2013 IL App (2d) 120744-U
No. 2-12-0744
Order filed January 24, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEKIN INSURANCE COMPANY, Plaintiff-Appellant, v. HAWKE, INC., Defendant-Appellee (Mason Harrison Ratliff Enterprises, Jon Penticoff, and Tammy Penticoff, Defendants).	)))))))))))	Appeal from the Circuit Court of Winnebago County. No. 10-MR-839 Honorable Eugene G. Doherty, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: We agreed with the trial court that Pekin Insurance Company had a duty to defend Hawke, Inc., in an underlying action because the underlying complaint left open the possibility that Hawke would be vicariously liable for the actions of the named insured. Therefore, we affirmed the trial court's ruling denying Pekin's motion for summary judgment and granting Hawke's cross-motion for summary judgment.

¶ 2 Plaintiff, Pekin Insurance Company (Pekin), filed a declaratory judgment action against defendants, Hawke, Inc. (Hawke), Mason Harrison Ratliff Enterprises (MHR), and Jon and Tammy Penticoff. The action was in response to a suit the Penticoffs had filed against Hawke and MHR for

injuries Jon allegedly suffered while working on a construction project. Jon was employed by Five Star Plumbing Company (Five Star), a subcontractor to general contractor Hawke.

¶ 3 Pekin had issued an insurance policy to Five Star, and the policy named Hawke as an additional insured. In its declaratory judgment action, Pekin sought a declaration that it had no duty to defend Hawke in the Penticoffs' suit because the underlying complaint did not allege the vicarious liability necessary to trigger coverage for Hawke as an additional insured. Pekin also sought a declaration that it had no duty to defend MHR.

¶ 4 Pekin and Hawke filed cross-motions for summary judgment. The trial court granted Pekin's motion as to MHR but denied its motion as to Hawke. Correspondingly, it granted Hawke's cross-motion. The trial court ruled that Pekin had a duty to defend Hawke in the Penticoffs' suit. Pekin appeals, and we affirm.

¶ 5 I. BACKGROUND

¶ 6 Pekin issued an insurance policy to Five Star for the policy period of April 27, 2009, to April 27, 2010. The policy contains an additional insured endorsement, and it is undisputed that Hawke qualifies as an additional insured in this case. The additional insured endorsement states in relevant part:

> "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.' "

The endorsement also contains an exclusion 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."

¶ 7 The Penticoffs brought their three-count complaint against Hawke and MHR on September 13, 2010, alleging as follows in regard to Hawke. Jon was a union plumber employed by Five Star, a subcontractor to general contractor Hawke. Hawke was in charge of the construction of a Sonic Drive-In in Belvidere. On June 1, 2009, Jon was working in an open trench on the premises when the trench collapsed on him, causing injuries. They further alleged:

"[D]efendant HAWKE, through its agents, sub-contractors, servants and/or employees,

were [*sic*] present during the course of said construction and defendant HAWKE participated in coordinating the work being done and designating various work methods, maintained and checked work progress, participated in the scheduling of work and the inspection of the work for progress and worker safety. In addition, and at the time and place, defendant HAWKE had the authority to stop the work, refuse the work and materials, or order changes to the work, if improper or unsafe conditions were present."

¶ 8 Count I alleged that Hawke, "by and through it agents, servants and employees," was negligent in one or more of the following ways:

"a. Failed to make a reasonable inspection of the premises and the work being done, when defendant knew or, in the exercise or [*sic*] ordinary care, should have known that such inspection was necessary to prevent injury to workers on the job site, including JON PENTICOFF.

b. Improperly operated, managed, maintained, coordinated and controlled the construction site and work being performed therein.

c. Failed to provide JON PENTICOFF with a safe place to work.

d. Failed to warn JON PENTICOFF of the dangerous conditions in existence when defendant knew or, in the exercise of ordinary care, should have know that such warning was necessary to prevent injury to JON PENTICOFF.

e. Failed to provide adequate safeguards to prevent JON PENTICOFF from injury while lawfully working on the construction site.

f. Failed to supervise the work being done at the construction site.

g. Failed to install, or cause to be installed, platforms, planks, ladders, trench boxes or other safety apparatuses, so as to protect the plaintiff while working in an open trench.

h. Failed to provide, or cause to be provided, safe, adequate or suitable temporary support for workers on the job site, including JON PENTICOFF to work off of during the performance of his assigned task."

