2013 IL App (1st) 122532-U

FIRST DIVISION
June 28, 2013

No. 1-12-2532

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GENERAL CASUALTY COMPANY OF WISCONSIN, INCORPORATED, a Wisconsin corporation, Plaintiff-Appellee, v. PHILADELPHIA INDEMNITY INSURANCE COMPANY, an Illinois corporation, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County No. 10 CH 39919 Honorable Kathleen Pantle, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justice Cunningham and Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** The insured's targeted tender of its defense to one of its insurers did not prevail over the "other insurance" clause in the insurer's policy because the insurer provided only excess insurance. In addition, the insurer did not waive any claim for reimbursement by its conduct. Finally, the insurer is entitled to reimbursement for its payment of postjudgment interest. The judgment of the trial court is affirmed.

¶ 2 Plaintiff, General Casualty Company of Wisconsin (General Casualty), filed a declaratory judgment action against defendant, Philadelphia Indemnity Insurance Company (Philadelphia Indemnity), seeking reimbursement for damages that General Casualty paid on behalf of their mutual

insured, Carmichael Leasing Company (Carmichael). The parties filed cross-motions for summary judgment, and the trial court granted summary judgment in favor of plaintiff and against defendant. On appeal, defendant contends the trial court erred in finding that: (i) General Casualty provided excess coverage to Carmichael; (ii) Carmichael's selective or "targeted" tender of its defense to General Casualty (to the exclusion of Philadelphia Indemnity) did not foreclose General Casualty's subsequent claim for reimbursement from Philadelphia Indemnity; and (iii) General Casualty did not waive its argument that its policy was excess. In the alternative, defendant further contends that the trial court erroneously found that Philadelphia Indemnity is responsible for the postjudgment interest that accrued on the damages award in the underlying litigation. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. The Insurance Policies

¶ 5 This case arose when General Casualty filed a complaint for declaratory judgment against Philadelphia Indemnity seeking reimbursement for the damages General Casualty paid following a judgment awarded against their mutual insured party, Carmichael. Carmichael leased various commercial trucks to Open Kitchens, Incorporated (Open Kitchens). General Casualty issued a $1 million commercial automobile liability policy to Open Kitchens. Philadelphia Indemnity issued a $1 million commercial automobile liability policy to Carmichael.

¶ 6 Both policies contained identical "Other Insurance" clauses, providing in part as follows:

> "For any covered 'auto' you own, this Coverage Form provides primary insurance. For any covered 'auto' you don't own, the insurance provided by this Coverage Form is excess over any

other collectible insurance ***."

Both policies also contained identical supplementary payments provisions, providing in relevant part that, in addition to the policy limit, the insurer would pay "[a]ll interest on the full amount of any judgment that accrues after entry of the judgment in any 'suit' against the 'insured' we defend ***."

¶ 7 The General Casualty policy also contained an endorsement providing that vehicles that Open Kitchens leased from Carmichael (and "designated or described in the Schedule") would be considered to be a "covered" auto that Open Kitchens owned. In addition, General Casualty's policy in favor of Open Kitchens included Carmichael as an additional insured.

¶ 8 B. The Underlying Litigation

¶ 9 On August 11, 2003, Emma Taylor, as administrator for the Estate of Willie Taylor, filed a survival and wrongful death complaint against Carmichael. The complaint alleged that while Willie Taylor (the decedent) was performing his duties as a loader at Open Kitchens, he was struck and fatally injured by a truck that was owned by Carmichael and operated by an unknown employee of Carmichael. On December 4, 2004, Carmichael tendered its defense to General Casualty and indicated in its tender that it elected to trigger General Casualty's coverage "to the exclusion of any other applicable policies that may provide liability coverage." General Casualty accepted the tender without a reservation of rights, and reimbursed Philadelphia Indemnity for its prior defense costs. On April 18, 2007, General Casualty wrote to Carmichael advising Carmichael that the underlying plaintiff's demand exceeded the $1 million liability limit under the General Casualty policy. General Casualty then observed that, since Carmichael potentially faced excess exposure, Carmichael "may wish to" notify its insurance carrier that the trial was scheduled to begin that day.

¶ 10 The wrongful death lawsuit proceeded to trial, and the jury's verdict awarded the underlying plaintiff $1.5 million. Carmichael appealed. On November 20, 2009, while Carmichael's appeal was pending, this court issued its decision in *River Village I, LLC v. Central Insurance Cos.*, 396 Ill. App. 3d 480 (2009), *appeal denied*, 236 Ill. 2d 545 (2010) (Table). On December 7, 2009, this court rejected Carmichael's appeal and affirmed the jury's award. *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437 (2009). On March 24, 2010, the supreme court denied Carmichael's petition for leave to appeal. *U.S. Bank v. Lindsey*, 236 Ill. 2d 546 (2010) (Table). On April 28, 2010, the supreme court issued its mandate.

