

No. 1-12-3532

**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

PEKIN INSURANCE COMPANY,	)	
	)	
Plaintiff-Appellant,	)	
	)	Appeal from the
v.	)	Circuit Court of
	)	Cook County.
	)	
SKENDER CONSTRUCTION COMPANY, an Illinois	)	No. 11 CH 5564
Corporation,	)	
	)	Honorable
Defendant-Appellee	)	Kathleen M. Pantle,
	)	Judge Presiding.
(Bradley Dose and Susan Dose,	)	
Defendants).	)	
	)	

PRESIDING JUSTICE GORDON delivered the judgment of the court.  
Justices McBride and Palmer concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court’s determination that the insurer owes a duty to defend the insured in an underlying lawsuit is affirmed where: (1) the insurer waived its policy defense by omitting it from both its denial of coverage letter and from its complaint for declaratory judgment; (2) the complaint in the underlying action contains allegations of vicarious liability, thereby falling within the coverage of the insurance policy; and (3) the tender made by the insured’s attorney with the insured’s express authorization was a proper targeted tender.

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¶ 2 The instant appeal concerns whether plaintiff Pekin Insurance Company (Pekin) has a duty to defend defendant Skender Construction Company (Skender) with respect to a negligence complaint filed against Skender by underlying plaintiffs Bradley and Susan Dose. Skender was a general contractor on a construction project and hired Everest Excavating, Inc. (Everest), as a subcontractor. On the work site, underlying plaintiff Bradley Dose, who was an employee of a different subcontractor, was injured when he slipped and fell into a trench dug by Everest; the underlying plaintiffs filed suit against both Skender and Everest.

¶ 3 Skender tendered its defense to Pekin, claiming to be an additional insured under Everest's insurance policy. Pekin rejected the tender, claiming that it had no duty to defend Skender because the lawsuit was the result of Skender's own negligence. Pekin also claimed that there was no proper tender, since Skender's defense was tendered through a law firm employed by Zurich American Insurance Company (Zurich)<sup>1</sup>, Skender's insurer. Pekin and Skender both filed cross-complaints for declaratory judgment concerning Pekin's duty to defend Skender.

¶ 4 Both parties filed motions for summary judgment and the trial court granted Skender's motion and denied Pekin's in relevant part, finding that Pekin had a duty to defend Skender in the underlying litigation and that the tender was proper. Pekin appeals, arguing: (1) Skender is not an additional insured because Skender and Everest did not execute a written contract until after the underlying injury, as required by the insurance policy; (2) Pekin has no duty to defend

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<sup>1</sup> Zurich received permission to intervene in the instant case, and filed a counterclaim for a declaratory judgment that Pekin has a duty to defend Skender and reimbursement of defense costs that Zurich incurred in defending Skender in the underlying case. However, Zurich is not a party to the instant appeal.

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Skender because the underlying complaint does not contain any allegations concerning vicarious liability, as required by the insurance policy; and (3) Skender's purported tender is improper as it was a "downstream tender" made by a rival insurer. For the reasons that follow, we affirm.

¶ 5

#### BACKGROUND

¶ 6 On February 14, 2011, Pekin filed a three-count complaint for declaratory judgment, alleging that Everest was a named insured on an insurance policy issued by Pekin (the Everest insurance policy) and that Skender claimed to be an additional insured under that policy. Skender had been named in a lawsuit initiated by the underlying plaintiffs in the circuit court of Cook County, and tendered its defense to Pekin after first tendering the defense to its own liability carrier. Pekin refused to accept the tender of defense, and sought a declaratory judgment that it had no duty to defend Skender because (1) the certificate of insurance under which Skender claimed to be an additional insured conferred no rights on Skender and any rights Skender had would arise from the Everest insurance policy; (2) the Everest insurance policy's additional insured endorsement specifically excluded coverage for the negligence of the additional insured, which was the basis for the underlying lawsuit; and, in the alternative, (3) there was no valid targeted tender of Skender's defense because the tender came from an employee of Skender's own liability carrier and not from Skender itself.

¶ 7 Attached to the complaint was the Everest insurance policy, a certificate of insurance, the underlying complaint, and a letter to Pekin tendering Skender's defense. The Everest insurance policy covered the period from September 25, 2009, to January 23, 2010, and contained an endorsement entitled "Contractors Additional Insured/Waiver of Rights of Recovery Extension

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Endorsement.” The endorsement provided, in relevant part:

“1. Additional Insured - When Required By Written  
Construction Contract For Ongoing Operations Performed By You  
For An Additional Insured and/or Your Completed Operations

A. With respect to coverage afforded under this section of the endorsement, Section II - Who is An Insured is amended to include as an insured any person or organization for whom you are performing operations, when you and such person or organization have agreed in a written contract effective during the policy period stated on the Declarations Page (hereinafter referred to as the ‘Policy Period’) and executed prior to the ‘bodily injury’ or ‘property damage’ for which coverage is sought, that you must add that person or organization as an additional insured on a policy of liability insurance (hereinafter referred to as the ‘Additional Insured’).

The Additional Insured is covered only with respect to vicarious liability for ‘bodily injury’ or ‘property damage’ imputed from You to the Additional Insured as a

proximate result of:

(1) Your ongoing operations performed for that Additional Insured during the Policy Period; or

(2) 'Your work' performed for the Additional Insured during the Policy Period, but only for 'bodily injury' or 'property damage' within the 'products - completed operations hazard.'

\* \* \*

C. With respect to the coverage afforded to the Additional Insured, the following additional exclusions apply:

This insurance does not apply to:

\* \* \*

(2) Liability for 'bodily injury' or 'property damage' arising out of or in any way attributable to the claimed negligence or statutory violation of the Additional Insured, other than vicarious liability which is imputed to the Additional Insured solely by virtue of the acts or omissions of the Named Insured.'" (Emphases omitted.)

¶ 8 Also attached to the complaint was a certificate of insurance naming Skender as an

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additional insured, which stated that it was issued as a “matter of information only” and conferred no rights upon the certificate holder.

¶ 9 Additionally, attached to Pekin’s complaint was the complaint in the underlying action, four counts of which are directed at Skender. In the complaint, the underlying plaintiffs allege that Skender was the general contractor for the construction of a building in Countryside and, as such, owed a duty to exercise reasonable care to protect those lawfully on the premises from any danger of which it was or should have been aware. Skender hired Everest to perform excavation on the job site, and also hired Connelly Electric as an electrical subcontractor. On November 5, 2009, Bradley Dose, who was working on the premises as foreman for Connelly Electric, was walking in an area where Everest had dug trenches and partially filled them with gravel. Dose slipped on the gravel and fell into a trench created by Everest, resulting in bodily injury.

¶ 10 In a count based on premises liability, the underlying complaint alleges that Skender, “by and through its duly authorized agents and employees, including but not limited to EVEREST,” was negligent in failing to exercise ordinary care to ensure that the premises were reasonably safe for the use of those lawfully on the premises; failing to provide Dose with a safe place to work; failing to warn workers of an unsafe means of ingress and egress; and failing to properly supervise and coordinate work being done on the premises.