The complaint asserted that as "a direct and proximate result of one or more of the aforementioned careless and negligent acts and/or omissions of defendant HAWKE," Jon was injured.

¶ 9 Count II alleged wilful and wanton conduct based on an identical list of acts and omissions. Count III sought recovery for medical expenses under the Family Expense Act (750 ILCS 65/15 (West 2008)).

¶ 10 On December 1, 2010, Pekin brought its complaint for a declaratory judgment against Hawke and the Penticoffs. Pekin alleged that in connection with the Penticoffs' suit, Hawke tendered its defense to Pekin after tendering the defense to its own liability insurer. Pekin alleged that it refused to accept the tender, and it sought a declaration that it had no duty to defend Hawke. Pekin joined the Penticoffs as nominal parties so that they would be bound by the judgment in the case.

¶ 11 On March 3, 2011, Pekin filed an amended complaint. The amended complaint added MHR as a defendant and additionally sought a declaration that Pekin had no duty to defend MHR under the policy it issued to Five Star.

¶ 12 On April 27, 2011, Hawke filed a counterclaim for a declaratory judgment, seeking a declaration that Pekin owed it a duty to defend as an additional insured. Hawke pointed to the allegation in the underlying complaint that it was present through "its agents, sub-contractors, servants and/or employees." Hawke argued that it faced potential liability to the Penticoffs based on vicarious liability for Five Star's work.

¶ 13 On June 24, 2011, Pekin filed a second amended complaint. The aforementioned allegations against Hawke remained the same. On January 25, 2012, Pekin filed a motion for summary judgment regarding its duty to defend.

¶ 14 Hawke filed a cross-motion for summary judgment on February 23, 2012. Hawke took the position that the allegations in the underlying complaint were sufficient to trigger Pekin's duty to defend, but citing *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 462 (2010), it also argued that the

trial court could look at its third-party complaint in the underlying action to determine whether there was coverage.

¶ 15 The trial court filed a memorandum opinion on May 4, 2012. It granted Pekin summary judgment with respect to the declaratory relief sought against MHR. Regarding Hawke, it found that the allegations that Hawke cited from the underlying complaint raised "not a hypothetical possibility, but the very real possibility that a claim is being made against Hawke in the underlying suit seeking to hold it vicariously liable for the actions of Five Star." The trial court determined that under this language and the analysis set forth in *Pekin Insurance Co. v. Hallmark Homes*, 392 Ill. App. 3d 589 (2009), Hawke was entitled to summary judgment. Based on its conclusion, the trial court stated that it was unnecessary to determine whether it could consider third-party pleadings in the underlying action to determine coverage.

¶ 16 On June 20, 2012, the trial court entered an order based on its memorandum opinion. It granted Pekin's motion for summary judgment with respect to its claims against MHR, and it denied Pekin's motion for summary judgment with respect to its claims against Hawke. It further granted Hawke's cross-motion for summary judgment. It ruled that Pekin had no duty to defend MHR in the underlying suit, but it had a duty to defend Hawke.

¶ 17 Pekin timely appealed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, Pekin argues that the trial court erred in denying its motion for summary judgment as to Hawke and granting Hawke's cross-motion for summary judgment. Summary judgment is appropriate only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material

fact and that the moving party is entitled to judgment as a matter of law. *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 93 (2010). When parties file cross-motions for summary judgment, they agree that only a question of law is involved and that the court should decide the issue based on the record. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010). We review *de novo* a grant of summary judgment. *Id.* Moreover, the construction of an insurance policy is a question of law, to which *de novo* review applies. *Wilson*, 237 Ill. 2d at 455; see also *Hallmark Homes*, 392 Ill. App. 3d at 593 (reviewing *de novo* trial court's declaratory judgment, which was based on legal arguments the parties raised in response to the plaintiff's motion for summary judgment).

