

No. 1-12-2863

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|-------------------------------------|---|-------------------|
| LAMP INCORPORATED, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellant, |) | Cook County. |
| |) | |
| v. |) | |
| |) | |
| NAVIGATORS INSURANCE COMPANY, |) | |
| |) | |
| Defendant-Appellee. |) | |
| |) | |
| NAVIGATORS INSURANCE COMPANY, |) | No. 2011 CH 26900 |
| |) | |
| Third-Party Plaintiff-Appellee, |) | |
| |) | |
| v. |) | |
| |) | |
| WEST BEND MUTUAL INSURANCE COMPANY, |) | Honorable |
| |) | Mary L. Mikva, |
| Third-Party Defendant-Appellant. |) | Judge Presiding. |

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* Plaintiff filed an action for a declaratory judgment that defendant had breached its duty to defend plaintiff in the underlying lawsuit. We affirmed the grant of summary

judgment in favor of defendant, where defendant was an excess insurer which did not owe plaintiff a duty to defend until the primary coverage was exhausted.

¶ 2 Plaintiff, Lamp Incorporated (Lamp), filed a complaint for a declaratory judgment that defendant, Navigators Insurance Company (Navigators), had breached its duty to defend Lamp in an underlying lawsuit filed by Christopher Warren (the *Warren* lawsuit). Navigators filed a counterclaim against Lamp and a third-party complaint against West Bend Mutual Insurance Company (West Bend) seeking a declaratory judgment that West Bend, and not Navigators, provided primary, non-contributory coverage to Lamp and owed the duty to defend Lamp in the *Warren* lawsuit. Navigators further sought a declaration that its policy applied as excess insurance above the insurance provided to Lamp in the West Bend policy and that Navigators owed no duty to defend Lamp in the *Warren* lawsuit until the primary limits of liability under the West Bend policy were exhausted. The circuit court entered summary judgment in favor of Navigators, finding that the insurance policy issued by Navigators was excess to the primary policy issued by West Bend and that Navigators owed no defense or indemnity obligations to Lamp unless and until the West Bend policy was exhausted. Lamp and West Bend appeal. We affirm.

¶ 3 I. Facts

¶ 4 A. The District Contract

¶ 5 The Board of Education of Batavia Public School District No. 101 (District) entered into a construction contract (the District Contract) with McKinney Steel & Sales, Inc. (McKinney) to provide structural steel for an addition and remodeling of the Batavia High School. The District Contract required McKinney, as subcontractor, to name Lamp (the construction manager on the project) as an additional insured on McKinney's commercial general liability (CGL) policy.

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Specifically, the "Supplementary General Conditions" of the District Contract provide:

"11.1.2.2 Special Requirements for Contractor Insurance:

1. The Owner, including the School District *** [and] Construction Manager *** shall be named as 'Additional Insured' on the General Contract and/or Subcontractor commercial general liability policy ***."

* * *

11.3.15. Insurance Obtained Shall be Primary Insurance. All insurance required of the Contractor and all Subcontractors of any tier shall state that the coverage afforded to the Additional Insureds shall be primary insurance of the Additional Insureds with respect to claims arising out of operations performed by or on their behalf and shall not be contributing with any other insurance or similar protections available to the Additional Insureds. If the Additional Insureds have other insurance which is applicable to the loss, it shall be on an excess or contingent basis."

¶ 6 B. The Toth Industrial Sales Corporation Subcontract

¶ 7 Toth Industrial Sales Corp. (Toth) subcontracted with McKinney to provide construction services for the Batavia High School remodeling project. This contract also required that Toth name Lamp as an additional insured on Toth's CGL policy.