¶ 11 In a count based on exercising control, the underlying complaint alleges that Skender was “present during the course of such erection and construction, participated in coordinating the work being done, designated various work methods to be used, maintained and checked work progress, participated in the scheduling of the work, inspected the work, was responsible for the

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techniques, sequences, procedures, means and coordination of all work, supervise[d] and direct[ed] the work and ensure[d] that the work was done in a workmanlike fashion.”

Additionally, “at that time and place, Defendant SKENDER had the authority to stop the work, refuse the work and materials and order changes in the work, in the event the work was being performed in a dangerous manner or for any other reason.” The complaint alleges that Skender was negligent in failing to make a reasonable inspection of the premises and the work being done thereon, when it knew or should have known that such inspection was necessary to prevent injury to Dose; failing to provide Dose with a safe place to work; failing to warn workers of an unsafe means of ingress and egress; and failing to properly supervise and coordinate work being done on the premises.<sup>2</sup>

¶ 12 Finally, attached to the complaint was a letter dated January 12, 2011, from a law firm that was designated as “Employees of a Member Company of Zurich Financial Services Group” to Pekin, indicating that “I have been authorized by my clients, Skender Construction Company, to pursue this tender of defense and indemnification with Everest Excavating, Inc. and Pekin Insurance Company.” The letter stated:

“Skender Construction Company hereby target tenders their complete defense and indemnity to Everest and Pekin Insurance Company. It is the desire of Skender Construction Company that Everest and its insurers provide Skender Construction Company

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<sup>2</sup> Underlying plaintiff Susan Dose had two counts for loss of consortium based on the same theories.

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with their exclusive defense and indemnification in this matter from this date forward. Pursuant to the authority of John Burns Construction Company v. Indiana Insurance Company, 189 Ill. 2d 570, 727 N.E.2d 211 (2000), Everest and its insurers are solely responsible for the defense and indemnification of Skender Construction Company without contribution from Skender Construction Company's general liability carrier."

¶ 13 On May 6, 2011, Skender filed a counterclaim for declaratory judgment, claiming that Pekin had a duty to defend it in the underlying case. Attached to its counterclaim was a copy of the written subcontract agreement between Skender and Everest. The subcontract was dated September 25, 2009, was signed on behalf of Everest on October 19, 2009, and was signed on behalf of Skender on November 23, 2009. Section 10 of the subcontract provided:

"Subcontractor shall maintain and pay for insurance coverage of the type and with minimum limits set forth in Exhibit D - Insurance Requirements attached hereto. Subcontractor shall indemnify SKENDER and all parties as set forth in Exhibit D - Insurance Requirements attached hereto."

The referenced "Exhibit D - Insurance Requirements" provided:

"During the life of the Agreement, the Subcontractor shall purchase and maintain the following insurance with companies properly licensed to do business in the State of Illinois and with a

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financial rating, reasonably acceptable to Skender, the Owner and Architect, covering all operations under this Agreement, whether performed by the Subcontractor or its subcontractors of any tier. The Subcontractor will obtain and submit to SKENDER, before any work is performed under this contract, Certificates of Insurance from the Subcontractor's insurance carriers, evidencing the following coverage. In addition to certificates, Skender, the Owner and Architect may require duplicate originals of all insurance policies, declaration pages, forms and endorsements may be required, should they deem necessary.

Subcontractor shall not commence Work under this Agreement until he has obtained all the insurance required under the Contract Documents.”

Under a section entitled “Additional Insured(s),” Exhibit D provided:

“Submittal of the Subcontractor's evidence of insurance shall name the following parties, their agents, employees and representatives as *Additional Insureds on a Primary and Non-Contributory basis* on all policies, except Workers' Compensation, for any liability arising directly or indirectly from the operations of the subcontractor, and shall be held harmless, as set out in the Contract Documents, to the fullest extent permitted by law:

1. Skender Construction (General Contractor)” (Emphasis  
in original.)

Also attached to the counterclaim was a copy of the letter from Pekin rejecting Skender’s tender of defense. The letter stated, in pertinent part, that “since the additional insured endorsement to the Pekin policy issued to Everest specifically excludes coverage for the negligence of the additional insured, there is no coverage for Skender as alleged by the Doses.” The letter further stated:

“In addition, as you know, the certificate of liability insurance maintained by your client states on its face that it confers no rights on Skender and that the certificate does not amend, extend or alter the coverage afforded by the identified policy of insurance.

Pekin also suggests that as an employee of an insurance company, Zurich Insurance Company, a rival insurer, you are not in a position to make a targeted tender on behalf of your ‘client’ as you are an employee of an insurance company’s claim department, and a rival insurer cannot selectively target its insured’s defense to another insurer.

For the reasons set forth herein, Pekin rejects the tender of defense and suggests that Skender look to its own insurer for defense and indemnity for the lawsuit filed by the Doses.”

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Finally, attached to the counterclaim was Skender's cross-complaint against Everest in the underlying action, in which Skender included claims for contribution, indemnity, and breach of contract.

¶ 14 On March 26, 2012, Skender filed a motion for summary judgment, claiming that the undisputed facts demonstrated that Pekin had a duty to defend Skender. On May 1, 2012, Pekin filed a cross-motion for summary judgment. Pekin repeated its argument that the certificate of insurance conferred no rights on Skender and that any rights arose from the Everest insurance policy, as well as its arguments that it had no duty to defend Skender since Skender was sued for its own negligence and that the targeted tender was improper. Additionally, for the first time, Pekin claimed that it had no duty to defend Skender because Skender and Everest did not execute their written contract until after the events giving rise to the underlying complaint.

¶ 15 On June 15, 2012, Skender filed its combined response in opposition to Pekin's motion for summary judgment and reply in support of Skender's motion for summary judgment. Skender argued that Pekin had waived its argument concerning execution of the written contract, since Pekin's letter rejecting Skender's tender of defense did not state that the "execution" requirement of the additional insured endorsement had not been satisfied. Instead, Skender pointed to the letter's statement that "since the additional insured endorsement to the Pekin policy issued to Everest specifically excludes coverage *for the negligence of the additional insured*, there is no coverage for Skender as alleged by the Doses." (Emphasis added.) Skender argued that this language concedes that Skender is an additional insured, and contends only that coverage is barred by an exclusion, thus waiving any argument that Skender was not an

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additional insured. Skender further pointed to the fact that Pekin did not assert in its complaint that Skender was not an additional insured as support for its waiver argument. Moreover, Skender argued that it had satisfied the execution requirement, since the subcontract was signed by Everest—Pekin’s insured and the party that was providing the insurance—on October 19, 2009, and Everest commenced work on the project before the underlying accident on November 5, 2009. Finally, the certificate of insurance identifying Skender as an additional insured was issued on October 6, 2009, further indicating that Everest agreed to be bound to the terms of the subcontract prior to the underlying accident. Skender also noted that, as a matter of equity, it should not be penalized for its delay in signing the subcontract, since Everest did not return the subcontract to Skender until November 19, 2009, making it impossible for Skender to sign before the underlying accident on November 5.

