2015 IL App (2d) 141166-U
No. 2-14-1166
Order filed September 9, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

SABAS SOTO, as assignee of Country Side Pet Motel, Plaintiff-Appellee, v. COUNTRY MUTUAL INSURANCE COMPANY, Defendant-Appellant, and GAVIN WILSON, Defendant.	)	Appeal from the Circuit Court of De Kalb County. No. 13-LM-78 Honorable William P. Brady, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in concluding that a complaint alleged potential coverage under an existing insurance contract and that defendant breached its duty to defend. We affirm.

¶ 2 This case originates from the death of a dog. In 2012, the Country Side Pet Motel boarded Boris, plaintiff's, Sabas Soto's, pure bred giant schnauzer. While in the Pet Motel's

care, Boris was struck and killed by an automobile. Plaintiff sued the Pet Motel for negligence, alleging that, while he was in its "exclusive care, custody, and control," the Pet Motel failed to exercise reasonable care for Boris's safety, directly resulting in his death. The complaint requested $30,000 in damages (in part based upon the loss of Boris's future "stud services").

¶ 3 The Pet Motel submitted the lawsuit to defendant, Country Mutual Insurance Company, requesting defense and indemnification under an existing policy. On September 11, 2012, defendant wrote to the Pet Motel, denying coverage and declining to hire an attorney to represent it or to pay for any settlement, judgment, or verdict amount. According to the rejection letter, because of a policy exclusion that did not cover "personal property" in the insured's "care, custody, or control," there was no coverage for the alleged negligence under the policy's "Commercial General Liability Coverage." However, according to defendant, the "Building and Personal Property Coverage Form, Coverage Extensions" provided for a "personal property of others" payment to plaintiff in the maximum amount of $2,500.[1]

¶ 4 Consistent with its letter, defendant did not thereafter defend the lawsuit, nor did it file a declaratory action to determine any existing rights or responsibilities under the policy. On November 15, 2012, a consent judgment was entered against the Pet Motel and in plaintiff's favor in the amount of $45,000. In exchange for a limited release, the Pet Motel executed an assignment to plaintiff of all of its rights against defendant.

¶ 5 Accordingly, in the action before us, plaintiff sued defendant, alleging breach of contract by virtue of its failure to defend or indemnify the Pet Motel in the negligence lawsuit.[2] As a

[1] It is not clear from the record whether this amount was ever accepted by plaintiff.

[2] Plaintiff also sued defendant for insurer bad faith (count 2), its agents, Stephen Tallitsch and Gavin Wilson, for broker malpractice (counts 3 and 4), and all defendants for consumer

result, plaintiff alleged, the Pet Motel suffered damages in the amount of $45,000, and it assigned those damages to plaintiff. The parties subsequently filed cross-motions for summary judgment and, based upon the court's August 27, 2014, ruling thereon, submitted an agreed order, which was entered on November 6, 2014. Defendant appeals those rulings, which collectively: (1) found that defendant had a duty to defend the Pet Motel in plaintiff's negligence action; (2) found that it breached its duty to defend and was, therefore, estopped from asserting any policy defenses in the coverage dispute; and (3) entered judgment against defendant and in plaintiff's favor in the amount of $60,810.72.

¶ 6 Defendant appeals. For the following reasons, we affirm.

¶ 7 I. BACKGROUND

¶ 8 To provide context, we note that the issue before us is a narrow one. Specifically, the parties agree that, if the court correctly determined that defendant had a duty to defend plaintiff's lawsuit against the Pet Motel, then it breached that duty, is estopped from raising any further defenses, and is responsible for the $60,810.72 judgment. The parties' agreement on these points stems from case law holding that, "whether an insurer has a duty to defend its insured depends on whether the underlying complaint alleges facts within or *potentially within* coverage of the insurance policy." (Emphasis added.) *State Farm Fire & Casualty Co. v. Hatherley*, 250 Ill. App. 3d 333, 336 (1993). "[A]n insurer may properly refuse to defend its insured if 'it is *clear*