¶ 8 C. The Insurance Policies

¶ 9 1. The West Bend Policy

¶ 10 West Bend issued a CGL policy (the West Bend policy) to McKinney. The West Bend policy has an "[o]ther insurance" clause stating that where other valid and collectible insurance is available

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to the insured for a covered loss, the insurance provided under the West Bend policy is the primary insurance unless certain specified exceptions apply, in which case it is excess insurance. The West Bend policy provides that when its insurance is excess, West Bend will have no duty "to defend the insured against any 'suit' if any other insurer has a duty to defend the insured against that 'suit.'"

¶ 11 Lamp is an additional insured under the Additional Insured Endorsement (AI Endorsement) to the West Bend policy. The AI Endorsement amends the "other insurance" clause, stating as follows:

"As respects the coverage provided under this endorsement, [the other insurance clause] is amended with the addition of the following:

4. Other insurance

b. Excess insurance

This insurance is excess over:

Any other valid and collectible insurance available to the additional insured whether primary, excess, contingent or on any other basis unless a written contract specifically requires that this insurance be either primary or primary and noncontributing. Where required by written contract, we will consider any other insurance maintained by the additional insured for injury or damage covered by this endorsement to be excess and noncontributing with this insurance."

¶ 12

2. The Navigators Insurance Company Policy

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¶ 13 Navigators issued a CGL policy (the Navigators policy) to Toth. The Navigators policy contains an "[o]ther insurance" clause similar to the one in the West Bend policy. The other insurance clause states that where other valid and collectible insurance is available to the insured for a covered loss, the insurance provided under the Navigators policy is the primary insurance unless certain exceptions apply, in which case it is excess insurance.

¶ 14 Lamp is an additional insured under the AI Endorsement to the Navigators policy. The AI Endorsement amends the "other insurance" clause, stating as follows:

"With respect to a policy of insurance issued to the additional insured hereunder as a *named insured*, this insurance is primary and non-contributory. With respect to other policies of insurance under which the additional insured hereunder qualifies as an additional insured, this insurance is excess." (Emphasis in original.)

¶ 15 3. The Westfield Insurance Policy

¶ 16 Lamp has its own CGL policy with Westfield Insurance in which Lamp is a named insured. The Westfield Insurance policy is not at issue here, as neither West Bend nor Navigators is looking to Westfield Insurance to defend or indemnify Lamp in the underlying litigation.

¶ 17 C. The *Warren* Lawsuit

¶ 18 On June 3, 2009, Christopher Warren was employed by Toth, a subcontractor on the construction project involving the remodeling of Batavia High School. Mr. Warren allegedly was injured that day during the placement of sheet metal decking at the construction site. On June 2, 2010, Mr. Warren filed a lawsuit against: (1) Batavia Unified School District No. 101; (2) Lamp; and (3) McKinney. Lamp tendered its defense to West Bend shortly after it was sued. West Bend

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accepted the defense, admitting that Lamp was an additional insured on the policy it issued to McKinney and that it owed a duty to defend Lamp.

¶ 19 Three months later, on September 9, 2010, Lamp tendered the *Warren* lawsuit to Navigators. On October 21, 2010, Navigators sent Lamp a letter acknowledging that Lamp was an additional insured under the Navigators policy issued to Toth but that the Navigators policy was excess to any other insurance under which Lamp qualified as an additional insured. Noting that West Bend also had accepted a tender from Lamp, Navigators requested that Lamp provide it with the underlying construction contract, the West Bend insurance policy, and West Bend's defense acceptance letter so as to enable Navigators to determine on what basis (*i.e.*, primary or excess) the West Bend and Navigators policies afforded coverage to Lamp. Lamp provided these documents to Navigators in early January.

¶ 20 On January 17, 2011, Navigators notified Lamp that its coverage of Lamp as an additional insured was excess to the additional insured coverage provided to Lamp under the West Bend policy. Therefore, Navigators asserted it did not have a present obligation to provide Lamp with a defense.

¶ 21 On January 18, 2011, Lamp sent a letter to Navigators stating that both the West Bend policy issued to McKinney, and the Navigators policy issued to Toth, provide excess coverage to Lamp and thus "cancel each other out." Lamp contended that Navigators and West Bend should share in Lamp's defense on a *pro rata* basis.