¶ 16 On October 26, 2012, the trial court entered a written order in which it granted Pekin’s motion for summary judgment in part, finding that the certificate of insurance conferred no rights. The trial court further granted Skender’s motion for summary judgment, finding that Pekin has a duty to defend Skender in the underlying litigation. The trial court concluded that both counts of the underlying complaint “are claims which bring the underlying *Dose* case within or potentially within the Pekin Policy’s coverage because underlying plaintiffs are pleading claims against Skender for vicarious liability that is imputed from Everest’s alleged acts or omissions.” Thus, the court found that, “[a]s Skender is being sued for events or conduct for which Everest is potentially responsible, the ‘imputed’ language in the additional insured endorsement is satisfied.” The court further found that Skender’s cross-complaint against

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Everest in the underlying action established Pekin's duty to defend and that, combined with the allegations in the underlying complaint, the cross-complaint "unquestionably demonstrates the potential that Skender is being sued for alleged liability that is being imputed to Skender from Everest."

¶ 17 The trial court also found that the "written contract" requirement was satisfied. The court first found that Pekin had waived the argument because the denial letter did not list the written contract requirement as a basis for the denial. Additionally, Pekin's complaint identified Skender as an additional insured and did not raise the issue that Skender was not an additional insured due to the written contract requirement. The court concluded that "Pekin's actions are inconsistent with its belated assertion that the 'written contract' requirement was not satisfied and therefore Pekin has waived consideration of this issue."

¶ 18 Furthermore, the trial court found that Pekin's arguments concerning the written contract requirement were not well-founded. The court noted that the policy required the contract be "executed" prior to the injury, not "signed" prior to the injury. Quoting Black's Law Dictionary, the trial court stated that " '[e]xecute' means 'To perform or complete (a contract or duty).'" The court found that it was undisputed that Everest began work on the project in accordance with the subcontract prior to the underlying accident and concluded that, "[t]hus, a written contract between Everest and Skender existed prior to the date of Bradley [Dose's] alleged bodily injury as Everest had signed the contract and began to perform the contract, thereby executing the contract."

¶ 19 The trial court also rejected Pekin's argument regarding the targeted tender, finding that

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“the problem with Pekin’s claim is that there is absolutely no factual basis for its assertion that Zurich, and not Zurich’s insured, Skender, made the tender. Pekin has presented no proof that a Zurich ‘employee’ made the tender as is alleged in Pekin’s Complaint.” The court found that “it is undisputed that underlying defense counsel, who represents Skender, not Zurich, tendered to Pekin.” Despite the fact that Zurich was paying the defense costs, the court noted that defense counsel owed an ethical obligation to Skender, not to Zurich. Furthermore, the court found that “Skender has presented uncontradicted proof that Skender voluntarily intended to effectuate the targeted tender, was not forced to do so (as contended by Pekin without citation to any facts \*\*\*), and authorized its defense attorney to effectuate the targeted tender,” pointing to an affidavit of Skender’s human resources manager that indicated that Skender wanted Pekin to provide primary coverage at every point in time since Skender had been made aware of the underlying lawsuit.

¶ 20 The trial court additionally found that Pekin has the obligation to defend Skender on a primary and non-contributory basis, based on the clear and unambiguous language of the additional insured endorsement. Finally, the court found that Pekin correctly argued that a certificate of insurance does not confer any rights but did not consider arguments as to whether the certificate of insurance can provide evidence of coverage since it did not rely on the certificate of insurance in its ruling.

¶ 21 On November 13, 2012, the trial court entered an order finding no just reason to delay enforcement or appeal of the October 26, 2012, order, and Pekin filed a notice of appeal.

¶ 22 ANALYSIS

¶ 23 On appeal, Pekin argues that the trial court erred in granting summary judgment in

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Skender's favor for three reasons: (1) Skender is not an additional insured because Skender and Everest did not execute a written contract until after the underlying injury, as required by the insurance policy; (2) Pekin has no duty to defend Skender because the underlying complaint does not contain any allegations concerning vicarious liability, as required by the insurance policy; and (3) Skender's purported tender is improper as it was a "downstream tender" made by a rival insurer.

¶ 24 A trial court is permitted to grant summary judgment only "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 2008). The trial court must view these documents and exhibits in the light most favorable to the nonmoving party. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). We review a trial court's decision to grant a motion for summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). " '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 of summary judgment.' " *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill. App. 3d 749, 755 (2005) (quoting *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993)).

¶ 25 "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Outboard Marine Corp.*, 154 Ill. 2d at 102. However,

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“[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment.” *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999). A defendant moving for summary judgment bears the initial burden of proof. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). The defendant may meet his burden of proof either by affirmatively showing that some element of the case must be resolved in his favor or by establishing “ ‘that there is an absence of evidence to support the nonmoving party’s case.’ ” *Nedzvekas*, 374 Ill. App. 3d at 624 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). In other words, there is no evidence to support the plaintiff’s complaint.

¶ 26 “ ‘The purpose of summary judgment is not to try an issue of fact but \*\*\* to determine whether a triable issue of fact exists.’ ” *Schrager v. North Community Bank*, 328 Ill. App. 3d 696, 708 (2002) (quoting *Luu v. Kim*, 323 Ill. App. 3d 946, 952 (2001)). However, “[w]hen, as in this case, parties file cross-motions for summary judgment, they concede the absence of a genuine issue of material fact and invite the court to decide the questions presented as a matter of law.” *Steadfast Insurance*, 359 Ill. App. 3d at 755 (citing *Continental Casualty Co. v. Law Offices of Melvin James Kaplan*, 345 Ill. App. 3d 34, 37-38 (2003)). We may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct. *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 50 (1992).

¶ 27 In Illinois, the duties to defend and to indemnify are not coextensive, with the obligation to defend being broader than the obligation to pay. *International Minerals & Chemical Corp. v. Liberty Mutual Insurance Co.*, 168 Ill. App. 3d 361, 366 (1988). In determining whether an insurer has a duty to defend its insured, a court looks to the allegations in the underlying

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complaint and compares them to the relevant provisions of the insurance policy. *Outboard Marine Corp.*, 154 Ill. 2d at 107-08. “If the facts alleged in the underlying complaint fall within, or potentially within, the policy’s coverage, the insurer’s duty to defend arises.” *Outboard Marine Corp.*, 154 Ill. 2d at 108. However, if it is clear from the face of the complaint that the allegations fail to state facts that bring the case within, or potentially within, the policy’s coverage, an insurer may properly refuse to defend. *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991) (quoting *State Farm Fire & Casualty Co. v. Hatherley*, 250 Ill. App. 3d 333, 336 (1993)). “[W]here an exclusionary clause is relied upon to deny coverage, its applicability must be clear and free from doubt because any doubts as to coverage will be resolved in favor of the insured.” *International Minerals & Chemical Corp.*, 168 Ill. App. 3d at 367. “[W]here the language of an insurance policy is clear and unambiguous, it will be applied as written.” *Hatherley*, 250 Ill. App. 3d at 337. The construction of an insurance policy presents a question of law that is reviewed *de novo*. *Outboard Marine*, 154 Ill. 2d at 108. As noted, *de novo* consideration means we perform the same analysis that a trial judge would perform. *Khan*, 408 Ill. App. 3d at 578.