¶ 11 At the conclusion of the direct appeal of the wrongful death lawsuit, the amount due totaled $1,906,487.13, consisting of the original $1.5 million jury award and $406,487.13 in postjudgment interest. On April 1, 2010, General Casualty wrote to Philadelphia Indemnity suggesting that General Casualty would pay $1 million (its policy limit) and Philadelphia Indemnity would pay the remaining amount. Philadelphia Indemnity, however, paid $500,000, and General Casualty paid the remaining $1,406,487.13 of the jury award. On April 28, 2010, the same day that the supreme court issued the mandate of its denial of Carmichael's petition for leave to appeal in the underlying litigation, General Casualty notified Philadelphia Indemnity that, due to the then-recent decision in *River Village*, General Casualty was reserving its right to seek reimbursement from Philadelphia Indemnity and that if General Casualty prevailed "in the declaratory action," it would also seek postjudgment interest.

¶ 12 C. The Declaratory Judgment Proceedings

¶ 13 On September 15, 2010, General Casualty filed the underlying complaint for declaratory judgment. In its complaint, General Casualty asked the trial court to find, *inter alia*, that (i) General Casualty's coverage of Carmichael in the underlying litigation was excess and Philadelphia Indemnity's coverage was primary; (ii) General Casualty was entitled to reimbursement from Philadelphia Indemnity in the amount of $906,487.13; and (iii) that General Casualty was entitled to prejudgment interest from the date General Casualty made the payment to the date of judgment.

¶ 14 In August 2011, the parties filed cross-motions for summary judgment. Philadelphia Indemnity's motion contended that General Casualty waived its argument that its coverage was excess only, and in the alternative, that General Casualty was not entitled to reimbursement for postjudgment interest. Philadelphia Indemnity, however, did not argue in its motion that the truck that killed Taylor was an "owned vehicle" under the General Casualty policy. General Casualty contended in its motion that this court's decision in *River Village* (*i.e.*, that a targeted tender could not be used to overcome an "Other Insurance" provision, rendering that policy excess) was decided after General Casualty accepted Carmichael's targeted tender, and therefore waiver was inapplicable. General Casualty further argued that, since Philadelphia Indemnity's insurance was primary and General Casualty's was excess, General Casualty was entitled to reimbursement for postjudgment interest. On May 1, 2012, following argument, the trial court granted General Casualty's motion for summary judgment and denied Philadelphia Indemnity's summary judgment motion.

¶ 15 This timely appeal follows.

¶ 16 II. ANALYSIS

¶ 17 Philadelphia Indemnity contends that the trial court erred in granting summary judgment in favor of General Casualty. Specifically, Philadelphia Indemnity argues that, contrary to the trial court's findings, General Casualty provided primary, not excess coverage, and Carmichael's targeted tender exclusively to General Casualty foreclosed General Casualty's ability to seek reimbursement from Philadelphia Indemnity. Philadelphia Indemnity further argues that General Casualty waived any claim that it provided only excess coverage. Finally, Philadelphia Indemnity argues in the alternative that it is not responsible for the postjudgment interest on the underlying litigation damages award. We will address each argument in turn.

¶ 18 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). Although summary judgment can aid in the expeditious disposition of a lawsuit, it remains a drastic measure and should be allowed only " 'when the right of the moving party is clear and free from doubt.' " *Dardeen v. Kuehling*, 213 Ill. 2d 329, 335 (2004) (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)). Where, as here, cross-motions for summary judgment are filed in an insurance coverage case, the parties acknowledge that no material questions of fact exist and only the issue of law regarding the construction of an insurance policy is present. *American Family Mutual Insurance Co. v. Fisher Development, Inc.*, 391 Ill. App. 3d 521, 525 (2009). In addition, the construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law. *Konami (America), Inc. v. Hartford Insurance Co. of Illinois*, 326 Ill. App. 3d 874, 877 (2002). We

review *de novo* both questions of law and a trial court's entry of summary judgment. *Phoenix Insurance Co. v. Rosen*, 242 Ill. 2d 48, 54 (2011) (questions of law); *Virginia Surety Co. v. Northern Insurance Company of New York*, 224 Ill. 2d 550, 556 (2007) (entry of summary judgment).