¶ 22 D. Lamp's Declaratory Judgment Action

¶ 23 On August 1, 2011, Lamp filed an action seeking a declaratory judgment that it is an additional insured under the Navigators policy and that Navigators had breached its duty to defend

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Lamp in the underlying *Warren* lawsuit. Lamp also sought sanctions against Navigators under section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2010)) for its allegedly "unreasonable and vexatious conduct with respect to its obligation to defend Lamp in the underlying [*Warren* lawsuit]."

¶ 24 The *Warren* lawsuit was voluntarily dismissed on September 12, 2011. Prior to the voluntary dismissal, West Bend was defending Lamp in the *Warren* lawsuit.

¶ 25 On October 3, 2011, Navigators filed a counterclaim against Lamp and a third-party complaint against West Bend, seeking a declaratory judgment that: the West Bend policy provided primary, non-contributory coverage to Lamp for the *Warren* lawsuit; West Bend owed a duty to defend Lamp with respect to the *Warren* lawsuit; the Navigators policy applied as excess insurance above the insurance provided to Lamp by the West Bend policy; Navigators owed no duty to defend or indemnify Lamp with respect to the *Warren* lawsuit unless and until the primary limits of liability under the West Bend policy were exhausted¹; and Navigators has satisfied all obligations owed to Lamp under the Navigators policy.

¶ 26 The parties filed cross-motions for summary judgment. The circuit court entered summary judgment in favor of Navigators and denied Lamp's and West Bend's motion for summary judgment. Lamp and West Bend (collectively referred to as appellants) appeal.

¶ 27 II. Analysis

¶ 28 "The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court[,], which are appropriate subjects for disposition by way

¹Neither party argues that the limits of the West Bend policy have been exhausted.

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of summary judgment.' [Citation.] Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. [Citation.] We review cases involving summary judgment *de novo*. [Citation.] As in this case, 'where the parties file cross-motions for summary judgment, they invite the court to decide the issues presented as a matter of law.' [Citation.]" *Pekin Ins. Co. v. Pulte Home Corp.*, 404 Ill. App. 3d 336, 339 (2010).

¶ 29 In the present case, the parties agree that Lamp is an additional insured under both the West Bend and Navigators policies, and that the AI Endorsement to the Navigators policy amends the "other insurance" clause to state that the insurance provided to Lamp therein is excess to other collectible insurance naming Lamp as an additional insured. The issue on appeal is whether the circuit court correctly found that the insurance provided to Lamp as an additional insured under the West Bend policy is primary insurance or whether it, too, is excess insurance. If the West Bend policy provides primary insurance, then Lamp was required to exhaust all of said insurance before invoking the excess insurance provided by the Navigators policy; Lamp could not tender its defense to the excess insurer, Navigators, where the primary coverage provided by West Bend remained unexhausted. See *State Auto. Mut. Ins. Co. v. Habitat Const. Co.*, 377 Ill. App. 3d 281, 293 (2007) (the theory of horizontal exhaustion provides that "an insured must exhaust all available primary insurance before any excess insurance may be invoked"); *Kajima Const. Services, Inc. v. St. Paul Fire & Marine Ins. Co.*, 368 Ill. App. 3d 665, 671-72 (2006), *aff'd*, 227 Ill. 2d 102 (2007) (an insured cannot selectively tender a defense to an excess insurer where primary coverage remains

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unexhausted). However, if instead of providing primary insurance, the West Bend policy provides excess insurance similar to the excess insurance provided by the Navigators policy, then they cancel each other out and both insurers must share the defense costs on a *pro rata* basis. *State Farm Fire and Cas. Co. v. Utica National Ins. Group*, 375 Ill. App. 3d 230, 233-34 (2007).

