2016 IL App (1st) 142380-U

THIRD DIVISION
January 20, 2016

No. 1-14-2380

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ACUITY, Plaintiff-Appellee, v. SOUTHWEST SPRING, INC., JAMES G. CRUTCHER, AUTO-OWNERS INSURANCE COMPANY, Defendants-Appellants, and SKYLINE DISPOSAL COMPANY, ROBERT BLAKE, and SHARON BLAKE, Defendants. AUTO-OWNERS INSURANCE COMPANY, SOUTHWEST SPRINGS, INC., and JAMES G. CRUTCHER, Counter-Plaintiffs-Appellants, v. ACUITY, Counter-Defendant-Appellee,	Appeal from the Circuit Court of Cook County, Illinois. No. 09CH51545 The Honorable David B. Atkins, Judge Presiding.

and)
)
SKYLINE DISPOSAL COMPANY, ROBERT BLAKE,)
and SHARON BLAKE,)
)
)
Counter-Defendants.)

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concur in the judgment.

ORDER

¶ 1 *Held: Where insurer accepted the defense of an underlying lawsuit with no reservation of rights and then actively worked on defense for over three years, during which time it reviewed coverage and still did not notify second insurer that it was considering seeking its involvement, yet tendered the defense to second insurer on the eve of trial, insurer waived its right to second insurer's contribution. Circuit court affirmed.*

¶ 2 This is an insurance coverage action arising from an automobile collision that led to an underlying tort action. Defendants-Appellants Southwest Spring, Inc. (Southwest), James G. Crutcher (Crutcher), and Auto-Owners Insurance Company (Auto-Owners) appeal from a partial grant of summary judgment wherein the circuit court agreed Plaintiff-Appellee insurer Acuity breached its duty to defend Crutcher, but that it had no duty to defend Southwest because Southwest was not an insured on the Acuity policy, and held that Auto-Owners had waived its right to recover from Acuity in equitable subrogation and contribution. In this cause, we are asked to determine whether Acuity had an obligation to its insureds Southwest

Spring and James Crutcher, who are also insureds on Auto-Owners policies, and whether Acuity breached that obligation. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 This case stems from a vehicular collision that occurred on May 26, 2006. Because there are a large number of parties and pertinent relationships involved here, we first describe the parties and their respective relationships. Southwest is an automotive parts repairer and rebuilder. Crutcher was Southwest's employee. He was a mechanic who was driving a garbage truck owned by defendant Skyline Disposal Company, Inc. (Skyline). Skyline is a waste disposal company. It was also a "long-standing" Southwest customer that brought its vehicles to Southwest for servicing several times per year.

¶ 5 Auto-Owners is an insurance company. It issued insurance policies to Southwest for garage liability, commercial general liability, and umbrella coverage. Antoinette Nastali is the owner and chief operating officer of Southwest, and had sole responsibility for Southwest's insurance decisions. Acuity is also an insurance company. It issued a commercial auto and commercial umbrella policy to Skyline.

¶ 6 The Acuity policy identified Skyline Disposal as the named insured. It provided that the word "you" referred to the named insured. The policy set forth, in pertinent part, the following:

> "SECTION II—LIABILTY COVERAGE
>
> A. Coverage
>
> We will pay all sums an insured legally must pay as damages because of bodily injury . . . to which this insurance applies, caused by an accident and resulting from the . . . use of a covered auto

* * *

1. Who is an Insured:

The following are insureds:

* * *

(b) Anyone else while using with your permission a covered auto you own, hire or borrow [. . .]"[1]

* * *

(c) Anyone liable for the conduct of an *insured* described above but only to the extent of that liability."

¶ 7 On the day of the collision, Skyline's garbage truck was at Southwest for servicing. Crutcher was working that day. He backed Skyline's truck out of Southwest's garage and into the nearby road. When he did so, the truck hit a vehicle occupied by Robert Blake, injuring Blake. Southwest notified its insurer, Auto-Owners, of the accident that same day. Auto-Owners field claims adjuster Sherese Nubin was assigned to handle the claim.