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fraud (count 5). On August 27, 2014, the court granted without prejudice defendants' motion to dismiss counts 3, 4, and 5. A November 6, 2014, court order noted that the court made no findings as to count 2, which was stayed until further order. Further, plaintiff dismissed defendants Tallitsch and Wilson and counts 3, 4, and 5 of the complaint without prejudice. The court entered Rule 304(a) language.

from the face of the underlying complaint that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage.' " (Emphasis in original.) *Id.* (quoting, *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991)). "Where an underlying complaint alleges facts which[,] if true[,] would exempt the insured from coverage under the policy, the insurer has no duty to defend." *Hatherley*, 250 Ill. App. 3d at 336. However:

> "Generally, where a complaint against an insured alleges facts within or *potentially* within the coverage of the insurance policy, and when the insurer takes the position that the policy does not cover the complaint, the insurer *must*: (1) defend the suit under a reservation of rights; or (2) seek a declaratory judgment that there is no coverage. If the insurer fails to take either of these actions, it will be estopped from later raising policy defenses to coverage." (Emphasis added.) *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 19.

¶ 9 Thus, as explained in more detail below, our review here concerns only whether the trial court erred in determining that the negligence complaint stated facts which, if true, brought the case potentially within the policy's coverage and, therefore, that defendant possessed (and, therefore, breached) a duty to defend the Pet Motel. We note that the court did not expressly find coverage existed for the negligence claim—indeed, it *denied* the initial cross-motions for summary judgment. However, the court concluded that *potential* coverage existed and, therefore, that defendant had breached a duty to defend. Nevertheless, in arguing opposite positions on duty to defend, the parties disagree on the available policy coverage. Accordingly, although the policy is approximately 80 pages long, we present below the provisions deemed relevant by the parties, so that we may determine whether the court correctly found the existence

of *potential* coverage and, therefore, a duty to defend. We further note that the following provisions are all part of the same overarching policy, number "AB 2007150 02," issued to the Pet Motel. Finally, defendant explains that the negligence action, a claim filed by a third party against the insured, would theoretically fall under the policy's general liability provisions, which provides "third-party coverage." In contrast, the policy's building and personal property provisions would theoretically provide "first-party coverage," whereby an insured would file a claim for a loss.

¶ 10 A. Policy

¶ 11 1. General Liability (Third-Party Coverage)

¶ 12 The general liability declarations form lists the named insured as the "Country Side Pet Motel Inc." The business description states "DOG KENNEL," and it classifies the business as "KENNELS–BREEDING, BOARDING OR SALES." There is no dispute that the policy was in effect when Boris was killed. The general liability coverage provides a $300,000 limit for "bodily injury and property damage liability."

¶ 13 The general liability terms include a duty to defend. Namely:

> "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and *duty to defend* the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply." (Emphasis added.)

¶ 14 The general liability provisions contain numerous coverage exclusions. Relevant here, coverage is excluded for damage to "personal property in the care, custody, or control of the

insured."

¶ 15 The above exclusion formed the basis of defendant's denial of coverage and its refusal to defend or indemnify the Pet Motel in the negligence action.

¶ 16 2. Building and Personal Property Coverage (First-Party Coverage)

¶ 17 The declarations page for the policy's "commercial property coverage" lists coverage for "building frame" ($120,000 limit) and "business personal property frame" ($20,000 limit).

¶ 18 The "building and personal property coverage form" provides that defendant will pay for direct physical loss of or damage to "covered property," which "means the type of property described in this section, A.1, and limited in A.2, Property Not Covered, *if a Limit of Insurance is shown in the Declarations for that type of property*." (Emphasis added.)

¶ 19 Included in section A.1 as "Covered Property" is:

> "c. Personal Property of Others that is
>
> (1) In your care, custody or control, and
>
> (2) Located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises
>
> However, our payment for loss of or damage to personal property of others will only be for the account of the owner of the property."

¶ 20 In section A.2, the policy next describes "Property Not Covered." There, the policy provides that covered property does *not* include: "Animals, *unless owned by others and boarded by you* ***. (Emphasis added.)"

¶ 21 The policy also contains a "commercial property plus endorsement," which modifies the building and personal property coverage form. The endorsement form lists a $2,500 limit for "personal effects and property of others."