¶ 20 Injured construction workers commonly sue the general contractors of construction projects because workers' compensation laws bar them from suing their subcontractor employers. *American Country Insurance Co. v. James McHugh Construction Co.*, 344 Ill. App. 3d 960, 963 (2003). Therefore, "it is a common construction industry practice for a general contractor to shift the liability risk for construction accidents to its subcontractor by requiring it to purchase liability insurance for the [general] contractor." *State Automobile Mutual Insurance Co. v. Kingsport Development, LLC*, 364 Ill. App. 3d 946, 952 (2006). The subcontractor typically satisfies this requirement by including the general contractor as an additional insured on the subcontractor's insurance policy. *Id.* Still, although the general contractor may intend for this arrangement to pass liability for workers' injuries to the subcontractor's insurance carrier, a limitation on insurance coverage recognizes that construction businesses also procure their own general liability coverage. *Id.*

¶ 21 In determining whether an insurer must defend its insured, the court must compare the allegations of the underlying complaint to the relevant policy provisions (*Outboard Marine Corp.*

v. Liberty Mutual Insurance Co., 154 Ill. 2d 90, 125 (1992)) and liberally construe both in the insured's favor (*Kingsport Development, LLC*, 364 Ill. App. 3d at 951). If any of the complaint's allegations fall within or potentially fall within a policy's coverage, the insurer is obligated to defend its insured. *Outboard Marine Corp.*, 154 Ill. 2d at 125. Therefore, if the underlying complaint contains several theories of recovery against the insured, the insurer has a duty to defend even if just one of the theories is potentially covered by the policy. *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991). Any doubts or ambiguities in an insurance policy, especially those appearing in exclusionary clauses, must be resolved in the insured's favor. *Outboard Marine Corp.*, 154 Ill. 2d at 121.

¶ 22 Pekin notes that the additional insured provision states that coverage extends only "with respect to *vicarious* liability for 'bodily injury' *** *imputed from You [Five Star] to the Additional Insured [Hawke]*." (Emphases added.) Pekin also cites the exclusion 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." (Emphases added.)

¶ 23 Pekin argues that the additional insured endorsement clearly and unambiguously requires that the allegations against the additional insured, Hawke, be based solely on the acts or omissions of the named insured, Five Star. Pekin argues that the underlying action, in contrast, accuses Hawke itself of various acts and omissions and seeks to hold Hawke directly liable for committing them. Pekin maintains that Hawke faces only the direct liability of an allegedly negligent party, and there is no

allegation that Hawke may be vicariously liable based on Five Star's negligence, "solely" or otherwise.

¶ 24 Pekin recognizes that this court was faced with similar policy language in *Hallmark Homes*. As that case plays an important role in our analysis, we discuss the relevant aspects in detail. In *Hallmark Homes*, Michael Bremer, a subcontractor's employee, was allegedly injured on a construction site. He brought suit against Hallmark Homes (Hallmark), which was the general contractor, and MC Builders, another entity involved in the project. *Hallmark Homes*, 392 Ill. App. 3d at 590-91. MC Builders had an insurance policy that included Hallmark as an additional insured. A policy provision stated, "Such person or organization 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." *Id*. at 591. Bremer's complaint alleged two counts against Hallmark under two theories of negligence, set out in sections 414 and 343 of the Restatement (Second) of Torts (Restatement). *Id.* at 591. The insurance company sought a declaration that it was not obligated to defend Hallmark in Bremer's suit, but the trial court granted summary judgment for Hallmark. *Id.* at 592.

¶ 25 On appeal, this court quoted section 414 of the Restatement:

> " '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.' " *Id.* at 591. (quoting Restatement (Second) of Torts §414, at 387 (1965)).

We stated that depending on the degree of control the general contractor retains, a section 414 claim may arise though vicarious liability, by which one party is held liable for the negligent acts or omissions of another. *Id.*

¶ 26 We stated that Bremer's complaint asserted both direct and vicarious liability against Hallmark. *Id.* at 591. We quoted the allegation that Hallmark " 'participated in coordinating the work being done and designated various work methods, maintained and checked work progress and participated in [the] scheduling of the work and the inspection of the work.' " *Id.* We stated that the allegation suggested that Hallmark retained control over many of the operative details of its agents and subcontractors' work, which could subject it to vicarious liability. *Id.* We further stated:

> "Hallmark Homes is potentially vicariously liable solely on the basis of the acts or omissions of MC Builders. Inasmuch as Hallmark Homes was the general contractor on the project, with responsibility for overall supervision of the site, under section 414 of the Restatement it is possible that Hallmark Homes could be vicariously liable for the negligence of MC Builders." *Id.* at 595.