¶ 19 A. Whether General Casualty provided excess coverage to Carmichael

¶ 20 Philadelphia Indemnity first contends that the trial court erred in finding that General Casualty provided excess coverage to Carmichael. Philadelphia Indemnity's contention rests on two points. First, Philadelphia Indemnity argues that the plain language of the additional insured endorsement in the General Casualty policy in favor of Open Kitchens, "transformed" the trucks that Open Kitchens leased from Carmichael into trucks that Open Kitchens owned. Philadelphia Indemnity then points to the "Other Insurance" provision in the General Casualty policy that provided primary insurance for "any covered 'auto' [Open Kitchens] own[s]," and concludes that General Casualty therefore is a primary, not excess, insurer. This contention is without merit.

¶ 21 At the outset, we note that Philadelphia Indemnity never raised this argument before the trial court. In its motion for summary judgment, Philadelphia Indemnity only contended that General Casualty waived its argument that its coverage was excess only, and in the alternative, that General Casualty was not entitled to reimbursement for postjudgment interest. Philadelphia Indemnity never argued that the truck that killed Taylor was an "owned vehicle" under the General Casualty policy. Since this argument was never presented to the trial court, it is forfeited. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 63 (citing *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996) ("It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal."); *Staes & Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 36).

¶ 22 Our holding is further supported by *Daniels v. Anderson*, 162 Ill. 2d 47 (1994). In *Daniels*, the plaintiff sued various defendants for, *inter alia*, the specific performance of a real estate sales contract. *Id.* at 51. Following a bench trial, the trial court entered judgment in favor of the plaintiff, and the appellate court affirmed. *Id.* On further appeal to the supreme court, the defendant presented a theory of equitable conversion, which he had raised for the first time before the appellate court. *Id.* at 57-58. In reaching its conclusion, the supreme court initially observed that the defendant never asserted the theory of equitable conversion "in any pleading, memorandum, argument, or post-trial motion in the trial court." *Id.* at 58. The defendant claimed that, while "he may not have used the label 'equitable conversion,' his presentation in the trial court encompassed the doctrine," namely, that the parties addressed exhaustively the issue of when he received notice of the plaintiff's right of first refusal. *Id.* The supreme court, however, rejected this argument, noting that equitable conversion concerned when the defendant owned the parcel at issue, not when he received notice. *Id.* at 58-59. The supreme court further agreed with the appellate court's reasoning that, were it to allow the defendant to change his defense theory on review, it would "not only weaken the adversarial process and our system of appellate jurisdiction, but may also prejudice [the plaintiff]. *Id.* at 59. The court explained that, had the defendant raised the equitable conversion doctrine in the trial court, the plaintiff "may have responded specifically to this theory with evidence and argument," and the trial court also "may have ruled on the equitable conversion theory, making findings concerning [the defendant's] knowledge of [the plaintiff's] interest." *Id.* The supreme court thus agreed with the appellate court that the claim was forfeited. *Id.* at 59.

¶ 23 Here, Philadelphia Indemnity's summary judgment motion only claimed that General

Casualty forfeited claims of excess coverage and that General Casualty was solely responsible for postjudgment interest. Similar to the *Daniels* defendant, Philadelphia Indemnity never claimed that the truck that killed Taylor qualified under General Casualty's policy as a vehicle "owned" by Open Kitchens. Philadelphia Indemnity seeks to avoid forfeiture by claiming that its argument that General Casualty provided primary coverage encompassed this claim. We disagree. As General Casualty notes in its response, any vehicle that Open Kitchens leased from Carmichael had to be listed on the schedule to the additional insured endorsement. General Casualty counters that, had Philadelphia Indemnity claimed before the trial court that the vehicle that killed Taylor was an vehicle "owned" by Open Kitchens, General Casualty would have presented evidence that the vehicle at issue was not on the attached schedule, and thus not an owned vehicle. In addition, had this issue been presented to the trial court, it would have had the opportunity to make additional findings. Therefore, following *Daniels*, we find Philadelphia Indemnity has forfeited this claim.

¶ 24 Nonetheless, Philadelphia Indemnity claims in reply that this is a purely legal issue, and General Casualty's acceptance of the targeted tender was an implicit concession that the vehicle was on the schedule because, under General Casualty's policy, Carmichael was entitled to "either primary coverage or no coverage at all." We reject this argument. Philadelphia Indemnity's contention before the trial court did not turn on the factual issue of whether the vehicle that killed Taylor was on the attached schedule. It turned on whether General Casualty's acceptance of the targeted tender and subsequent defense of Carmichael without a reservation of rights operated as a waiver of any claim that its policy provided excess coverage. Since the "ownership" of the vehicle that killed Taylor was never before the trial court, General Casualty reasonably did not include any evidence

regarding whether the vehicle was listed on the corresponding schedule. Such information would have been superfluous to the resolution of Philadelphia Indemnity's motion. For that reason, it is improper for Philadelphia Indemnity to raise this issue here for the first time.