¶ 8 In June 2006, Blake and his wife, Sharon Blake (the Blakes) filed a lawsuit (the Blake lawsuit) against Crutcher, Southwest, and Skyline alleging negligence and seeking compensation for injuries sustained in the collision. Specifically, the Blakes alleged that Crutcher, acting as an agent of either Skyline or Southwest, caused the accident through his

[1] Although this section, A(1)(b), includes an exception for: "(3) Someone using a covered auto while he or she is working in a business of selling, servicing, repairing, parking or storing autos unless the business is yours," appellants point out that an "Illinois Changes" endorsement to the policy removed that exception. That endorsement provides, in relevant part:

"1. CHANGES IN LIABILITY COVERAGE

a. Paragraph 1(b)(3) of the Who Is an Insured provision in the Business Auto, Motor Carrier and Truckers Coverage Forms . . . do[es] not apply."

negligent driving. The Blakes' complaint also alleged that Southwest was liable for poor safety practices on its premises.

¶ 9 Nastali testified at deposition that she expected the Auto-Owners garage liability policy would cover an accident in which a Southwest employee was operating a customer's vehicle as part of service provided by Southwest. During the course of litigating the underlying Blake lawsuit, Nastali learned that Skyline was named a defendant along with Southwest and Crutcher. She believed her garage liability insurance would cover her company, her employee, and her customers. It was desirable to her from a business standpoint that the three work together as a unit to defend against the Blake lawsuit. Nastali made a business decision that Southwest would pay for the physical repair of the damaged Skyline truck.

¶ 10 At her deposition, Auto-Owners field claims adjuster Nubin testified that Auto-Owners received notice of the Blake's lawsuit in July 2006, and she assigned Auto-Owners' 'panel counsel' to defend Southwest, Crutcher, and Skyline. Panel counsel are attorneys or law firms selected by Auto-Owners to defend cases that do not involve a reservation of rights. Nubin admitted Auto-Owners did not reserve its rights.

¶ 11 Nubin also testified that, by September 2006, Auto-Owners was aware that Acuity had issued an insurance policy to kyline. Subsequently, there were discussions between Acuity and Auto-Owners regarding the coverage and defense of Skyline. Nubin agreed that, by September 22, 2006, "there was already an agreement between Acuity and Auto-Owners that all of the defense obligations under the Skyline policy from Acuity are going to get transferred over to Auto-Owners, and Auto-Owners is going to go ahead and defend these defendants without reservation of rights against the Blake lawsuit." Nubin testified that, as

the Auto-Owners representative for the file, she informed Acuity that Auto-Owners was accepting the tender, that is, "accepting all of Acuity's defense and indemnity obligations." She testified she did not inform Acuity that Auto-Owners was reserving any rights to later seek to recover from Acuity, nor did she inform panel counsel or any other attorneys paid by Auto-Owners to do so.

¶ 12 Nubin specifically agreed that her expectation was "if there was ever going to have to be an indemnity payment made on the Blake lawsuit, it would come from the Auto-Owners policy, without Acuity's involvement," and that her expectation, "through [her] agreement with Acuity, was that if there needs to be an indemnity payment for Skyline Disposal, Southwest Spring and/or James Crutcher to the Blakes, either in settlement or judgment, that Skyline – strike that – Southwest Spring's policy with Auto-Owners would answer to that, paying its primary layers [of coverage] and then going directly into its excess layers, up to the $3 million available[.]" To that end, in October 2006, Nubin directed Auto-Owners' panel counsel to defend Skyline, Southwest Spring, and Crutcher "fully and completely under the Auto-Owners policy, without reservation of rights and without any involvement of Acuity[.]"

¶ 13 Over the next few years, the Blake lawsuit proceeded through litigation, defended by Auto-Owners panel counsel. During this time, Nubin was promoted to claims manager at Auto-Owners Insurance. Auto-Owners then assigned claims adjuster Chad McGuire to assume direct file-handling responsibilities for the Blake lawsuit. Thereafter, Nubin, as manager, reviewed the file every six months. Nubin never determined the Blake case would need a subrogated recovery of defense or indemnity costs expended.

¶ 14 McGuire testified at his deposition that, after Nubin was promoted to manager, he took over responsibility of the Blake lawsuit file. He confirmed that Auto-Owners panel counsel fully controlled the defense of Southwest Spring, Crutcher, and Skyline Disposal in the Blake litigation.[2] McGuire received a copy of the Acuity policy around December 2007, which he forwarded to the Auto-Owners' home office. Despite receipt of the Acuity policy, Auto-Owners took no action to place Acuity on notice that it intended to seek contribution of any kind.