¶ 28

#### I. Execution of Written Contract

¶ 29 Pekin’s first argument is that Skender was not an additional insured because Skender and Everest did not execute their written contract until after the alleged bodily injury. Under the Everest insurance policy, an additional insured is “any person or organization for whom you are performing operations, when you and such person or organization have agreed in a written contract effective during the policy period stated on the Declarations Page \*\*\* and executed

prior to the ‘bodily injury’ or ‘property damage’ for which coverage is sought, that you must add that person or organization as an additional insured on a policy of liability insurance.” (Emphasis added.) Pekin argues that the subcontract between Skender and Everest was not executed prior to Dose’s injury and, accordingly, Skender did not qualify as an “additional insured” under the policy.

¶ 30 We first consider whether Pekin has waived this argument. “Waiver arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right.” *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 326 (2004) (citing *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 396 (1993)). “A waiver may be either expressed or implied, arising from acts, words, conduct, or knowledge of the insurer.” *Home Insurance*, 213 Ill. 2d at 326 (citing *Crum & Forster*, 156 Ill. 2d at 396, and *Western Casualty & Surety Co. v. Brochu*, 105 Ill. 2d 486, 499 (1985)). “Implied waiver of a legal right must be proved by a clear, unequivocal, and decisive act of the party who is alleged to have committed waiver.” *Ryder v. Bank of Hickory Hills*, 146 Ill. 2d 98, 105 (1991). However, “[a]n implied waiver arises when conduct of the person against whom waiver is asserted is inconsistent with any intention other than to waive it.” *Home Insurance*, 213 Ill. 2d at 326 (citing *Liberty Mutual Insurance Co. v. Westfield Insurance Co.*, 301 Ill. App. 3d 49, 53 (1998)).

¶ 31 In the case at bar, Skender argues that Pekin has waived its argument that Skender was not an additional insured due to the executed contract requirement because (1) Pekin’s denial letter omitted any discussion of the executed contract requirement; and, in fact, (2) Pekin conceded in the letter that Skender was an additional insured. Furthermore, (3) Pekin did not

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claim in its complaint that Skender failed to qualify as an additional insured because of the executed contract requirement but first raised the argument in its motion for summary judgment.

We agree.

¶ 32 Pekin’s denial letter informed Skender that, “since the additional insured endorsement to the Pekin policy issued to Everest specifically excludes coverage for the negligence of the additional insured, there is no coverage for Skender as alleged by the Doses.” Skender argues that this language both omits any reference to the executed contract requirement and affirmatively concedes that Skender is an additional insured. By contrast, Pekin argues that such language does not constitute a waiver, since merely omitting a defense in a letter denying coverage does not constitute waiver of the defense. It is undisputed that the denial letter did not have any reference to the executed contract requirement. However, even if this language is not read as a concession of Skender’s additional insured status, Pekin’s argument does not take into account the fact that not only was the defense omitted from the denial letter, it was omitted from Pekin’s complaint.

¶ 33 Pekin compares the instant case to *Tobi Engineering, Inc. v. Nationwide Mutual Insurance Co.*, 214 Ill. App. 3d 692 (1991), which it contends is a “substantially similar case.” There, the insurer wrote a letter to the insured stating that two exclusions applied to the claim but, after the insured filed suit, asserting that the insurer wrongfully refused to defend it, the insurer included as an affirmative defense that the claim was not covered under the policy. *Tobi*, 214 Ill. App. 3d at 693-94. The insured argued that the insurer had waived any policy defenses other than the two exclusions. *Tobi*, 214 Ill. App. 3d at 695. The appellate court rejected the

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waiver argument, noting that an insurer is not required to assert all of its defenses to liability in a letter to its insured. *Tobi*, 214 Ill. App. 3d at 696.

¶ 34 We find *Tobi* inapposite. There, the insured, while omitting the defense from the letters denying coverage, included the defense as an affirmative defense, which would have been the insurer's first pleading before the trial court. Here, by contrast, Pekin not only omitted the defense from the denial letter but also omitted it from its complaint. In fact, Pekin's complaint states that "Pekin contends that Skender is not entitled to coverage because Skender has been sued for negligence, and the additional insured endorsement specifically excludes coverage for the negligence of the additional insured," language that almost expressly concedes Skender's status as an additional insured.

¶ 35 Similarly, we cannot find that *Liberty Mutual Fire Insurance Co. v. Woodfield Mall, L.L.C.*, 407 Ill. App. 3d 372 (2010), is helpful to Pekin. Pekin contends that, in *Liberty Mutual*, the appellate court rejected the argument that reference to an "additional insured" in a denial letter conceded that the defendant was an additional insured under the insurance policy. However, that mischaracterizes the contents of the letter at issue in that case. There, in a single letter, the insurer acknowledged that the defendant qualified as an additional insured under the policy but also (1) stated that there was only " 'a potential of coverage for [the defendant] under the policy' " and that it would only defend the defendant " 'subject to the position outlined in this letter' "; (2) specifically invoked the policy's limitation on coverage to " 'premises or other property owned by or rented to [the named insured]' " and the policy's limitation on indemnification to " 'damages awarded for "bodily injury" for liability arising out of the premises

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leased to [the named insured]’ ”; and (3) concluded the letter by expressly “ ‘reserv[ing] all rights under applicable law and the policy’ ” and cautioning that the letter should not be construed as “ ‘waiver or estoppel of any possible coverage defenses afforded by the policy or applicable law.’ ” *Liberty Mutual*, 407 Ill. App. 3d at 393-94. The insurer then filed a declaratory judgment action based on the “premises” language quoted in the letter. *Liberty Mutual*, 407 Ill. App. 3d at 394. Accordingly, the court concluded that “[u]nder these facts, we do not see how the insurer intentionally relinquished its right to deny coverage based on the ‘premises’ policy language.” *Liberty Mutual*, 407 Ill. App. 3d at 394.

¶ 36 Unlike the letter in *Liberty Mutual*, Pekin’s letter made no reference to the executed contract requirement, nor did it contain any of the cautionary language that was included in the *Liberty Mutual* letter. Instead, the letter expressly stated that it was basing its denial on the vicarious liability exclusion. Furthermore, in *Liberty Mutual*, the insurer filed a complaint for declaratory judgment in which the policy defense was raised. Here, by contrast, Pekin’s complaint made no mention of the executed contract requirement as a basis for its denial. Given the combination of Pekin’s letter and its complaint, we agree with the trial court that “Pekin’s actions are inconsistent with its belated assertion that the ‘written contract’ requirement was not satisfied and therefore Pekin has waived consideration of this issue.”