¶ 22 We note that defendant's position is that, because there is no specific limit of insurance shown on the commercial property declarations page for "personal property of others," the Pet Motel did not purchase coverage for that type of property. Thus, according to defendant, in the *entire* policy, the only coverage for injury to a dog boarded by the Pet Motel is for the maximum amount of $2,500, as provided by the building and personal property endorsement.

¶ 23 Finally, the building and property provisions noted that, in the event of a covered loss or damage, "[w]e may elect to defend you against suits arising from claims of owners of property. We will do this at our expense."

¶ 24 Thus, (setting aside what insurance was or was not purchased) we briefly recap the above provisions. First, the general liability provisions *exclude* coverage for "personal property" in the insured's "care, custody, or control." Next, the building and personal property provisions *include* as "covered property" the "property of others" in the insured's "care, custody, or control." Then, (basically using a double negative) the building and personal property provisions do *not exclude* "animals" that are "owned by others and boarded by" the insured. Finally, the building and personal property endorsement *covers* "property of others."

¶ 25 3. Summary Judgment Arguments and Rulings

¶ 26 Defendant moved for summary judgment, arguing that there was no general liability coverage for Boris's death because of the policy's care, custody, or control exclusion. It argued that the only coverage available was under the building and personal property extension provision, in the amount of $2,500.

¶ 27 In its cross-motion for summary judgment and response to defendant's motion, plaintiff asserted that the policy must be read in its entirety and any doubts or ambiguities must be read in favor of coverage. Plaintiff noted that the policy used the terms "personal property" and

"animals" separately, reflecting that they were not intended to mean the same thing for purposes of the policy. Plaintiff argued that specific terms in a contract govern over general terms and that the term "animal" is more specific than "personal property." Plaintiff argued that the policy explicitly provided coverage for animals that are owned by others and boarded by the insured. Plaintiff argued it was absurd to suggest that a liability policy for the insured dog kennel excluded coverage for the entirety of its business operations, as dog kennels and groomers only provide services which involve the care, custody, or control of property of others. Further, the policy did not define "personal property," and the exclusion upon which defendant relied used the term "personal property," *not* "personal property of others" or "animals." Again, plaintiff argued, as the terms "personal property," "personal property of others," and "animals" were used separately throughout the policy, the policy *did* cover animals boarded by the insured, and the exclusion did not state that "animals" were excluded from coverage, plaintiff argued that the policy covered the negligence suit. Plaintiff also argued that defendant breached its duty to defend the insured. Finally, plaintiff argued that the property coverage form lists a coverage limit of $20,000, and that, in deposition testimony, defendant had admitted that animals, as defined by the policy, were not the same as personal property. Accordingly, plaintiff argued, the provision allowing $2,500 did not apply because it was limited to "personal property of others," not animals. Plaintiff also noted that it was absurd to suggest that the insurance policy did not cover the Pet Motel's entire business, *i.e.*, the dogs, and that defendant had admitted in depositions that, in most bailment situations, more than $2,500 in coverage would be warranted.

¶ 28 On August 27, 2014, the trial court announced that it was denying both summary judgment motions. As to defendant's motion, the court stated:

"First off, from my point of view[,] the defendant Country says that the policy when read as a whole anybody can see that there's no coverage, and although I may not agree that it's as clear as [defense counsel] argued, I certainly see his point. However, what is clear to me is there was a claim for a defense raised and I don't think it was a specious claim for defense. I think it was one based on an acceptable reading of the policy, and there was a refusal to provide that defense.

Even if one wants to look at the offer of the $2,500 as providing the upper limits of the defense, I still think there was a reasonable reading of the policy raises the issue of whether those limits were in excess of the $2,500.

So when [defendant] makes the decision not to provide a defense and then makes the other decision not to seek a declaratory judgment to back up their decision, they are putting themselves in a position, I believe, where the case law in Illinois is quite clear and that is they are subject to the equitable estoppel of being prevented from raising policy defenses, and I think that they are estopped from doing it both at trial as well as in the motion for summary judgment and as such I don't see any basis, any reason, any way I can grant that motion for summary judgment because it is based on exceptions pointed out in the policy, some of which may be true, some of which may not be true, but they are estopped from raising those[.]"