¶ 15 McGuire confirmed that, by May 2009, Auto-Owners was "at least paying two different panel counsel law firms for their coverage analysis and research as to how the Blake lawsuit might affect Skyline's policy and the loss ratio for Skyline itself." In May 2009, Auto-Owners panel counsel analyzed whether Acuity should provide coverage for all three defendants. At this time, McGuire's "working assumption" was that Auto-Owners policy would primarily pay for the loss, and Auto-Owners would directly access its excess policy to pay any indemnity over primary limits. At this time, no reservation, conflict, or excess letters were issued to place Acuity on notice that Auto-Owners would potentially expect contribution.

¶ 16 In July 2009, the Blake lawsuit was officially set for trial, to begin January 21, 2010. In October 2009, Auto-Owners again had its panel counsel analyze whether Acuity's policy was primary. Also in October 2009, Auto-Owners panel counsel conferred with the Blakes' counsel.

[2] Southwest Spring and Crutcher were represented by a separate law firm than was Skyline Disposal, but both firms were assigned by Auto-Owners Insurance.

¶ 17 McGuire confirmed that he, Auto-Owners, and panel counsel "decided to issue a targeted tender letter to Acuity for the defense and indemnity of Southwest Spring" in November 2009.

¶ 18 Southwest owner Nastali testified that neither Auto-Owners nor its panel counsel ever informed her what a "targeted tender" involved, or what potential risks and benefits could arise from such a tender. Specifically, Nastali confirmed she was never informed that, by making a targeted tender of the "defense of Southwest Spring to Acuity within about two months of the trial date, would mean that [Southwest] would be turning off or deactivating the millions of dollars of protection that [it] had with Auto-Owners" or that there "was a risk that [Southwest Springs was] not going to be defended by attorneys trusted by Auto-Owners any longer and that [Southwest] might be putting the fate of [the] company in the hands of Acuity." Nastali did not receive notice that making a targeted tender to Acuity could mean deactivating the Auto-Owners insurance policy or the potential of Acuity assigning new defense counsel. Nor did Auto-Owners inform Nastali that there was a potential conflict of interest and Southwest might want to talk to outside counsel "whose loyalty was solely to [Southwest] as a business." Nastali testified that, when she signed the proposed tender letter, she did so not knowing what it was, but only at the direction of Auto-Owners' panel counsel. Nastali complied because she thought the insurance company was "working for our best interest."

¶ 19 In an undated letter that Acuity received on November 18, 2009, Southwest tendered its defense to Acuity. This was two months before the cause was scheduled to go to trial, and three and one-half years after the accident itself. After describing the automobile collision which occurred on May 26, 2006, the letter stated in part:

> "Southwest Spring selectively tenders its defense and indemnity of [the Blake lawsuit] to Acuity under both the commercial auto and commercial umbrella policies. As you may know, trial of the captioned case is scheduled for January 21, 2010. Consequently, Acuity's prompt attention and response to Southwest Spring's tender is requested."

¶ 20 Acuity rejected the tender by letter on December 22, 2009, noting:

> "This is a response to your undated letter tendering the defense and indemnification of Southwest Spring relative to [the Blake lawsuit]. This letter was received by ACUITY on November 18, 2009. No prior communications of any kind seeking to tender the defense of Southwest Spring to Acuity had been made prior to that date."

Acuity claimed: Southwest Spring was not an insured because the Acuity policy "Who is an Insured" section pertained only to natural persons and not to corporate entities; Southwest Spring failed to make a timely formal tender of its defense, as the tender was made "on the eve of trial after relevant parties understood and in effect agreed that Acuity would not be involved in defense or indemnification of any defendants in the underlying litigation"; Southwest Spring breached the policy's notice and cooperation provisions by failing to promptly forward lawsuit papers, failing to give notice to seek intent to seek coverage as soon as practicable, and failing to cooperate in Acuity's investigation of the claims made against Southwest Spring; and there was inadequate tender where Acuity's duties under the policy were not properly triggered and/or conditions precedent to coverage were breached.

¶ 21 Eventually, Skyline was dismissed from the underlying action. Auto-Owners settled the remaining claims against Southwest and Crutcher for $2.5 million, exhausting the $1

million limit of its garage liability policy and paying an additional $1.5 million under its commercial liability policy.

¶ 22 Southwest, Crutcher, and Auto-Owners jointly filed a counterclaim seeking declaratory judgment that Southwest and Crutcher were insureds on the Acuity policy issued to Skyline, and Acuity had a duty to defend them in the underlying action

¶ 23 Acuity filed a motion for summary judgment, arguing that Auto-Owners had no right to contribution from Acuity for Auto-Owners' settlement payment, or reimbursement for the defense costs incurred, because the tender was made shortly before a scheduled trial date and was, therefore, untimely; and Auto-Owners waived its right to recover from Acuity by defending the underlying action without reserving those rights.