¶ 30 We must examine the West Bend policy to determine whether it provides primary or excess insurance to Lamp. "In construing an insurance policy, the primary function of the court is to ascertain and enforce the intentions of the parties as expressed in the agreement. *** If the words in the policy are plain and unambiguous, the court will afford them their plain, ordinary meaning and will apply them as written." *Crum and Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993).

¶ 31 The AI Endorsement to the West Bend policy unambiguously states that the coverage provided to Lamp as an additional insured is excess unless there exists "a *written contract* specifically requir[ing] that this insurance be either primary or primary and noncontributing." (Emphasis added). The written contract at issue is the District Contract; pursuant to the clear and unambiguous language of the West Bend policy, we must examine the District Contract to determine whether it specifically requires that the coverage afforded Lamp as an additional insured under the West Bend policy be either primary or primary and noncontributing. If the District Contract so requires, then the coverage afforded Lamp as an additional insured under the West Bend policy is primary; if it does not so require, then the coverage is excess.

¶ 32 "The primary goal of contract interpretation is to give effect to the parties' intent by interpreting the contract as a whole and applying the plain and ordinary meaning to unambiguous

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terms." *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill. App. 3d 632, 636-37 (2008). Illinois follows the "four corners rule" for contract interpretation, pursuant to which a written agreement " 'must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed by extrinsic evidence.' " *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999) (quoting *Western Illinois Oil Co. v. Thompson*, 26 Ill. 2d 287, 291 (1962)).

¶ 33 In applying the four corners rule, the court first looks to the language of the agreement alone. *Id.* If the language is clear and facially unambiguous, the court then interprets the agreement as a matter of law as written, without the use of parol evidence. *Id.*

¶ 34 We proceed to examine the relevant language of the District contract, specifically sections 11.1.2.2 and 11.3.15 of the Supplementary General Conditions of the District Contract. Section 11.1.2.2 provides that the subcontractor "shall" name the Construction Manager as an additional insured on the CGL policy. In accordance with section 11.1.2.2, McKinney (the subcontractor) procured the West Bend policy naming Lamp (the construction manager) as an additional insured.

¶ 35 Section 11.3.15 of the Supplementary General Conditions of the District Contract states:

"Insurance Obtained Shall be *Primary Insurance*. All insurance required of the Contractor and all Subcontractors of any tier shall state that the coverage afforded to the Additional Insureds *shall be primary insurance* of the Additional Insureds with respect to claims arising out of operations performed by or on their behalf *and shall not be contributing with any other insurance* or similar protections available to the Additional Insureds. If the Additional Insureds have other insurance which is

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applicable to the loss, it shall be on an excess or contingent basis." (Emphasis added.)

¶ 36 The clear and unambiguous language of section 11.3.15 of the Supplementary General Conditions of the District Contract provides that the coverage afforded to Lamp as the additional insured under the West Bend policy shall be primary and noncontributing and that any other applicable insurance shall be excess. Pursuant to section 11.3.15, the circuit court here correctly found that the West Bend policy provides primary noncontributing coverage to Lamp. As the West Bend policy provides primary coverage to Lamp, the circuit court also correctly found that Navigators, as the excess insurer, had no duty to defend unless and until the West Bend policy is exhausted.

¶ 37 Appellants disagree, arguing that section 11.3.15 of the Supplementary General Conditions of the District Contract created two classes of insurance: (1) insurance required to be obtained; and (2) insurance other than required to be obtained. Appellants contend both West Bend's policy and Navigators' policy naming Lamp as an additional insured fall within the first class of insurance. Appellants contend "the policy of insurance that Lamp contracted as a named insured for Westfield Insurance to provide" falls within the second class of insurance. Appellants further contend that section 11.3.15 requires that the first class of insurance be primary *vis-a-vis* the second class of insurance, but that section 11.3.15 contains no language referencing the priority of coverage between two policies (such as West Bend's and Navigators') both falling within the first class of insurance. Accordingly, appellants argue that the circuit court erred in finding that "West Bend's insurance [is] primary *vis-a-vis* the Navigators' policy."