¶ 29 In light of the court's ruling, on October 8, 2014, plaintiff filed another summary judgment motion, arguing that the above ruling was outcome determinative as to the breach of contract count (because defendant could not raise any defenses thereto). Accordingly, on November 6, 2014, the court entered an agreed order signed by the parties. The order first noted that the court had found that defendant had a duty to defend, breached that duty, and was, thus,

estopped from asserting policy defenses in the coverage dispute. As such, the parties agreed that, "should the Court's August 27, 2014 order be affirmed on appeal, that the contractual damages are not in dispute as to Count I only." In relevant part, the court order entered summary judgment in plaintiff's favor on count I and a total judgment amount of $60,810.72.[3]

¶ 30 II. ANALYSIS

¶ 31 Defendant argues on appeal that the trial court erred in finding a duty to defend a tort lawsuit seeking damages where the lawsuit alleged that the damaged property, a dog, was in the care, custody, and control of the insured, falling squarely within the general liability's policy exclusion. For the following reasons, we disagree and affirm.

¶ 32 We apply *de novo* review to both the court's summary judgment ruling and to the extent we construct the terms of the insurance policy. See *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010) (construction of insurance policy); *Illinois Tool Works, Inc. v. Travelers Casualty and Surety Co.*, 2015 IL App (1st) 132350, ¶ 8 (summary judgment).

¶ 33 As previously noted, the rule of estoppel provides that an insurer which takes the position that "a complaint potentially alleging coverage is not covered under a policy that includes a duty to defend may not simply refuse to defend the insured. Rather, the insurer has two options: (1) defend the suit under a reservation of rights or (2) seek a declaratory judgment that there is no coverage." *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 150

[3] The total consisted of: (1) indemnification of the November 15, 2012, judgment in the amount of $45,000; (2) reimbursement of a settlement paid on November 15, 2012, by the Pet Motel to plaintiff in the amount of $5,000; (3) reimbursement of attorney fees and costs paid by the Pet Motel in the amount of $1,325; (4) interest in the amount of $9,047,72l; and (5) costs in the amount of $438.

(1999). The estoppel doctrine only applies where an insurer breached its duty to defend: application of the doctrine is inappropriate where there was no duty to defend, such as "when the policy and the complaint are compared, there clearly was no coverage or potential for coverage." *Id.* at 151. "Once the insurer breaches its duty to defend, however, the estoppel doctrine has broad application and operates to bar the insurer from raising policy defenses to coverage, *even those defenses that may have been successful* had the insurer not breached its duty to defend." (Emphasis added.) *Id.* at 151-52. In that case, the insurer is liable for any judgment against the insured and the costs of that suit. *Murphy v. Urso*, 88 Ill. 2d 444, 451 (1981).

¶ 34 Accordingly, to determine whether there is a duty to defend, we must compare the allegations in the underlying complaint with the insurance policy to assess whether the complaint alleges facts that "fall within, or potentially within, the policy's coverage." *Pekin*, 273 Ill. 2d at 455. We will not interpret an insurance policy in such a way that any of its terms are rendered meaningless or superfluous, and the policy must be read and interpreted as a whole, not in isolated parts, to determine whether an ambiguity exists. *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 371 (2007); *Cincinnati Insurance Co. v. Gateway Construction Co.*, 372 Ill. App. 3d 148, 152 (2007). Further, when reviewing the policy, we are mindful that:

> "A court's primary objective in construing the language of the policy is to ascertain and give effect to the intentions of the parties as expressed in their agreement. [Citation.] If the terms of the policy are clear and unambiguous, they must be given their plain and ordinary meaning. [Citation.] Conversely, if the terms of the policy are susceptible to more than one meaning, they are considered ambiguous and will be construed strictly against the insurer who drafted the policy. [Citation.] In addition, provisions that limit or exclude coverage will be interpreted liberally in favor of the

> insured and against the insurer. [Citation.] A court must construe the policy as a whole and take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract. [Citation.]' " *Pekin*, 273 Ill. 2d at 455-56 (quoting *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997)).