¶ 24 Southwest Spring, Crutcher, and Auto-Owners[3] filed a cross-motion for summary judgment, arguing that Acuity's policy provided primary liability coverage to Southwest and Crutcher as omnibus additional insureds, and that no tender was necessary to trigger Acuity's obligations to them because Acuity had actual notice of the claim against them when it learned of the underlying complaint against Skyline, including the allegations that they were using a vehicle owned by Acuity's named insured, Skyline. They maintained that Southwest had properly target-tendered its defense to Acuity under both its commercial auto and commercial umbrella coverage, effectively deselecting the Auto-Owners policies issued to Southwest by requesting defense and indemnity from Acuity alone. They further argued that Acuity had breached its duty to defend Southwest and Crutcher, and therefore should be estopped from asserting policy defenses to coverage.

[3] This appeal is limited to the dispute between Acuity and Auto-Owners Insurance.

¶ 25 In a memorandum opinion, the circuit granted and denied various aspects of the two motions. In pertinent part, the court found that: Southwest's tender letter to Acuity was invalid and unenforceable; Southwest was not an insured under the Acuity policy; Acuity did not have a duty to defend Southwest in the underlying Blake lawsuit; Auto-Owners and Acuity both provided concurrent primary coverage, such that they covered the same risk, making equitable subrogation unavailable; and Auto-Owners waived its right to contribution from Acuity by providing a defense for their mutual insureds for two and a half years without seeking involvement from Acuity. The court held: "Therefore, normally applicable claims for equitable contribution or subrogation are rendered null and Auto-Owners may not otherwise seek contribution from Acuity."

¶ 26 II. ANALYSIS

¶ 27 On appeal, Auto-Owners first contends the circuit court erred in determining that Acuity had no duty to defend Southwest. Specifically, Auto-Owners argues that the circuit court erred because: (1) Acuity had actual notice of a claim against Southwest as an omnibus insured; and (2) Acuity breached its duty to defend Southwest. Auto-Owners also contends that, even if Acuity were not estopped from raising its coverage defenses, Acuity's coverage defenses would have no merit. Acuity responds, in part, that the targeted tender was, in fact, invalid because Nastali did not desire to tender the defense, did not understand what she was signing, and merely signed the tender letter because Auto-Owners' panel counsel instructed her to do so. Acuity also argues, in part, that Auto-Owners waived any right to seek contribution from Acuity by failing to reserve its rights and waiting too long to tender the defense, and Acuity did not breach its duty to defend because its duty was never triggered by a valid tender.

¶ 28 While the parties present us with these myriad issues on appeal, the primary issue here is actually whether Auto-Owners has a right to equitable recovery from Acuity. We find that it does not, and affirm the ruling of the circuit court.

¶ 29 Summary judgment is proper when the pleadings, affidavits, depositions and admissions of record, construed strictly against the moving party, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001). This relief is an appropriate tool to employ in the expeditious disposition of a lawsuit in which " 'the right of the moving party is clear and free from doubt.' " *Morris*, 197 Ill. 2d at 35 (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). "[T]he construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court and appropriate subjects for disposition by summary judgment." *Konami (America), Inc. v. Hartford Insurance Co. of Illinois*, 326 Ill. App. 3d 874, 877 (2002).

¶ 30 Where cross-motions for summary judgment are filed in an insurance case, the parties acknowledge that no material questions of fact exist and only the issue of law regarding the construction of an insurance policy is present. *American Family Mutual Insurance Co. v. Fisher Development, Inc.*, 391 Ill. App. 3d 521, 525 (2009) (citing *Liberty Mutual Fire Insurance Co. v. St. Paul Fire & Marine Insurance Co.*, 363 Ill. App. 3d 335, 338-39 (2005). We review the circuit court's decision to grant or deny such a motion for summary judgment *de novo* (*Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007), and we will only disturb the decision of the trial court where we find that a genuine issue of material fact exists (*Addison v. Whittenberg*, 124 Ill. 2d 287, 294 (1988)).