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¶ 38 Contrary to appellants' argument, section 11.3.15 contains no language providing that the West Bend policy in which Lamp is covered as an additional insured is primary only over the Westfield Insurance policy in which Lamp is covered as the named insured. Rather, section 11.3.15 specifically states that the coverage afforded to Lamp as an additional insured under the West Bend policy is "primary insurance *** and shall not be contributing with *any other* insurance." (Emphasis added.) Thus, section 11.3.15 clearly provides that the coverage afforded to Lamp as an additional insured under the West Bend policy is primary over all other applicable insurance, including the Navigators policy at issue here.

¶ 39 Appellants argue that an affidavit filed by Lamp's Vice President of Marketing and Sales, Ian C. Lamp, compels a different result. In his affidavit, Mr. Lamp stated in pertinent part:

"13. Lamp Incorporated understands that Article 11.3.15 of the supplementary general conditions required that Lamp's additional insurance with West Bend and Navigators be primary vis-a-vis the policy of insurance that Lamp Incorporated contracted with [Westfield Insurance] to bind for it as a named insured.

14. Lamp Incorporated understands that Article 11.3.15 of the supplementary general conditions did not require that Lamp's additional insurance under the West Bend policy be primary vis-a-vis its additional insurance under the Navigators policy."

¶ 40 However, we may not consider Mr. Lamp's affidavit as it constitutes parol evidence which is inadmissible when the written contract, as here, is clear and facially unambiguous. *Id.* See also *Policemen's Benevolent Labor Committee v. County of Kane*, 2012 IL App (2d) 110993, ¶ 18 (parol evidence rule applies even during summary judgment proceedings).

¶ 41 Appellants next argue that under the "targeted tender rule" Lamp "hereby formally deselects its additional insured coverage from West Bend, issues a targeted tender to Navigators, and looks exclusively to Navigators for primary defense and indemnity." As discussed, the underlying *Warren* lawsuit has been voluntarily dismissed; by issuing a targeted tender to Navigators, appellants apparently are seeking to hold Navigators responsible for 100% of the defense costs incurred prior to the voluntary dismissal as well as all defense and indemnity costs in the event the *Warren* lawsuit is refiled and goes forward.

¶ 42 The targeted tender rule "allows an insured covered by multiple concurrent policies the right to select which insurer will defend and indemnify it regarding a specific claim." *State Auto. Mut. Ins. Co.*, 377 Ill. App. 3d at 293. "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." *River Village I, LLC v. Central Ins. Cos.*, 396 Ill. App. 3d 480, 486 (2009).

¶ 43 "In an effort to override this right of the insured to choose among co-insurers, insurers developed 'other insurance' excess provisions in their policies. These provisions attempt to render otherwise primary insurance as excess over any other collectible insurance, most often with statements in the policy that declare the insurer's coverage to be excess over any other valid and collectible insurance available to the insured." [Citation.] In such instances, the 'other insurance' excess provision requires the insured to exhaust the policy limits of the other co-insurers before being able to trigger a defense and indemnification duty in that insurer." *Id.* at 487.

¶ 44 "In the ensuing battle between the doctrine of targeted tender used by an insured to obtain

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his selected primary coverage and the application of 'other insurance' excess provisions used by insurers to invoke only excess coverage, the question arose as to which should prevail. *** [O]ur courts have held that, when an insured has maintained concurrent primary insurance among multiple insurers, the presence of an 'other insurance' excess provision in one insurer's policy does not, in and of itself, overcome the insured's right of targeted tender. [Citations.]" *Id.*

¶ 45 "[T]he 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. In other words, all the insurers stood in the same position with respect to the potential duty of defense and indemnification owed to the insured. It is in this situation, where the concurrent multiple policies held are primary policies, that the targeted tender rule prevails and allows the insured to select which insurer will defend and indemnify him." *Id.* at 487-88.