¶ 37 We must also discuss the impact prejudice has on our analysis, since Pekin argues that prejudice is required in order to find that an insurer has waived a policy defense. However, it appears that Pekin has conflated the issues of estoppel and waiver with regard to this issue. An insurer has two options when taking the position that it has no duty to defend: (1) defend the suit

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under a reservation of rights or (2) seek a declaratory judgment that there is no coverage.

*Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 19. “[W]here an insurer assumes an insured’s defense without a reservation of rights, the insurer will not be equitably estopped from denying coverage unless prejudice exists.” *Lay*, 2013 IL 114617, ¶ 19. Thus, estoppel in this context operates in the case of an insurer defending a case without a reservation of rights, and requires prejudice.<sup>3</sup> *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384 (1993), which Pekin cites in support of a prejudice requirement, discusses such a situation in the portion cited by Pekin and so does not support its argument in the context of waiver.

¶ 38 By contrast, as noted, “[w]aiver arises from an affirmative act, is consensual, and consists of the intentional relinquishment of a known right.” *Crum & Forster*, 156 Ill. 2d at 396 (citing *Western Casualty & Surety Co. v. Brochu*, 105 Ill. 2d 486, 499 (1985)). “A waiver may be express or implied, arising from acts, words, conduct, or knowledge of the insurer. It is unilateral, as no act of the insured is necessary to complete it. Prejudicial reliance by the insured is not required.” *Brochu*, 105 Ill. 2d at 499. See also *Liberty Mutual Fire Insurance Co. v. Woodfield Mall, L.L.C.*, 407 Ill. App. 3d 372, 393 (2010). Thus, unlike estoppel, when considering waiver, no prejudice is required.

¶ 39 *Brum* provides an example of the operation of both waiver and estoppel. There, the insurer sent a letter accepting defense of the claim and indicating that there was no further

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<sup>3</sup> Estoppel also applies when the insurer fails to take either of the two options available to it, and takes no action. However, in such cases, prejudice is not required. See *Employers Insurance v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 158 (1999) (distinguishing two forms of equitable estoppel in insurance context, and whether prejudice is required for each).

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question concerning coverage “ ‘at this time.’ ” (Emphasis omitted.) *Brum*, 105 Ill. 2d at 499. Two weeks later, the insurer’s attorney notified the insured that the insurer was undertaking the defense under a reservation of rights based on two policy exclusions and that the insurer’s attorney had the right to take over the defense and reject the insurer’s tender of a defense under the reservations stated. *Brum*, 105 Ill. 2d at 499. The insured argued that the insurer had waived its right to deny coverage under the policy, but the supreme court concluded that, “[u]nder these facts we fail to see how [the insurer] intentionally relinquished its right to deny coverage” based on the two exclusions. *Brum*, 105 Ill. 2d at 499. However, the court noted that “[i]t is possible” that the insured “may be able to establish that it was prejudiced by [the insured’s] subsequent conduct,” which would lead to the insurer being estopped from asserting a defense of noncoverage. *Brum*, 105 Ill. 2d at 499-500. See also *American States Insurance Co. v. National Cycle*, 260 Ill. App. 3d 299, 305-06, 308 (1994) (insured made arguments concerning both waiver, which did not require a showing of prejudice, and estoppel, which did).

¶ 40 In the case at bar, Skender is asserting waiver, not estoppel, since Pekin did not accept the defense without a reservation of rights but instead sought a declaratory judgment. Accordingly, prejudice is not required.

¶ 41 We note that two cases Pekin relies on do appear to require prejudice in finding waiver: *Jones v. Universal Casualty Co.*, 257 Ill. App. 3d 842 (1994), and *Owners Insurance Co. v. Seamless Gutter Corp.*, 2011 IL App (1st) 082924, which cited *Jones*. In *Jones*, the appellate court, in *dicta*, considered the insured’s argument that the insurer “has waived the right, or is estopped,” to raise an argument concerning the insurance policy’s notice requirement because the

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insurer failed to raise the notice provision in the denial letter. *Jones*, 257 Ill. App. 3d at 851-52.

The court considered a case relied on by the insured and stated that, to the extent that the case “is to be read as a pronouncement that in any case where an insurer refuses coverage on one ground, it waives the right, or is estopped, to deny coverage on another ground, we must respectfully disagree” with the holding in the case. *Jones*, 257 Ill. App. 3d at 852. Instead, the court concluded that “[w]e believe that the better rule is that insureds must show that they relied to their detriment upon the insurer’s failure to assert a particular defense.” *Jones*, 257 Ill. App. 3d at 852. Thus, the court stated that, on remand, “in order to establish waiver or estoppel, the plaintiffs must show some detrimental reliance on the fact that [the insurer] did not raise the reasonable notice provision in its letter denying coverage.” *Jones*, 257 Ill. App. 3d at 852.

¶ 42 Respectfully, we cannot agree with the *Jones* court’s conclusion because the court did not distinguish between waiver and estoppel, but considered the two together. However, as noted, they are separate doctrines with separate requirements. See *Potesta v. United States Fidelity & Guaranty Co.*, 504 S.E.2d 135, 145 n.13 (W. Va. 1998) (including *Jones* among cases in which “the terms estoppel and waiver are interchanged,” making it “sometimes difficult to conclusively determine the exact rule being applied”). Indeed, the case cited by *Jones* for its “better rule” considers both waiver and estoppel and applies a prejudice requirement only to the estoppel claim. See *National Tea Co. v. Commerce & Industry Insurance Co.*, 119 Ill. App. 3d 195, 205-06 (1983). Thus, Pekin’s citation of *Jones* is not persuasive, nor is its use of *Owners*, since *Owners* exclusively relies on *Jones* for its imposition of a prejudice requirement.

¶ 43 Moreover, even if we agreed with Pekin concerning a prejudice requirement, we would

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find Pekin's reliance on *Owners* to be unpersuasive. Pekin claims that in *Owners*, "under facts extremely similar to those here," the appellate court found that the plaintiff insurer had not waived its argument that the defendant corporation was not an additional insured when it failed to include the policy defense in its denial letter. *Owners*, 2011 IL App (1st) 082924, ¶¶ 56-59. However, we do not find the facts in *Owners* to be similar to the facts in the case at bar. In *Owners*, while the insurer did not include the claim that the corporation was not an additional insured in its denial letter, it did include the claim in its complaint for declaratory judgment. *Owners*, 2011 IL App (1st) 082924, ¶ 23. Thus, as of the time of filing the complaint for declaratory judgment, the corporation would have been aware that its status as an additional insured was being challenged. Here, by contrast, not only was Skender's status as an additional insured not challenged in the denial letter, it was also not challenged in Pekin's complaint. It was not until Pekin's motion for summary judgment that it contended that Skender was not an additional insured due to the executed contact requirement. Thus, Skender would have been unaware that this was a contested issue.