¶ 35 The duty-to-defend threshold is low: the complaint need present only the possibility, not probability, of recovery under the policy. *Bituminous Casualty Corp. v. Gust K. Newberg Construction Co.*, 218 Ill. App. 3d 956, 960 (1991) ("the threshold requirements that the complaint must satisfy to present a claim of potential coverage is minimal"). Further, "[i]n a court's determination of the duty to defend, the underlying complaint is to be liberally construed in favor of the insured, and doubts and ambiguities are to be construed in favor of the insured"; an exclusionary clause is subject to the same liberal standard. *Lyons v. State Farm Fire and Casualty Co.*, 349 Ill. App. 3d 404, 407 (2004). Finally, "[a]n insurer may not justifiably refuse to defend an action against its insured unless it is *clear* from the face of the underlying complaints that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage." (Emphasis in original.) *Wilkin*, 144 Ill. 2d at 73.

¶ 36 We note first that plaintiff argues that defendant has forfeited its opportunity to challenge the trial court's ruling that it breached a duty to defend because potential coverage existed under the policy. Plaintiff asserts that defendant's appellate argument focuses only on whether there exists actual coverage under the policy, not on whether *potential* coverage existed. We disagree. Defendant *does* challenge the court's ruling that it breached a duty to defend because there was potential coverage under the policy. Admittedly, the argument in that regard is somewhat circular: defendant essentially argues that the complaint allegations did not potentially fall within coverage of the policy because there was no coverage under the policy. In other words,

defendant appears to acknowledge that the trial court did not determine that the policy actually covered the complaint allegations. However, it argues that the trial court erred in finding that the complaint allegations were potentially covered by the policy and, therefore, a duty to defend existed, because, due to the policy's care, custody, and control exclusion, no coverage existed. As such, we will not find defendant's arguments forfeited.

¶ 37 Nevertheless, we disagree with defendant that it was "clear" that no *potential* coverage existed for plaintiff's negligence claim concerning the death of a dog at the insured's dog kennel. Defendant posits that, where the complaint alleged negligence based on the loss of property that was in the care, custody, and control of the insured, and the policy excludes coverage for property in the care, custody, and control of the insured, it could not be more clear that there is no coverage and that no duty to defend was triggered. However, defendant's argument focuses on the clarity of the exclusion in isolation, without reference to the internal inconsistencies and anomalies in the policy as a whole. It does not consider the purpose for the policy or the nature of the risks involved. It does not consider a viewpoint which reviews the complaint and the *entire* policy liberally and from the position of erring on the side of *coverage*. Again, we must compare the complaint with the policy, liberally construing the policy as a whole and taking into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract. *Pekin*, 273 Ill. 2d at 455-56.

¶ 38 In doing so here, we consider that defendant issued a liability policy to a dog kennel, a business which boards and cares for animals belonging to others. The complaint against the dog kennel alleged negligence due to the death of an animal boarded there. Defendant claims that the general liability policy does not cover dogs boarded by the kennel because dogs are personal property, and the policy excludes coverage for "personal property" in the Pet Motel's care,

custody, or control. However, the term "personal property," is not defined within the policy. Further, the general liability provision does not *specifically* exclude "animals" or "personal property of others," despite the fact that those latter terms are used elsewhere throughout the policy. Indeed, when we look to the policy in its entirety, we see that it contemplates *coverage* for "animals" that are "owned by others" and "boarded by" the insured, as well as coverage for "property of others." Generally, more specific provisions within a contract govern over more general ones, and we presume that when parties to a contract use different terms throughout the contract, those terms are not synonymous. See, *e.g.*, *Skidmore v. Throgmorton*, 323 Ill. App. 3d 417, 426 (2001) ("When a contract contains both specific and general provisions relating to the same subject, the specific provision controls"); *Cowens v. Illinois Insurance Guaranty Fund*, 249 Ill. App. 3d 214, 218-19 (1993) (finding parties to an insurance contract did not intend for the terms "accident" and "loss," both of which were undefined, to be synonymous; the policy used both terms simultaneously and "[h]ad the parties intended 'loss' to mean 'accident' in the phrase in question, they merely would have used the term 'accident.'").