¶ 25 Finally, the plain language of General Casualty's policy provides that coverage is primary for vehicles that Open Kitchens "own[s]" and excess for other vehicles. Therefore, the coverage is not all or nothing (or, in Philadelphia Indemnity's terms, primary or nothing); it is primary, *excess*, or nothing. The General Casualty policy classifies leased vehicles that are listed on an attached schedule as an "owned" vehicle (and thus provides primary coverage). Again, however, there is no evidence in this record that the vehicle that struck and killed Taylor was listed on the schedule, and Philadelphia Indemnity made no such argument before the trial court. Philadelphia Indemnity's first claim of error is therefore meritless.

¶ 26 B. Whether General Casualty could seek reimbursement

¶ 27 Philadelphia Indemnity next contends that the trial court erroneously found that Carmichael's targeted tender of its defense to General Casualty to the exclusion of all other insurers, including Philadelphia Indemnity, left the door open for General Casualty's reimbursement claims. Specifically, Philadelphia Indemnity argues that, under the holding in *John Burns Construction Co. v. Indiana Insurance Co.*, 189 Ill. 2d 570 (2000), Carmichael's targeted tender to General Casualty rendered General Casualty's "other insurance" clause "completely inoperative and irrelevant." Philadelphia Indemnity further asserts that the trial court erroneously relied upon this court's holding in *River Village I, LLC v. Central Insurance Cos.*, 396 Ill. App. 3d 480 (2009), *appeal denied*, 236 Ill. 2d 545 (2010) (Table), for multiple reasons. First, Philadelphia Indemnity claims that the *River*

Village holding was inapplicable in this case because General Casualty's "other insurance" clause did not transform its policy into an excess coverage policy. Philadelphia Indemnity also argues that *River Village* could not and did not change the holding in *Burns Construction*. Finally, Philadelphia Indemnity asserts that *River Village* misconstrued the supreme court's holding in *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102 (2007). Resolving this issue necessitates a brief review of *Burns Construction*, *Kajima*, and *River Village*.

¶ 28 The *River Village* court recently described the targeted tender doctrine as follows:

> "The targeted tender doctrine allows an insured who is covered by multiple and concurrent insurance policies to select, or 'target,' which insurer he wants to defend and indemnify him regarding a specific claim. [Citation.] The insured essentially can choose which insurer among his several co-insurers will participate in the claim against him; he can elect one insurer over another, or even deactivate coverage with an insurer he previously selected in order to invoke exclusive coverage with another. [Citation.] This allows an insured who has paid for multiple coverage to protect his interests, namely, keeping future premiums low, optimizing loss history and preventing policy cancellation among the insurers he chooses." *River Village*, 396 Ill. App. 3d at 486-87.

¶ 29 In light of this doctrine, insurers in general began to rely upon "other insurance" clauses in their policies, which generally would convert their primary coverage into excess coverage over any

other valid and collectable insurance that was available to the insured party. *Id.* at 487. This requires insureds to exhaust the policy limits of other co-insurers before the insurer's duty to defend and indemnify is triggered. *Id.*

¶ 30 i. The *Burns Construction* Decision

¶ 31 In *Burns Construction*, our supreme court was called upon to reconcile the targeted tender doctrine and an "other insurance" provision. There, the plaintiff entered into a subcontract with Sal Barba Asphalt Paving, Inc. (Barba), for Barba to pave a railroad station parking lot. *Burns Construction*, 189 Ill. 2d at 571. Pursuant to the subcontract, Barba had the plaintiff added to Barba's policy with the defendant as an additional insured. *Id.* After construction work was completed, Sydney Gault (the plaintiff in the underlying litigation) slipped and fell in the parking lot and sued the plaintiff (Burns Construction) for his injuries. *Id.*

¶ 32 The plaintiff notified Barba of the suit and asked Barba's insurer, the defendant, to defend and indemnify the plaintiff in the Gault action. *Id.* The plaintiff's letter to the defendant indicated that the plaintiff wanted the defendant company to provide exclusive defense and indemnification and did not want the plaintiff's own insurer, Royal Insurance Company (Royal), to become involved in the suit. *Id.* The defendant refused to defend the plaintiff, so the plaintiff then sought defense from Royal. *Id.* at 572. The plaintiff and Royal filed an action for declaratory judgment seeking a declaration that the defendant alone had the duty to defend and indemnify the plaintiff. *Id.*

¶ 33 The supreme court reversed both the trial and appellate courts, holding that Burns Construction had the right to choose which insurer would be required to defend and indemnify it in the underlying litigation, and that nothing in the Indiana policy limited Burns Construction's right

to select which insurer would be required to defend. *Id.* at 574. Agreeing with prior appellate court decisions, the court made the following holding, "An 'other insurance' provision does not in itself overcome the right of an insured to tender defense of an action to one insurer alone." *Id.* at 578.