¶ 44 Indeed, Pekin's own argument against waiver demonstrates that Skender was prejudiced by Pekin's conduct. In its appellate brief, Pekin contends that "Skender itself put this issue before the Court by attaching the contract to its counterclaim and seeking a declaration that 'Skender is an additional insured on the Pekin policy for purposes of the underlying case.' \*\*\* The fact that it was not specifically pled in Pekin's Complaint does not matter because Skender specifically pled the issue in its counterclaim and put the contract before the Court." Similarly, in its reply brief, Pekin contends that "Skender's response to Pekin's complaint was to file a

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counterclaim that sought a finding that ‘Skender is an additional insured on the Pekin policy,’ the very determination it now contends Pekin waived. \*\*\* By its actions, Skender has shown that it did not rely to its detriment on Pekin’s alleged waiver. If it did, it would not seek that relief. Skender’s counterclaim does not reference the alleged waiver and no affirmative defense was filed.”

¶ 45 The problem with Pekin’s argument is that it fails to acknowledge that Skender had no way of knowing that Pekin was contesting Skender’s status as an additional insured. Consequently, Skender would not have known that, under Pekin’s argument, Skender was the party placing its status as an additional insured at issue, nor would it have had any reason to raise waiver in its complaint. In order for a duty to defend to arise, two requirements must be satisfied: “(1) the action must be brought against an insured, and (2) the allegations of the complaint must disclose the potential for policy coverage.” *Owners*, 2011 IL App (1st) 082924, ¶ 33. Skender’s cross-complaint pled facts concerning both elements. However, as far as Skender was aware, the issue in the case at bar was the second element—whether the vicarious liability exclusion applied—and the first element was not contested. Had Skender been aware that both issues were contested, its complaint may have reflected that fact; indeed, it may even have included a waiver claim in its complaint. Pekin’s reply brief even states that “Skender itself raised the issue of whether it qualifies as an additional insured by attaching the contract to its counterclaim and seeking a declaration that Pekin has a duty to defend. In determining the duty to defend, the trial court had to first find that Skender was an insured on the policy. [Citations.] *Skender pleading the issue relieved any duty on Pekin.*” (Emphasis added.) Consequently, we

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cannot find that Skender was not prejudiced by Pekin's conduct and, accordingly, find the issue of whether the executed contract requirement was satisfied to be waived.

¶ 46 As a final matter, we note that Pekin states in its reply brief that "waiver should not be allowed to create insured status." However, that is the opposite of what is actually occurring. In finding waiver, we are merely stating that Pekin has voluntarily relinquished its right to depend on the executed contract requirement as a basis for denying coverage. This is entirely based on Pekin's conduct. To the extent that anyone has "create[d] insured status," it is Pekin, not "waiver."

¶ 47 II. Vicarious Liability Exclusion

¶ 48 Pekin also argues that it had no duty to defend Skender because the underlying complaint did not contain allegations that created the potential for vicarious liability to be imputed from Everest to Skender. Under the Everest insurance policy, coverage would not be provided for "[l]iability for 'bodily injury' or 'property damage' arising out of or in any way attributable to the claimed negligence or statutory violation of the Additional Insured, other than vicarious liability which is imputed to the Additional Insured solely by virtue of the acts or omissions of the Named Insured." Pekin argues that the underlying complaint seeks to hold Skender directly liable for its conduct, not vicariously liable for Everest's conduct. We cannot agree.

¶ 49 As noted, in determining whether an insurer has a duty to defend its insured, a court looks to the allegations in the underlying complaint and compares them to the relevant provisions of the insurance policy. *Outboard Marine Corp.*, 154 Ill. 2d at 107-08. "If the facts alleged in the underlying complaint fall within, or potentially within, the policy's coverage, the insurer's duty

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to defend arises.” *Outboard Marine Corp.*, 154 Ill. 2d at 108. Here, we find that the facts in the underlying complaint potentially fall within the policy’s coverage.

¶ 50 The underlying complaint names both Skender and Everest as defendants. The underlying plaintiffs allege that Skender was the general contractor for the construction of a building in Countryside and, as such, owed a duty to exercise reasonable care to protect those lawfully on the premises from any danger of which it was or should have been aware. Skender hired Everest to perform excavation on the job site, and also hired Connelly Electric as an electrical subcontractor. On November 5, 2009, Bradley Dose, who was working on the premises as foreman for Connelly Electric, was walking in an area where Everest had dug trenches and partially filled them with gravel. Dose slipped on the gravel and fell into a trench created by Everest, resulting in bodily injury.

¶ 51 In a count based on premises liability, the underlying complaint alleges that Skender, “by and through its duly authorized agents and employees, including but not limited to EVEREST,” was negligent in failing to exercise ordinary care to ensure that the premises were reasonably safe for the use of those lawfully on the premises; failing to provide Dose with a safe place to work; failing to warn workers of an unsafe means of ingress and egress; and failing to properly supervise and coordinate work being done on the premises.

¶ 52 In a count based on exercising control, the underlying complaint alleges that Skender was “present during the course of such erection and construction, participated in coordinating the work being done, designated various work methods to be used, maintained and checked work progress, participated in the scheduling of the work, inspected the work, was responsible for the

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techniques, sequences, procedures, means and coordination of all work, supervise[d] and direct[ed] the work and ensure[d] that the work was done in a workmanlike fashion.”

Additionally, “at that time and place, Defendant SKENDER had the authority to stop the work, refuse the work and materials and order changes in the work, in the event the work was being performed in a dangerous manner or for any other reason.” The complaint alleges that Skender, “by and through its agents, servants and employees,” was negligent in failing to make a reasonable inspection of the premises and the work being done thereon, when it knew or should have known that such inspection was necessary to prevent injury to Dose; failing to provide Dose with a safe place to work; failing to warn workers of an unsafe means of ingress and egress; and failing to properly supervise and coordinate work being done on the premises.

¶ 53 We find that both counts contain claims for vicarious liability. In both counts, Skender is alleged to be negligent through its agents, specifically naming Everest in count I as an agent; neither count alleges that Skender was negligent “individually.” This distinguishes the instant case from *Pekin Insurance Co. v. Roszak/ADC, LLC*, 402 Ill. App. 3d 1055, 1063 (2010), in which we expressly noted that “[n]owhere in count II does the complaint allege an agency relationship between Roszak and Rockford. In addition, neither count IX nor count X against Roszak and Rockford alleges an agency relationship between Roszak and Rockford. The complaint merely states that Roszak was the general contractor on the site and that Rockford was the steel fabricator.”

¶ 54 Additionally, count II of the complaint contains facts that could possibly lead to vicarious liability. Count II is based on the exercise of control by Skender, the general contractor, over the

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work of Everest, the subcontractor. “Generally, one who employs an independent contractor is not liable for the latter’s acts or omissions.” *Joyce v. Mastri*, 371 Ill. App. 3d 64, 73 (2007) (citing *Downs v. Steel & Craft Builders, Inc.*, 358 Ill. App. 3d 201, 204-05 (2005)). However, section 414 of the Restatement (Second) of Torts (1965), “which has long been recognized as an expression of law in Illinois,” provides an exception to the general rule, referred to as the “retained control” exception. *Cochran v. George Sollitt Construction Co.*, 358 Ill. App. 3d 865, 873-74 (2005) (citing *Larson v. Commonwealth Edison Co.*, 33 Ill. 2d 316, 325 (1965)); *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, ¶ 47.