¶ 39 Defendant asserts that the subset of building and personal property coverage concerning animals boarded by the insured *does not apply* because the Pet Motel did not actually purchase that coverage. It again notes that the business and personal property provisions state that covered property is that described and which had a limitations amount listed on the declarations page. Specifically, covered property "means the type of property described in this section, A.1, and limited in A.2, Property Not Covered, if a Limit of Insurance is shown in the Declarations for that type of property." Here, defendant argues, the declarations page and an insurance application form reflect that the insured did not purchase coverage for property of others under

the building and personal property first-party provisions. As such, defendant essentially contends that the language and terms of those policy provisions are irrelevant.

¶ 40 In our view, however, the question is not whether the Pet Motel was *actually* covered under those first-party coverage provisions. At risk of beating a dead horse, we note that we are not determining the ultimate question of coverage. Instead, we are asked to consider whether, when the complaint was presented, there was *clearly* no *potential* for coverage under the liability policy. The question for us is whether, even if the subset of business and personal property coverage was not actually purchased (a fact that, if true, requires significant review to establish and is, therefore, arguably not obvious or clear), the *language* used in those provisions is rendered irrelevant to interpreting the *general liability* provisions. In other words, in our view, the relevance of those provisions, even if they concern a subset of coverage not actually purchased, concerns their impact on our interpretation of the language chosen for the general liability policy exclusion. Given that these provisions are all part of the same overarching policy issued to the insured, insurance policies should be read as a whole, in favor of the insured, giving meaning to every phrase, and assuming the parties' use of different phrases was intentional, we think the answer is no, the language is not irrelevant. The varying terms used throughout the policy *collectively* raise uncertainties as to whether potential coverage for the negligence claim existed, given that language used in one portion of the policy (again, issued to insure a dog kennel), explicitly contemplates coverage for "animals" that are owned by others and are "boarded by" the kennel, and the exclusion upon which defendant relies excludes broadly only "personal property," not specifically "animals," or "personal property of others." Accordingly, while it very well might be that the policy does *not*, ultimately, cover the claim, the threshold for the complaint to present a claim of *potential* coverage is low. There exist sufficient bases here to

find unclear the existence of potential coverage.

¶ 41 Although not precedential, a discussion in the case *Hugo Boss Fashions v. Federal Insurance Co.*, 252 F.3d 608, 620 (2nd Cir. 2001) was cited as persuasive by the court in *Illinois Tool Works*, 2015 IL App (1st) 132350, ¶ 28, and we find it instructive here. In *Hugo Boss*, the court explained that there are at least three types of uncertainties in underlying claims that can give rise to a duty to defend: (1) factual uncertainty, such as whether the injury occurred in a time, place, or manner covered by the policy; (2) legal uncertainty, such as whether caselaw governing the insurance policy will be read to impose coverage in a given situation; and (3) whether the terms of the insurance contract will be deemed to give rise to an ambiguity that must be read against the insurer. *Hugo Boss*, 252 F.3d at 620. "Each of these uncertainties will ultimately be resolved by courts or juries—and often in favor of the insurer, thereby precluding coverage and the duty to indemnify. But until they are, the insurer cannot avoid its duty to defend." *Id.* The court illustrated that where, for example, a complaint alleges an intentional tort, but the insurance contract provides coverage only for harms caused by negligence, there would be no doubt that there is clearly no duty to defend. *Id.* at 621. In contrast, where, for example, an insurance contract disclaims coverage for harms caused before "sunset," but the term "sunset" is not defined by the policy, it may be impossible to determine coverage, even if the complaint states the exact time of day at which an injury occurred; therefore, to protect itself from having to defend such a claim for too long, an insurance company in such a scenario could seek a declaratory judgment with respect to the relevant policy exclusion. *Id.* at 622. The court noted, "such suits are commonplace." *Id.*