¶ 34 ii. The *Kajima* Decision

¶ 35 In *Kajima,* the supreme court more closely examined the *Burns Construction* holding. Kajima, the plaintiff, had entered into a subcontract with Midwestern Steel Fabricators, Inc. (Midwestern), that required Midwestern to add Kajima as an additional insured on the commercial general liability insurance policy it held with St. Paul Fire and Marine Insurance Company (St. Paul). *Kajima*, 227 Ill. 2d at 103-04. Midwestern provided Kajima with a certificate of insurance from St. Paul naming Kajima as an additional insured and providing Kajima with $2 million in general liability coverage and $5 million in umbrella coverage, while Kajima retained its own $1 million primary insurance coverage with its insurer, Tokio Marine and Fire Insurance Company (Tokio). *Id.* An employee who was injured at the project site sued Kajima. *Id.* at 104. Kajima made a targeted tender to Midwestern and St. Paul for defense and indemnity, stating that it was exclusively choosing St. Paul to provide its defense, rather than Tokio. *Id.* The case settled for $3 million, with St. Paul paying its primary limits of $2 million, and Tokio paying its primary limits of $1 million. *Id.* Kajima and Tokio then filed a declaratory judgment action against St. Paul seeking reimbursement of the $1 million that Tokio had contributed to the settlement. *Id.* at 104-05. On cross-motions for summary judgment, the trial court granted St. Paul's motion and denied the plaintiffs' motion, and the appellate court affirmed. *Id.* at 105.

¶ 36 On further appeal, the supreme court initially noted that various cases cited by the plaintiff,

including *Burns Construction*, were not "on point" because they did not involve excess insurance policies, "but only concurrent primary policies." *Id.* at 107-12. Rather, as the court made clear, this situation provided a different context an insured (Kajima) holding different types of concurrent insurances, *i.e.,* primary (from Tokio) and excess (St. Paul's umbrella policy) and thus raising a different issue: whether the targeted tender rule supercedes an excess insurer's right to force exhaustion of all primary insurances before its duty is triggered. *Id.* at 112-13.

¶ 37 The *Kajima* court initially observed that there is a distinction between primary and excess insurance in that excess insurance "provides a secondary level of coverage" and is triggered only after the limits of primary insurance have been exhausted. *Id.* at 114. In light of this distinction, the supreme court refused to extend the targeted tender doctrine to allow an insured to request the application of an excess policy before exhausting all primary coverage. *Id.* at 116-17. Specifically, the court found that "the better rule is that set forth by the appellate court that [a] targeted tender can be applied to circumstances where concurrent primary insurance coverage exists for additional insureds, but to the extent that defense and indemnity costs exceed the primary limits of the targeted insurer, the deselected insurer or insurers' primary policy must answer for the loss before the insured can seek coverage under an excess policy." *Id.* As a result, and despite its targeted tender to St. Paul, Kajima was first required to exhaust the limits of its primary policy with its own insurer (Tokio) before invoking coverage under the excess (St. Paul) policy. *Id.* at 117.

¶ 38 iii. The *River Village* Decision

¶ 39 In *River Village*, this court further clarified the *Burns Construction* holding in light of *Kajima*. The *River Village* plaintiff was a general contractor on a building project, with Harleysville

as its primary insurer. *River Village*, 396 Ill. App. 3d at 482. River Village hired First Choice Drywall (First Choice) to perform subcontracting work at the project site. *Id.* A contract between River Village and First Choice required First Choice to name River Village as an additional insured on its insurance policy for defense and indemnification purposes. *Id.* This contract did not specify what type of insurance, *i.e.,* primary or excess, First Choice was required to obtain for River Village, only that First Choice was to indemnify and hold harmless River Village for any and all claims and pay for and maintain such insurance as agreed to by the parties. *Id.*

¶ 40 Pursuant to this contract, First Choice added River Village as an additional insured to the commercial general liability insurance policy it had with the defendant (Central). *Id.* The Central policy contained an "other insurance" excess provision, but the certificate of insurance that Central issued to River Village for the policy stated that River Village would be added as primary additional insured if required by written contract. *Id.* at 482-83.