¶ 55 Section 414 provides:

“One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.” Restatement (Second) of Torts § 414 (1965).

¶ 56 “The Restatement describes a continuum of control, explaining [that] the employer is subject to liability as master under the principles of agency where the employer retains control over the operative detail of any part of the contractor’s work. [Citation.] If the employer retains only supervisory control, *i.e.*, power to direct the order in which work is done, or to forbid its being done in a dangerous manner, then the employer is subject to liability under section 414 unless he exercised supervisory control with reasonable care.” *Martens v. MCL Construction*

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*Corp.*, 347 Ill. App. 3d 303, 314 (2004) (citing Restatement (Second) of Torts § 414, cmt. a (1965)). Thus, “[a]s comment *a* to section 414 clarifies, the general contractor, by retaining control over the operative details of its subcontractor’s work, may become vicariously liable for the subcontractor’s negligence; alternatively, even in the absence of such control, the general contractor may be directly liable for not exercising his supervisory control with reasonable care.” *Cochran*, 358 Ill. App. 3d at 874.

¶ 57 However, the “retained control” concept is limited by comment *c* to section 414:

“In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.” Restatement (Second) of Torts § 414, cmt. *c* (1965).

Thus, negligence and, specifically, the existence of a duty under section 414 “turn[] on whether the defendant controls the work in such a manner that he should be held liable.” *Martens*, 347

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Ill. App. 3d at 315; *Calloway*, 2013 IL App (1st) 112746, ¶ 50. “Whether a contractor retained such control over a subcontractor’s work so as to give rise to liability is an issue reserved for a trier of fact, unless the evidence presented is insufficient to create a factual question.” *Joyce v. Mastri*, 371 Ill. App. 3d 64, 74 (2007) (citing *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill. App. 3d 1051, 1059 (2000)).

¶ 58 In the case at bar, we find that there are sufficient facts alleged in the underlying complaint that could lead to vicarious liability under section 414. The complaint specifically alleges that Skender was “present during the course of such erection and construction, participated in coordinating the work being done, designated various work methods to be used, maintained and checked work progress, participated in the scheduling of the work, inspected the work, was responsible for the techniques, sequences, procedures, means and coordination of all work, supervise[d] and direct[ed] the work and ensure[d] that the work was done in a workmanlike fashion.” Thus, the complaint alleges that Skender retained control over the operative detail of Everest’s work, which would subject it to vicarious liability.

¶ 59 Again, this fact distinguishes the instant case from *Roszak*, in which we determined that the complaint alleged that “Roszak had the general rights of a supervisor but include[d] no allegations that Roszak retained the right to supervise the details of Rockford’s work” (*Roszak*, 402 Ill. App. 3d at 1065), and from *Pekin Insurance Co. v. United Contractor Midwest, Inc.*, 2013 IL App (3d) 120803, ¶ 28, in which the complaint alleged that the general contractors, “acting alone, negligently violated [its] duty of care to Hill by failing to supervise and warn Hill of the dangers posed by the live, overhead power lines on or near the work site” Unlike in

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*Roszak* and *United Contractor*, here, the complaint did contain allegations that Skender had the right to supervise the details of Everest's work, alleging that Skender "was responsible for the techniques, sequences, procedures, means and coordination of all work, supervise[d] and direct[ed] the work and ensure[d] that the work was done in a workmanlike fashion."

Accordingly, the complaint contains allegations of vicarious liability, meaning that the facts alleged in the complaint potentially fall within the Everest policy's coverage and Pekin has a duty to defend Skender.

¶ 60 We also note that Pekin's reliance on *Roszak*; *Pekin Insurance Co. v. Beu*, 376 Ill. App. 3d 294 (2007); and *Pekin Insurance Co. v. United Parcel Service, Inc.*, 381 Ill. App. 3d 98 (2008), is unpersuasive since all three of those cases involved policy language different than contained in the instant case. In all three cases, the insurance policy provided that a person or organization otherwise qualified as an additional insured " 'is an additional insured only with respect to liability incurred solely as a result of some act or omission of the named insured and not for its own independent negligence or statutory violation.' " *Roszak*, 402 Ill. App. 3d at 1058; *United Parcel Service*, 381 Ill. App. 3d at 100; *Beu*, 376 Ill. App. 3d at 295. In the case at bar, the Everest policy provides that "[t]he Additional Insured is covered only with respect to vicarious liability for 'bodily injury' or 'property damage' imputed from You to the Additional Insured" and further provides that coverage would not be provided for "[l]iability for 'bodily injury' or 'property damage' arising out of or in any way attributable to the claimed negligence or statutory violation of the Additional Insured, other than vicarious liability which is imputed to the Additional Insured solely by virtue of the acts or omissions of the Named Insured." Pekin argues

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that the language in the three cases is similar to the language in the case at bar, and so we should interpret the provisions in the same way. However, there is an important difference in the language, turning on the word “solely.”

¶ 61 In *Roszak*, *United Parcel Service*, and *Beu*, the policy language stated that coverage was only for liability “ ‘incurred *solely* as a result of some act or omission of the named insured and not for its own independent negligence or statutory violation.’ ” (Emphasis added.) *Roszak*, 402 Ill. App. 3d at 1058; *United Parcel Service*, 381 Ill. App. 3d at 100; *Beu*, 376 Ill. App. 3d at 295. Thus, the courts interpreted that language to mean that only acts for vicarious liability could be alleged in the underlying complaint and that any allegations of the additional insured’s own independent liability would result in no coverage under the policy. *Beu*, 376 Ill. App. 3d at 297 (“since the allegations in Hall’s complaint were not based solely on the acts or omissions of the named insured, but also were predicated on the additional insured’s alleged independent acts of negligence, plaintiff has no duty to defend the additional insured, Roger Beu, under the terms of the policy”); *United Parcel Service*, 381 Ill. App. 3d at 104 (“[T]he underlying complaint alleges negligence against ‘Defendants, and each of them’ for Aggen’s fall from the ladder and the resulting injuries. There is nothing in the underlying complaint to suggest that Swan’s acts or omissions were ‘solely’ to blame for Aggen’s accident. Since negligence has been directly alleged against UPS, UPS is not covered by the additional insured provision in the Pekin policy.”); *Roszak*, 402 Ill. App. 3d at 1061 (agreeing with *Beu* and *United Parcel Service* and finding that “the underlying complaint directly alleges negligence on the part of Roszak, the additional insured \*\*\*\* The additional insured endorsement does not cover these claims because

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a direct allegation of negligence on the part of the additional insured is not ‘solely as a result of some act or mission of the named insured.’ Instead, the complaint alleges the injury was caused by the additional insured’s ‘own independent negligence,’ which the endorsement expressly does not cover.”).