¶ 27 We recognized that the underlying complaint alleged that Hallmark itself was negligent, that it did not identify MC Builders as a subcontractor, and that it did not specifically assert that Hallmark's liability rested on MC Builders' negligence. *Id.* at 595. However, we stated that the test for coverage was not whether the complaint directly alleged facts that show that the claim was with the policy's coverage. *Id.* Rather, an insurer owed a duty to defend unless there was no possible coverage arising from the alleged facts and "the terms of the policy clearly preclude coverage under all of the facts consistent with the allegations." *Id.*

¶ 28 The insurer in *Hallmark Homes* pointed out that the policy language at issue was essentially the same as that in *Pekin Insurance Co. v. United Parcel Service, Inc.*, 381 Ill. App. 3d 98 (2008), and *Pekin Insurance Co. v. Beu*, 376 Ill. App. 3d 294 (2007). *Hallmark Homes*, 392 Ill. App. 3d at 596. *United Parcel Service, Inc.* and *Beu* in turn relied on *Village of Hoffman Estates v. Cincinnati Insurance Co.*, 283 Ill. App. 3d 1011 (1996). *Id.* Those cases held that there was no duty to defend where the underlying complaint did not explicitly allege that the additional insured was solely liable for the named insured's acts or omissions. *Id.* In addition to noting that the language in the underlying complaints was different in those three cases, this court stated that the cases applied an unduly narrow reading of the applicable principles, and that the duty to defend does not require that the complaint use language affirmatively bringing the claims within the policy's scope. *Id.* at 596-97. We stated that " '[t]he question of coverage should not hinge on the draftmanship skills or whims of the plaintiff in the underlying action.' " *Id.* (quoting *International Insurance Co. v. Rollprint Packaging Products, Inc.*, 312 Ill. App. 3d 998, 1007 (2000)).

¶ 29 Pekin argues that this case is distinguishable from *Hallmark Homes* because here, the underlying case does not reference Section 414 of the Restatement. Pekin argues that the only allegations against Hawke are for direct liability, and the Penticoffs did not set forth the legal requisites for vicarious liability. To the extent that Pekin focuses on the legal theories pled in the underlying complaint, we note that "[t]he alleged conduct, rather than the manner in which the claim is labeled in the underlying complaint, determines whether the insurer has a duty to defend." *Pekin Insurance Co. v. Precision Dose, Inc.*, 2012 IL App (2d) 110195, ¶ 60.

¶ 30 Pekin further argues that we should adopt the reasoning employed by *Pekin Insurance Company v. Roszak/ADC, LLC*, 402 Ill. App. 3d 1055 (2010), a First District case that criticizes

Hallmark Homes. The underlying suit in *Roszak* involved the employee of a subcontractor of the insured subcontractor. *Id.* The employee's count of negligence alleged that the general contractor:

> " 'individually and through its agents, servants and employees, was present during the course of such erection and construction. [The general contractor] participated in coordinating the work being done and designated various work methods, maintained and check work progress and participated in the scheduling of the work and inspection of the work. In addition thereto, at that time and place, the defendant had the authority to stop the work, refuse the work and materials and order changes in the work, in the event that the work was being performed in a dangerous manner or for any other reason.' " *Id.* at 1057.

¶ 31 The insurer in *Roszak* sought a declaratory judgment that it was not obligated to defend the general contractor as an additional insured on a subcontractor's policy. *Id.* at 1056. As in *Hallmark Homes*, the additional insured endorsement stated, "[s]uch person or organization is an additional insured only with respect to the 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." *Id*. at 1058.