¶ 41 An employee of First Choice who was injured while working at the project site sued River Village, among others. *Id.* at 483. River Village tendered its defense to First Choice, noting that it was instructing its insurer, Harleysville, not to respond to the suit or provide coverage until River Village's policy with Central (that it had through its contract with First Choice) was exhausted. *Id.*

¶ 42 Central did not respond, however, and River Village brought a declaratory judgment and breach of contract action against Central, claiming that Central owed it a defense in the underlying litigation. *Id.* Central responded by denying tender, filing an answer and bringing its own counterclaim for declaratory judgment against River Village, which included a claim that Central's insurance was only excess to the primary policy River Village maintained with Harleysville. *Id.* As

litigation progressed, Central requested, as part of discovery, a copy of all insurance policies covering River Village for any work performed at the project site, which would have included the Harleysville policy. *Id.* River Village refused, claiming that the requests were "irrelevant and immaterial," and "unrelated to this litigation." *Id.* at 483-84.

¶ 43 The underlying litigation settled. *Id.* at 484. Harleysville paid out on the claim, which was within its policy limits, and was added as a party plaintiff to the Central litigation. *Id.* The parties then filed new cross-motions for summary judgment solely on the issue of whether Central's policy was primary or only excess as to River Village's policy with Harleysville. *Id.* Following argument, the trial court granted the defendant's (Central's) motion and denied the plaintiffs' (River Village and Harleysville's) motion. *Id.* at 485. The plaintiffs appealed. *Id.*

¶ 44 This court first examined various cases concerning the targeted tender doctrine and "other insurance" clauses, including *Burns Construction*. *Id.* at 486-87. We specifically noted that "the common and determinative element shared by these cases is that, in each, the insurance at issue that held by the insured and provided by his multiple insurers originated from primary policies. *Id.* at 487. We thus concluded that, since "all the insurers stood in the same position with respect to the potential duty of defense and indemnification owed to the insured," the rule to be derived from these cases is that, "where the concurrent multiple policies held are primary policies, *** the targeted tender rule prevails [over an 'other insurance' clause] and allows the insured to select which insurer will defend and indemnify him." *Id.* at 487-88. We further found that *Kajima* was consistent with this rule, noting that the appellant was required to exhaust all primary policies prior to seeking coverage under an excess policy. *Id.* at 489 (citing *Kajima*, 227 Ill. 2d at 117).

¶ 45 We noted that the plaintiffs' argument rested on the conclusion that the Central policy was a primary one and thus, their targeted tender to Central should prevail over Central's "other insurance" policy. *Id.* at 490. We rejected that claim, however, noting that Central's policy contained an "other insurance" excess provision that was triggered if there were any other valid and collectible insurance available to the plaintiff. *Id.* Since Harleysville (River Village's primary insurer) had satisfied the settlement of the underlying litigation within its policy limits, there was "no question" that the Harleysville policy was other valid and collectible insurance available to River Village. *Id.* at 491. We thus affirmed the trial court. *Id.* at 492.

¶ 46 iv. Carmichael's Targeted Tender to General Casualty

¶ 47 Turning to the case before us, in light of the holdings in *Burns Construction*, *Kajima*, and *River Village*, it is clear that Carmichael's targeted tender to General Casualty did not render General Casualty's "other insurance" clause "completely inoperative and irrelevant." Here, as noted above, General Casualty was the excess insurer by virtue of its "other insurance" clause, in which coverage was primary for vehicles that Open Kitchens "own[ed]" and excess for other vehicles. Although the General Casualty policy classified leased vehicles that were listed on an attached schedule as "owned" vehicles (thus providing primary coverage), there is no evidence in this record that the vehicle that struck and killed Taylor was listed on the schedule. As such, General Casualty was an excess insurer in this case, and Philadelphia Indemnity was the primary insurer. Therefore, as in *Kajima*, and *River Village*, Carmichael's targeted tender to its excess insurer (General Casualty) did not prevail over the excess insurer's (General Casualty's) "other insurance" clause. Accordingly, the trial court did not err in finding that General Casualty was entitled to reimbursement from

Philadelphia Indemnity up to the limits of Philadelphia Indemnity's primary policy.

¶ 48 Philadelphia Indemnity's claim that the *River Village* decision is inapplicable also fails. First, Philadelphia Indemnity claims *River Village* is distinguishable based upon its prior argument that the additional insured endorsement in the General Casualty policy defined as owned those trucks that Open Kitchens leased from Carmichael, and General Casualty's "other insurance" clause would then provide primary coverage for these owned vehicles. Since we have already found that Philadelphia Indemnity's argument regarding the additional insured endorsement is without merit, so too is its claim that *River Village* is distinguishable on this basis.

¶ 49 Next, Philadelphia Indemnity argues that we should set aside the reasoning in *River Village* because that decision "could not and did not" change the holding in *Burns Construction*. We agree only to the extent that *River Village* merely clarified the holdings in *Burns Construction*. As noted in *River Village*, the insurance policies at issue in *Burns Construction* were all primary policies. By contrast, this case (similar to *River Village* and *Kajima*) concerns a primary policy and an excess policy. Philadelphia Indemnity's argument on this point is thus unavailing.