¶ 62 In the case at bar, by contrast, the word “solely” modifies the acts of Everest. In other words, Skender is not covered under the policy if it is vicariously liable for the acts of a different subcontractor. It is only covered if it is vicariously liable for Everest’s conduct. The exclusion does not speak to whether the underlying complaint may include both claims for direct liability and vicarious liability. Thus, as long as it is possible that any of the claims alleged in the underlying complaint involve vicarious liability for Everest’s conduct, Skender is covered under the policy. See *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991) (“if the underlying complaints allege several theories of recovery against the insured, the duty to defend arises even if only one such theory is within the potential coverage of the policy”). In short, the policy language here is broader than in the cases cited by Pekin. Here, since we have determined that the underlying complaint includes claims for vicarious liability based on Everest’s conduct, Pekin has a duty to defend Skender. Since we have found a duty to defend based on the underlying complaint, we have no need to discuss whether we may also look to Skender’s countercomplaint in the underlying case for proof of coverage.

¶ 63

### III. Targeted Tender

¶ 64 Finally, Pekin claims that Skender’s purported targeted tender is improper “as it is no more than a downstream tender made by rival insurer Zurich’s house counsel.” An insured “has

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a paramount right to choose or not to choose an insurer's participation in a claim." *Alcan United, Inc. v. West Bend Mutual Insurance Co.*, 303 Ill. App. 3d 72, 83 (1999). "The 'targeted' or 'selective' tender doctrine allows an insured covered by multiple insurance policies to select or target which insurer will defend and indemnify it with regard to a specific claim." *Kajima Construction Services v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102, 107 (2007). "Where the insured makes such a designation, the duty to defend falls solely on the selected insurer." *Bituminous Casualty Corp. v. Royal Insurance Co. of America*, 301 Ill. App. 3d 720, 724 (1998) (quoting *Cincinnati Cos. v. West American Insurance Co.*, 183 Ill. 2d 317, 324 (1998)).

¶ 65 "[O]nly the insured or someone acting at the specific request of the insured can properly tender and trigger a defense." *Bituminous Casualty*, 301 Ill. App. 3d at 726 (citing *Institute of London Underwriters v. Hartford Fire Insurance Co.*, 234 Ill. App. 3d 70, 73 (1992)).

"Coverage cannot be triggered by a tender from a rival insurer." *Bituminous Casualty*, 301 Ill. App. 3d at 726 (citing *Empire Fire & Marine Insurance Co. v. Clarendon Insurance Co.*, 267 Ill. App. 3d 1022, 1030 (1994) (Cousins, J., concurring in part and dissenting in part)).

¶ 66 In the case at bar, since the attorney that sent Skender's tender letter was retained on Skender's behalf by Zurich, Pekin contends that the targeted tender was improper as it was made by a rival insurer. We cannot agree.

¶ 67 The facts clearly establish that it was Skender's decision to tender its defense to Pekin. The letter tendering Skender's defense to Pekin was dated January 12, 2011, and was sent from a law firm that was designated as "Employees of a Member Company of Zurich Financial Services

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Group.” The letter indicated that “I have been authorized by my clients, Skender Construction Company, to pursue this tender of defense and indemnification with Everest Excavating, Inc. and Pekin Insurance Company.” The letter further stated:

“Skender Construction Company hereby target tenders their complete defense and indemnity to Everest and Pekin Insurance Company. It is the desire of Skender Construction Company that Everest and its insurers provide Skender Construction Company with their exclusive defense and indemnification in this matter from this date forward. Pursuant to the authority of John Burns Construction Company v. Indiana Insurance Company, 189 Ill. 2d 570, 727 N.E.2d 211 (2000), Everest and its insurers are solely responsible for the defense and indemnification of Skender Construction Company without contribution from Skender Construction Company’s general liability carrier.”

Additionally, Skender provided an affidavit from its human resources manager that indicated that Skender wanted Pekin to provide primary coverage at every point in time since Skender had been made aware of the underlying lawsuit. The affidavit stated that Skender was aware of the January 12, 2011, letter and that “[t]he January 12, 2011 letter was sent with SKENDER’s full and complete authorization.” Accordingly, the attorney was acting at Skender’s specific request and the tender was proper.

¶ 68 We agree with the trial court that “there is absolutely no factual basis for its assertion that

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Zurich, and not Zurich's insured, Skender, made the tender. Pekin has presented no proof that a Zurich 'employee' made the tender as is alleged in Pekin's Complaint." While Pekin is correct that Zurich retained the attorney to represent Skender, the fact remains that the law firm represented Skender and the firm owed duties to Skender. See *Preferred American Insurance v. Dulceak*, 302 Ill. App. 3d 990, 995-96 (1999) ("the attorney represents both the insured and the insurer in furthering the interests of each"); *Illinois Municipal League Risk Management Ass'n v. Seibert*, 223 Ill. App. 3d 864, 871 (1992) ("The attorney-client relationship between the insured and the attorney imposes the same professional obligations as if the insured personally retained the attorney."); *Nandorf, Inc. v. CNA Insurance Cos.*, 134 Ill. App. 3d 134, 137 (1985) ("The attorney hired by the insurance company to defend in an action against the insured owed fiduciary duties to two clients: the insurer and the insured. The attorney-client relationship between the insured and the attorney hired by his insurer imposes upon the attorney the same professional obligations that would exist had the attorney been personally retained by the insured."). We cannot accept Pekin's bald statement that "it is clear that counsel is acting in the self-interest of Zurich not to defend or indemnify its own insured, Skender" without a scintilla of factual support. It is no small matter to contend that a law firm is violating its ethical responsibilities, and we will not assume that it is, especially in the face of several documents indicating that the law firm was acting with Skender's express authorization.

¶ 69 We also note that this is not the type of case in which a "rival insurer" is attempting to tender a defense. In those cases, the insured tendered the defense to one insurer and that insurer, without the insured's consent, tendered the defense to a different insurer. See *Institute of*

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*London*, 234 Ill. App. 3d at 75 (“In this case, no official of Great Lakes ever asked Hartford to defend or indemnify on behalf of Great Lakes. Rather, Hartford was instructed by its insured not to do so. In fact, the request for indemnification came from an attorney defending Great Lakes under the Institute’s policy. *The Institute concedes that Great Lakes did not ask [the attorney] to send the tender letters.*” (Emphasis added.)). That type of situation is a far cry from that present in the case at bar, where Skender expressly authorized the law firm to tender its defense to Pekin. Accordingly, we agree with the trial court that the tender was proper.

¶ 70

#### CONCLUSION

¶ 71 We find that Pekin owes Skender a duty to defend it in the lawsuit filed in the underlying case because (1) Pekin waived its argument that Skender did not qualify as an additional insured based on the executed contract requirement; (2) the underlying complaint contains allegations of vicarious liability, thereby falling within the policy’s coverage; and (3) Skender’s defense was properly tendered to Pekin.

¶ 72 Affirmed.