¶ 32 The *Roszak* court relied on *United Parcel Service, Inc.*, and *Beu* in holding that direct allegations of negligence against the additional insured do not fall within coverage that is limited to liability incurred solely as a result of some act or omission of the named insured and not for the additional insured's own independent negligence. *Id.* at 1061. The *Roszak* court acknowledged that *Hallmark Homes* involved a very similar additional insured endorsement. *Id.* at 1066. It stated that we had relied on the allegations in the underlying complaint that Hallmark participated in coordinating the work, designated work methods, maintained and checked work progress, and participated in the scheduling and inspection of work, as "establishing" that the general contractor

had retained control over the operative details of the subcontractor's work. *Id.* at 1066-67. The *Roszak* court stated that we therefore found that the underlying complaint alleged that the general contractor was vicariously liable for the negligence of the subcontractor under section 414 of the Restatement. *Id.* at 1067. The *Roszak* court stated that it disagreed with our interpretation of section 414: "Comment *a* to section 414 indicates a general contractor that retains the power to coordinate the order in which work is done and to stop work that is performed dangerously, as in the complaints in both *Hallmark Homes* and the instant case, does not retain sufficient control so as to be vicariously liable for the subcontractor's negligence." *Id.*

¶ 33 Pekin argues that the underlying complaint against Hawke is virtually identical in every meaningful respect to the complaint in *Roszak*. Pekin argues that while it may not be necessary for the complaint's allegations to explicitly bring the claim within the policy's scope, it is appropriate to find that there is no duty to defend where the facts preclude the claim from being within the policy's scope. Pekin quotes *Village of Hoffman Estates*, where the court stated: "The term 'solely' implies exclusively or entirely. By the express terms of the endorsement, [the named insured's] acts or omissions must be the *sole* ground for alleging liability against the Village for coverage to apply." (Emphasis in original.) *Village of Hoffman Estates*, 283 Ill. App. 3d at 1014. The court concluded that there were no allegations of liability against the additional insured based solely on the named insured's acts, so "the explicit terms of the endorsement [were] not met." *Id.* Pekin argues that determinations of the duty to defend must be based on the actual construction of the underlying complaint, not on a speculative reconstruction of allegations that are conspicuously missing. See *Roszak*, 402 Ill. App. 3d at 1063 ("[W]e must look to what the underlying plaintiff did allege and

ascertain whether those allegations contain facts supporting the elements of a theory of liability that is covered by [the insurer's] policy.").

¶ 34 Hawke points to the following allegations in the underlying complaint: (1) Jon "was a union plumber employed by a sub-contractor of HAWKE known as Five Star Plumbing, and was working on the premises in furtherance of his plumbing work, in an open trench"; (2) it was Hawke's duty "to operate, manage, supervise, coordinate and control the construction site and activities taking place therein, including the trench in which the plaintiff was working in at the time of the occurrence, in a reasonably safe and proper manner for workmen engaged in activities at the site"; (3) Jon "was acting in the course and scope of his employment and was forced to work in, on and around a certain trench on the construction site in progress," which ultimately collapsed; and (4) Hawke was present at the site through "its agents, sub-contractors, servants and/or employees" and "participated in coordinating the work being done and designating various work methods, maintained and checked worker progress, [and] participated in the scheduling of work and the inspection of the work for progress and worker safety."

¶ 35 Hawke argues that the above allegations state that Jon was injured while working within the course and scope of his employment with Hawke's subcontractor Five Star, and that Hawke retained control of its agents and subcontractors' work, which leads to the possibility that Hawke could be found vicariously liable solely based on Five Star's acts or omissions. Hawke maintains that this vicarious liability could arise if it is shown that it did not know about the dangerous trench, or if Five Star was found to be the sole cause of Jon's injuries.

¶ 36 Hawke argues that this court was correct in its analysis of the allegations in *Hallmark Homes*, which it argues are nearly identical to the allegations against it. Hawke acknowledges that *Roszak*

reached the opposite conclusion, but Hawke points out that we are not bound by decisions of other appellate districts. See *American Economy Insurance Co. v. Holabird & Root*, 382 Ill. App. 3d 1017, 1034 (2008). On the same token, we note that we are not bound by the decisions of other appellate panels, regardless of the district. See *O'Casek v. Children's Home & Aid Society*, 229 Ill. 2d 421, 440 (2008).