¶ 50 Finally, Philadelphia Indemnity claims that the *River Village* court misconstrued the supreme court's holding in *Kajima* namely, that the *Kajima* holding only applied to "true excess" policies and not "excess by coincidence" policies as in this case (*i.e.*, policies with an "other insurance" clause rendering its coverage excess over any other valid and collectible insurance). Philadelphia Indemnity's claim is without merit. The rule announced in *Kajima* was not limited solely to "true excess policies." Although the court in *Kajima* recounted the various types of excess insurance coverage, including "true" excess policies, excess "by coincidence" policies, and "umbrella" policies

(see *Kajima*, 227 Ill. 2d at 115), the central holding that an insured must exhaust its primary policies before invoking an excess policy (see *id.* at 117) does not vary depending upon the type of excess coverage involved. Consequently, the trial court properly found that, notwithstanding Carmichael's targeted tender of its defense to General Casualty to the exclusion of all other insurers, including Philadelphia Indemnity (Carmichael's primary insurer), General Casualty could still seek reimbursement from Philadelphia Indemnity. In so doing, the trial court reached a result which gave each company the benefit of its respective bargain with its insured, as established in each insurance policy.

¶ 51 C. Whether General Casualty waived arguments that its policy was excess

¶ 52 Philadelphia Indemnity also claims that the trial court erred in rejecting its argument that General Casualty "waived" any argument that its policy was excess. Philadelphia Indemnity's argument below and before this court is that General Casualty's conduct in accepting Carmichael's targeted tender and defending Carmichael without a reservation of rights resulted in General Casualty's waiver of any subsequent claim that its policy was excess only (and thus entitle General Casualty to reimbursement from Philadelphia Indemnity).

¶ 53 "Waiver arises from an affirmative act, is consensual, and consists of the intentional relinquishment of a known right." *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 396 (1993). Waiver can arise either expressly or "by conduct inconsistent with an intent to enforce that right." *In re Nitz*, 317 Ill. App. 3d 119, 130 (2000). It is well established, however, that a waiver will generally not be found when a party " 'is ignorant of the existence of such rights.' " *American States Insurance Co. v. National Cycle, Inc.*, 260 Ill. App. 3d 299, 306 (1994)

(quoting *Kenilworth Insurance Co. v. McDougal*, 20 Ill. App. 3d 615, 620 (1974)). Although "[s]trong proof is not required to show a waiver of a policy defense," there must nevertheless be sufficient facts that would make it "unjust, inequitable or unconscionable to allow the defense to be interposed." *Kenilworth*, 20 Ill. App. 3d at 620. Finally, the party claiming an implied waiver has the burden of proving "a clear, unequivocal, and decisive act of its opponent manifesting an intention to waive its rights." *Nitz*, 317 Ill. App. 3d at 130.

¶ 54 In this case, Philadelphia Indemnity does not claim that General Casualty expressly waived any argument that its policy was excess. Rather, Philadelphia Indemnity's argument is that General Casualty impliedly waived this argument based upon its conduct. We disagree.

¶ 55 In April 2005, when General Casualty accepted Carmichael's targeted tender, the holding in *Burns Construction* plainly stated that an " 'other insurance' provision does not in itself overcome the right of an insured to tender defense of an action to one insurer alone." *Burns Construction*, 189 Ill. 2d at 578. In 2007, (nearly eight years after the *Burns Construction* decision), the *Kajima* court noted that there remained a misconception with respect to the sweep of the *Burns Construction* holding. Specifically, the *Kajima* court explained, "as has been suggested, 'if [*Burns Construction*] is taken to its logical conclusion, it seems possible for an insured to deselect all of its primary insurers and tender only to its excess insurers.' " *Kajima*, 227 Ill. 2d at 116-17 (quoting T. Hamilton & T. Stark, *Excess-Primary Insurer Obligations and the Rights of the Insured,* 69 Def. Couns. J. 315, 324 (2002)).

¶ 56 The *River Village* decision clarified that a targeted tender does not prevail over an "other insurance" clause where the two insurers provide primary and excess coverage, respectively. See

generally, *River Village*, 396 Ill. App. 3d 480. *River Village*, however, was not decided until November 2009. About six months later, and on the same day our supreme court issued its mandate denying Carmichael's petition for leave to appeal, General Casualty notified Philadelphia Indemnity that, in light of *River Village*, General Casualty was now reserving its right to seek reimbursement from Philadelphia Indemnity. On these facts, we cannot hold that Philadelphia Indemnity met its burden to prove "a clear, unequivocal, and decisive act" of General Casualty manifesting General Casualty's intent to waive its reservation of rights. As such, Philadelphia Indemnity could not show that there was no genuine issue as to any material fact and that it was entitled to a judgment as a matter of law with respect to this claim. 735 ILCS 5/2-1005(c) (West 2010). Consequently, the trial court did not err in denying Philadelphia Indemnity's motion for summary judgment on this point.