¶ 46 "[A] markedly different situation occurs when an insured is covered by multiple insurers providing different types of coverage. That is, policies concurrently held by an insured are not always all primary; an insured may hold primary insurance from one insurer and, at the same time, excess coverage from another. In this instance, when the insurers do not stand in the same position with respect to a potential duty of coverage, our courts have clearly held that an insured cannot use his targeted tender right to choose to impose a coverage duty on an insurer with an 'other insurance' excess provision in its policy to the exclusion of other co-insurers with which he holds primary policies." *Id.* at 488. In other words, "an insured cannot selectively tender a defense to an excess insurer where primary coverage remains unexhausted." *State Auto. Mut. Ins. Co.*, 377 Ill. App. 3d at 293.

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¶ 47 As we discussed earlier in this order, the West Bend policy provides primary coverage to Lamp. The Navigators policy provides excess coverage to Lamp. Lamp cannot selectively tender his defense to the excess insurer, Navigators, where, as here, primary coverage from West Bend remains unexhausted. *Id.*

¶ 48 Next, appellants contend Navigators should be estopped from asserting that it had no duty to defend Lamp where Navigators failed to defend under a reservation of rights and failed to timely seek a declaratory judgment that there was no coverage. In support, appellants cite *Korte Const. Co. v. American States Ins.*, 322 Ill. App. 3d 451 (2001). In *Korte*, Margy Voigt, individually and as special administrator of the estate of Darwin Voigt, filed a wrongful-death action (the *Voigt* lawsuit) against Korte Construction Company (Korte). *Id.* at 453. Ms. Voigt alleged that on June 25, 1997, Darwin Voigt was a laborer working for Miller & Maack General Contractors, Inc. (Miller & Maack) at the Edwardsville high school construction site and he was killed while setting up a construction office trailer owned by, and for the use of, Korte. *Id.* Korte was an "additional insured" under an insurance policy issued by American States Insurance (American States) to Miller & Maack. *Id.* Korte allegedly tendered its defense of the *Voigt* lawsuit to American States pursuant to the additional-insured endorsement but American States refused to accept said tender. *Id.*

¶ 49 Korte filed a complaint on December 31, 1998, seeking a declaratory judgment that American States had a duty to defend Korte in the *Voigt* lawsuit, and that American States has a duty to indemnify Korte up to the \$1 million limit of the policy for any settlement or judgment entered in the *Voigt* lawsuit. *Id.* On June 16, 1999, American States answered the declaratory judgment complaint and asserted the affirmative defense that Korte was covered as an additional insured under

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an applicable insurance policy issued by St. Paul Fire & Marine Insurance Company (St. Paul) to the Edwardsville School District, which policy provided primary insurance to Korte, making the coverage provided by the American States policy excess. *Id.* at 454. In its answer, American States prayed for a declaratory judgment that its policy provides only excess coverage and therefore that it had no duty to defend or indemnify Korte. *Id.*

¶ 50 On March 15, 2000, the circuit court granted summary judgment in favor of Korte on its complaint. *Id.* at 455. In pertinent part, the circuit court found that Korte was an additional insured under the American States policy and that American States had a duty to defend and indemnify Korte in the *Voigt* lawsuit. *Id.* The circuit court further ruled that because American States failed to defend Korte under a reservation of rights or timely seek a declaratory judgment as to coverage issues, it was estopped from raising policy-defense or noncoverage issues. *Id.*

¶ 51 On appeal, the Fifth District Appellate Court (Fifth District) affirmed. *Id.* at 462. The Fifth District noted "[w]hen a complaint against an insured alleges facts that bring the action within or potentially within the scope of insurance policy coverage, the insurer taking the position that the complaint is not covered by the policy must defend the suit under a reservation of rights or seek a declaratory judgment that there is no coverage." *Id.* at 457. The Fifth District held that "[w]hile there need not be a race to the courthouse and the insured should not be able to estop the insurer from asserting policy defenses by filing a complaint for declaratory judgment first, the insurer must take some action to adjudicate the issue of coverage or undertake to defend the insured under a reservation of rights, and it must take that action within a reasonable time of a demand by the insured." *Id.* at 458. The Fifth District concluded that American States did not defend under a