¶ 42 Here, this is not a case where the claimant is not an insured, where the event occurred outside of the coverage term, or where the policy does not cover negligence claims. As such,

this case can easily be contrasted from the example proffered by the court in *Hugo Boss* or other cases where it was *clear* that there was no possibility of coverage. See, *e.g.*, *Ismie Mutual Insurance Co. v. Michaelis Jackson & Associates, LLC*, 397 Ill. App. 3d 964 (2009) (clear no possibility of coverage or duty to defend where the lawsuit against the insured concerned Medicare fraud, and the policy was one for personal injury); see also, *Secura Insurace Co. v. Plumb*, 2014 WL 4417356 (C.D. Ill.) (clear no possibility of coverage or duty to defend where the alleged injury occurred outside the coverage period). Rather, this case involves a policy that: (1) covers negligence and property damage, but excludes from coverage "personal property" in the "care, custody, or control of the insured"; (2) does not define "personal property"; yet (3) contemplates coverage (whether or not actually purchased) for "personal property of others" and "animals" belonging to others and "boarded by" the insured. In our view, these circumstances are similar to the "sunset" example proffered by the court in *Hugo Boss* and created uncertainties triggering a duty to defend.

¶ 43 Reading both the complaint and entire policy liberally in favor of the insured, we conclude that it was not "clear" from the face of the complaint there was no *potential* coverage such that defendant was justified in doing nothing. We agree with the trial court that defendant breached a duty to defend because, considering the policy as a whole, the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract, the negligence complaint *potentially* fell within the policy's coverage and, therefore, the duty to defend that was specified within the policy was triggered. Defendant's position requires the reconciliation and cross-referencing of several seemingly contradictory provisions. In our view, if a coverage dispute cannot be resolved short of interpretation akin to that which would occur in a declaratory judgment action, the matter likely reflects *potential* coverage such that an insurer

must take action to either defend under a reservation of rights or seek declaratory relief. Defendant, however, unilaterally determined that there was no possibility of coverage for the damages alleged by the negligence suit and, therefore, it did nothing. It did not defend the Pet Motel under a reservation of rights. It did not commence a declaratory action to determine the rights of the parties. Defendant's unilateral decision and lack of action was simply a calculated gamble; however, under these circumstances, we conclude that, even if there existed an exclusion that defendant determined barred coverage, it improvidently chose to sit back and do nothing. We agree with the sentiment expressed by the court in *Shell Oil Co. v. AC & S, Inc.*, 271 Ill. App. 3d 898, 903 (1995), where it noted that, where there was a serious dispute between the insured and insurer regarding whether the claim might possibly fall within policy coverage and give rise to a duty to defend, the insurer, if it "believed it had a valid case of noncoverage, [ ] should have taken appropriate action [*i.e.*, seek a declaratory judgment as to its rights and obligations before or pending trial or defend the insured under as reservation of rights]." See also, *West American Insurance Co. v. J.R. Construction Co.*, 334 Ill. App. 3d 75, 86 (2002) (insurance company claimed no duty to defend based upon a blanket endorsement that it claimed excluded the construction company as a named insured; summary judgment granted in the insured-construction company's favor: "*even if the exclusions* under the blanket endorsement *applied*, we would still conclude, under these facts, that [the insurance company] is estopped from raising these policy defenses to coverage as a matter of law" because the allegations were *potentially* within the policy's coverage, and the company waited 21.5 months from the time the defense was tendered until it filed its declaratory judgment action." (Emphasis added.)); *Korte Construction Co. v. American States Insurance*, 322 Ill. App. 3d 45, 457-58 (2001) (insurer was estopped from raising noncoverage as a defense: "when an insured tenders to an insurer the

defense of the underlying cause, the insurer may not simply refuse to participate in the litigation of the underlying cause and wait for the insured to institute litigation against the insurer to determine the insurer's respective rights and duties.").

¶ 44 As the complaint alleged a cause of action potentially covered by the policy, and as defendant did not defend under a reservation of rights or file a declaratory action to determine its rights, it is estopped from asserting policy defenses, even those that might have been successful, and it is liable for the judgment.

¶ 45 III. CONCLUSION

¶ 46 For the foregoing reasons, we affirm the judgment of the circuit court of De Kalb County.

¶ 47 Affirmed.