¶ 57 Nonetheless, Philadelphia Indemnity relies upon *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307 (2004), in support of its contention that General Casualty waived any claim for reimbursement. Philadelphia Indemnity's reliance, however, is misplaced. In *Home Insurance*, the supreme court observed that it was undisputed that the plaintiff's (Home Insurance's) policy was an excess policy, whereas the defendant's (Cincinnati Insurance's) was a primary policy. *Id.* at 310. But despite this clear distinction between the two carriers' policies, Home Insurance failed to make a reservation of rights. As the court pointed out, Home Insurance "was presumed to know the contents of its own policy and that it was an excess insurer." *Id.* at 327.

¶ 58 Here, by contrast, the issue is not whether General Casualty knew the contents of its own policy. Rather, as noted above, when Carmichael tendered the defense of the underlying litigation, whether a targeted tender trumped General Casualty's "other insurance" provision was not a known

right that General Casualty relinquished. *River Village* clarified that issue, and when it was decided, General Casualty relied on it and notified Philadelphia Indemnity in a reasonably timely manner that it was reserving its right to reimbursement from Philadelphia Indemnity based upon *River Village*. Moreover, "until the limits of primary insurance coverage are exhausted, secondary coverage does not provide any collectible insurance." (Internal quotation marks removed.) *Kajima*, 227 Ill. 2d at 114-15 (citing *Roberts v. Northland Insurance Co.*, 185 Ill. 2d 262, 277 (1998) (Freeman, C.J., concurring in part and dissenting in part, joined by Miller and McMorrow, JJ.)). Thus, even assuming, *arguendo*, that General Casualty's notification was untimely, the primary insurer (here, Philadelphia Indemnity) would have to exhaust its coverage prior to the secondary coverage (from General Casualty) could provide any collectible insurance. *Home Insurance* is therefore unavailing.

¶ 59 D. Whether Philadelphia Indemnity is responsible for postjudgment interest

¶ 60 Finally, Philadelphia Indemnity argues in the alternative that, should we decide that the trial court did not err in finding that General Casualty provided only excess coverage, we should reduce the judgment against Philadelphia Indemnity by the amount of the postjudgment interest that accrued while General Casualty was defending Carmichael in the underlying litigation.

¶ 61 Supreme Court Rule 341 requires that the argument section of an appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Philadelphia Indemnity, however, cites no authority in support of its argument.[1] It is a deep-rooted rule that a reviewing court is not merely a repository into which an appellant may " 'dump the burden of

[1] General Casualty's response brief is similarly bereft of authority on this issue.

argument and research,' " nor is it our obligation to act as an advocate or seek error in the record. *Lindsey*, 397 Ill. App. 3d at 459 (quoting *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993)). The consequence of not complying with Supreme Court Rule 341 is waiver of those issues on appeal. *Id.* (citing *Universal Casualty Co. v. Lopez,* 376 Ill. App. 3d 459, 465 (2007)). Therefore, on this basis alone, we could affirm the decision of the trial court.

¶ 62 Waiver aside, however, Philadelphia Indemnity's alternative contention lacks merit. We have already held that the trial court properly determined that General Casualty provided excess coverage and Philadelphia Indemnity provided primary coverage. Under such circumstances, and under long-standing precedent, the trial court also correctly found that Philadelphia Indemnity was responsible for postjudgment interest. See, *e.g.*, *Hartford Accident & Indemnity Co. v. Aetna Insurance Co.*, 173 Ill. App. 3d 665, 668 (1988) (holding that "Hartford's [the excess insurer's] excess policy comes into play only when Hartford is acting as the primary carrier. It does not apply when Hartford is the excess carrier"), *aff'd*, 132 Ill. 2d 79, 84 (1989) ("Our reading of Hartford's policy is consistent with the appellate court's ***."). Accordingly, Philadelphia Indemnity's alternative claim that General Casualty is responsible for postjudgment interest fails.

¶ 63 III. CONCLUSION

¶ 64 The trial court did not err in granting summary judgment in favor of General Casualty and denying Philadelphia Indemnity's motion for summary judgment. Carmichael's targeted tender of its defense to General Casualty did not prevail over the "other insurance" clause in the General Casualty policy because General Casualty provided only excess insurance. In addition, General Casualty did not by its conduct waive any claim for reimbursement. Finally, Philadelphia Indemnity

is responsible for the payment of all postjudgment interest.

¶ 65 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 66 Affirmed.