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reservation of rights or timely file a declaratory judgment action, and therefore that "[i]t is now estopped from raising noncoverage as a defense to Korte's action for declaratory judgment and indemnification." *Id.*

¶ 52 In the present case, appellants argue that, as in *Korte*, Navigators did not defend it under a reservation of rights or timely seek a declaratory judgment that there is not coverage and therefore that Navigators is estopped from raising noncoverage as a defense.

¶ 53 Navigators responds that *Korte* was wrongly decided, contending that the Fifth District there made a finding of estoppel without first determining whether the insurer's coverage was triggered in the first place under the policy. Navigators argues we should follow the supreme court case *Employers Ins. of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127 (1999), which held in pertinent part:

"[The] estoppel doctrine applies only where an insurer has breached its duty to defend. Thus, a court inquires whether the insurer had a duty to defend and whether it breached that duty. [Citation.] 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.

¶ 54 Navigators also cites the First District Appellate Court (First District) decision in *North River Ins. Co. v. Grinnell Mutual Reinsurance Co.*, 369 Ill. App. 3d 563 (2006). In *North River Ins. Co.*, United States Fire Insurance Company (U.S. Fire) brought a declaratory judgment action against Tokio Marine and Fire Insurance Company (Tokio) seeking reimbursement from Tokio's primary insurance policy for money paid from U.S. Fire's excess policy to fund a settlement in an underlying

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personal injury lawsuit. *Id.* at 565-66. The circuit court granted summary judgment in favor of U.S. Fire and against Tokio on U.S. Fire's reimbursement claim. *Id.* at 566. On appeal, Tokio argued that U.S. Fire had waived its right to seek reimbursement or should be estopped from asserting the same because it did not issue a reservation of rights letter. *Id.* 570. Citing *Ehlco*, the First District held that "[w]aiver and estoppel apply only where an insurer has breached its duty to defend. Thus, a court inquires whether the insurer had a duty to defend and whether it breached that duty." *Id.* Finding that U.S. Fire was an excess insurer which had no duty to defend in the underlying litigation, the First District held that "the principles of waiver and estoppel are inapplicable to U.S. Fire." *Id.*

¶ 55 In accordance with the supreme court opinion in *Ehlco* which was followed in *North River Ins. Co.* and which we are also bound to follow (*People v. Muhammad*, 398 Ill. App. 3d 1013, 1017 (2010)), estoppel only applies here if Navigators breached a duty to defend Lamp in the underlying *Warren* lawsuit. As discussed earlier in this order, Navigators did not breach a duty to defend Lamp. Accordingly, the principle of estoppel is inapplicable here to Navigators.

¶ 56 Finally, appellants contend the circuit court erred in granting summary judgment for Navigators on Lamp's claim against it for sanctions under section 155 of the Illinois Insurance Code for "its unreasonable and vexatious conduct with respect to its obligation to defend Lamp in the underlying [*Warren* lawsuit]." Section 155 states:

"In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as

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part of the taxable costs in the action reasonable attorney fees, other costs, plus
[certain penalties] ***." 215 ILCS 5/155(1) (West 2010).

¶ 57 Navigators was not vexatious and unreasonable in failing to defend Lamp in the underlying *Warren* lawsuit because Navigators was an excess insurer which, under the clear language of the West Bend policy and the District Contract, did not owe Lamp a duty to defend until the primary coverage provided to Lamp as an additional insured under the West Bend policy was exhausted. Accordingly, the circuit court correctly found that section 155 sanctions were not appropriate here.

¶ 58 For all the foregoing reasons, we affirm the circuit court.

¶ 59 Affirmed.