(2), the trial court here found that Pangallo and Cogle were permissive users of the Chicago Truck vehicle, thereby, automatically becoming additional insureds under the contingent portion of Chicago Truck's contingent and excess policy, regardless of any exemptions in the policy.

¶ 78 Philadelphia claims Pangallo and Cogle were not permissive users because the accident vehicle was not a "leased auto" as defined in the policy.

¶ 79 However, under section 7-317(b)(2), an insurer is required to insure the named insured "and any other person using or responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured." *State Farm*, at 244 (quoting 625 ILCS 5/7-317(b)(2) (West 1996)).

¶ 80 Our supreme court in *State Farm* interpreted section 7-317(b)(2) as meaning that a vehicle owner's insurance policy must contain an omnibus clause regardless of whether an exemption applies. *Id.* at 244-46.

¶ 81 Here, the record shows that Cogle and Chicago Truck engaged in an oral lease. Thus, Pangallo, as Cogle's agent, had implied permission to use the Chicago Truck vehicle as contemplated by section 7-317(b)(2) and our supreme court in *State Farm*. In resolving issues concerning section 7-317(b)(2),

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we look to the definition of "permitted user" in the statute, not to the policy. *Id.* Under the statute, Philadelphia must provide a defense for Pangallo and Cogle. *Id.*

¶ 82 Philadelphia, however, claims that section 7-317(b) and *State Farm* only require omnibus coverage to a permissive driver under a primary policy, not an excess policy.

Philadelphia argues that Indiana's policy for Cogle is primary while the Chicago Truck coverage is excess, therefore, Indiana, not Philadelphia owed Pangallo and Cogle a duty to defend the Donovan lawsuit.

¶ 83 Philadelphia's claims are not persuasive because our supreme court in *State Farm* instructs that it is the public policy of this state to read an omnibus clause into a vehicle owner's policy, not the vehicle driver's policy, and construe it as primary coverage. *Id.* at 246. Here, Philadelphia insured the vehicle owner.

¶ 84 In addition, *State Farm* instructs that an omnibus clause is required regardless of policy exclusions, exceptions and conditions precedent. *Id.* Therefore, we find the trial court did not err in finding that an omnibus permissive user clause is required in the contingent portion of Philadelphia's contingent and excess coverage policy issued to Chicago Truck, as owner of the accident vehicle. Accordingly, Philadelphia was required to

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provide a defense to Pangallo and Cogle in the Donovan lawsuit.

¶ 85 Based on the foregoing, we cannot say the trial court erred in finding Philadelphia owes Pangallo and Cogle a duty to defend the underlying Donovan lawsuit. Philadelphia is estopped from asserting any coverage defenses. *West American Insurance Co.*, 334 Ill. App. 3d at 86.

Lastly, Indiana claims in its appellate brief that the trial court erred in denying its request for attorneys fees under section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2006) and under Supreme Court Rule 137 (Ill. S.Ct. R. 137 (eff.Feb. 1, 1994)). However, we do not have jurisdiction to address these claims because Indiana did not file a cross appeal. Ill. S.Ct. R. 303(b) (eff. June 4, 2008).

¶ 86 CONCLUSION

¶ 87 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 88 Affirmed.