¶ 37 Hawke further argues that *Roszak* was distinguished by another division of the First District in *Pekin v. Pulte Home Corp.*, 404 Ill. App. 3d 336 (2010). We find that case of limited value to the instant analysis, as it distinguished *Roszak* by concluding that, contrary to Roszak's reasoning, it was not limited to the words of the complaint in determining coverage. *Pulte Home Corp.*, 404 Ill. App. 3d at 341. The court also determined that it did not need to address *Hallmark Homes* because it was resolving the coverage issue based on the terms of the subcontractor agreement in addition to the facts giving rise to the underlying litigation. *Id.* at 349.

¶ 38 As we stated in *Hallmark Homes*, "each coverage case is dependent on its own unique facts, which include the exact terms of the policy and the allegations of the complaint in the underlying case." *Hallmark Homes*, 392 Ill. App. 3d at 596. After carefully considering the additional insured endorsement and the allegations in the Penticoffs' case, we conclude that the trial court correctly granted summary judgment for Hawke.

¶ 39 It is clear that the additional insured endorsement limits coverage to vicarious liability imputed to Hawke solely by the acts or omissions of Five Star. As stated, injured employees of construction subcontractors are barred from suing their employers (*McHugh*, 344 Ill. App. 3d at 963), so they have little reason to directly assert that their injuries arose from the subcontractor's actions. While we will not read into a complaint facts that are not there, the duty to defend arises

if the facts leave open the *possibility* of coverage. *Roszak*, 402 Ill. App. 3d at 1063. That is, the insurer must defend unless the policy "cannot possibly cover the liability arising from the facts alleged." *Illinois Emcasco Insurance Co. v. Northwestern National Casualty Co.*, 337 Ill. App. 3d 356, 361 (2003).

¶ 40 As Hawke points out, the allegations in the underlying complaint state that Jon was doing plumbing work for Five Star, a subcontractor of Hawke, when he was injured; that it was Hawke's duty to "control the construction site and activities taking place therein"; and Hawke was present at the site through "its agents, sub-contractors, servants and/or employees" and "participated in coordinating the work being done and designating various work methods, maintained and checked worker progress, [and] participated in the scheduling of work and the inspection of the work for progress and worker safety."

¶ 41 The underlying case in *Hallmark Homes* had an almost identical allegation regarding "participating in coordinating the work ***," and this court stated that the allegation "suggested" that Hallmark retained control over many of the operative details of its agents and subcontractors' work, which could subject it to vicarious liability. *Hallmark Homes*, 392 Ill. App. 3d at 589. *Roszak* found this reasoning unsound on the basis that comment a to Section 414 of the Restatement indicates that the power to direct the order in which work is done or forbid work from being done in a dangerous manner is not sufficient control for the general contractor to be vicariously liable. *Roszak*, 402 Ill. App. 3d at 1067. However, the allegations here, in *Hallmark Homes,* and in *Roszak* go beyond this and extend to designating work methods. More significantly, the Penticoffs' complaint can be interpreted to further state that Hawke was acting through "its agents [and] subcontractors," which is an even stronger indication of potential vicarious liability based on Five Star's acts and omissions.

Also, "[b]y retaining control over the subcontractor's work, the general contractor may be vicariously liable for the subcontractor's negligence" (*Pestka v. Town of Fort Sheridan Co., LLC.*, 371 Ill. App. 3d 286, 300 (2007)) and here the Penticoffs asserted Hawke's duty to "control the construction site and activities taking place therein." Thus, we agree with the trial court that the underlying complaint raises "not a hypothetical possibility, but the very real possibility that a claim is being made against Hawke in the underlying suit seeking to hold it vicariously liable for the actions of Five Star."

¶ 42 We also agree with *Hallmark Homes* that *United Parcel Service, Inc., Beu*, and *Village of Hoffman Estates* do not reflect the broad reading we must give a complaint in determining whether there is a duty to defend. See *Hallmark Homes*, 392 Ill. App. 3d at 597. Even otherwise, those cases are distinguishable because the underlying complaints did not allege that the general contractors were acting through their subcontractors, as is the situation here.

¶ 43 As we have concluded that Pekin has a duty to defend Hawke based on the allegations of the underlying complaint and the terms of the insurance policy, we do not address the issue of whether we can look to other documents, such as Hawke's third-party complaint, in determining whether a duty to defend exists.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we affirm the judgment of the Winnebago County circuit court.

¶ 46 Affirmed.