¶ 31 "An insurance policy is a contract, and the general rules governing the interpretation of other types of contracts also govern the interpretation of insurance policies." *Hobbs v. Hartford Ins. Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005). "In construing an insurance policy, the primary function of the court is to ascertain and enforce the intentions of the parties as expressed in the agreement. [Citation.] To ascertain the intent of the parties and the meaning of the words used in the insurance policy, the court must construe the policy as a whole, taking into account the type of insurance for which the parties have contracted, the risks undertaken and purchased, the subject matter that is insured and the purposes of the entire contract. [Citation.] If the words in the policy are plain and unambiguous, the court will afford them their plain, ordinary meaning and will apply them as written." *Crum & Forster Managers Corporation v. Resolution Trust Corporation*, 156 Ill. 2d 384, 391 (1993). If the insurer relies on an exclusionary provision, it must be "clear and free from doubt" that the policy's exclusion prevents coverage. *Country Mutual Insurance Company v. Olsak*, 391 Ill. App. 3d 295, 305 (2009). An omnibus clause is a "provision in an automobile insurance policy extending liability coverage to persons who use the named insured's vehicle with his or her permission." *State Farm Mutual Automobile Insurance Co. v. Universal Underwriters Group*, 182 Ill. 2d 240, 243-44 (1998).

¶ 32 When multiple insurance policies are available to the insured, that insured has the paramount right to choose or knowingly forego an insurer's participation in a claim. *John Burns Construction Co. v. Indiana Insurance Co.*, 189 Ill. 2d 570, 574-76 (2000) (insured general contractor had the right to select a single carrier to provide exclusive coverage for a loss); *American National Fire Insurance Co. v. National Union Fire Insurance Co. of Pittsburgh, PA*, 343 Ill. App. 3d 93, 101 (2003) (general contractor had the right to choose

between three insurers to defend and indemnify it where the general contractor was the named insured on its own policy and the additional insured on two subcontractors' policies). The insured may choose to forego an insurer's assistance for various reasons, such as the insured's fear that premiums would be increased or the policy cancelled in the future, and the insured's ability to forego a particular insurer's assistance should be protected. *Cincinnati Cos. v. West American Insurance Co.*, 183 Ill. 2d 317, 326 (1998).

¶ 33 Here, Auto-Owners alone paid the defense costs in the Blake lawsuit, as well as the settlement amount, in the underlying case. Auto-Owners then brought an action for contribution against Acuity seeking to recover a portion of these costs. The issue presented here, then, is whether Acuity was liable to Auto-Owners such that it must contribute to the cost of the defense and settlement of the underlying lawsuit. " 'In insurance law, contribution is "an equitable principle arising among coinsurers which permits one who has paid the entire loss to receive reimbursement from the other insurer liable for the loss." ' " *Cincinnati Companies*, 183 Ill. 2d at 322 (quoting *Aetna Casualty & Surety Co. v. James J. Benes & Associates, Inc.*, 229 Ill. App. 3d 413, 417 (1992) (quoting *Hall v. Country Casualty Insurance Co.*, 204 Ill. App. 3d 765, 772 (1990))).

¶ 34 The parties do not dispute that Auto-Owners agreed to provide a defense to Skyline, Southwest, and Crutcher in the underlying Blake lawsuit. As noted above, Auto-Owners Insurance field claims adjuster Sherese Nubin, who handled the claim over many years first as a claims adjuster and later as a manager, specifically testified that, in 2006, she informed Acuity that Auto-Owners was accepting the tender, that is, "accepting all of Acuity's defense and indemnity obligations." To that end, in October 2006, Nubin directed Auto-Owners' panel counsel to defend Skyline, Southwest Spring, and Crutcher "fully and completely

under the Auto-Owners policy, without reservation of rights and without any involvement of Acuity[.]" She testified she did not inform Acuity that Auto-Owners was reserving any rights to later seek to recover from Acuity, nor did she inform panel counsel or any other attorneys paid by Auto-Owners to do so. Then, once Nubin was promoted to manager, Chad McGuire assumed direct file handling responsibilities of the Blake lawsuit. McGuire testified that Auto-Owners panel counsel fully controlled the defense of Southwest Spring, Crutcher, and Skyline in the Blake litigation. Thereafter, in May 2009, Auto-Owners panel counsel analyzed whether Acuity should provide coverage for Southwest, Crutcher, and Skyline. McGuire's "working assumption" was that Auto-Owners policy would pay for the loss, and Auto-Owners would directly access its excess policy to pay any indemnity over primary limits. As of May 2009, no reservation, conflict, or excess letters were issued to place Acuity on notice that Auto-Owners would potentially expect contribution from it. Auto-Owners neither reserved its rights nor attempted to tender the defense until mid-November 2009.

¶ 35 The collision occurred in May 2006. Southwest immediately gave notice of the collision to its primary carrier, Auto-Owners, which covered Southwest under garage liability, commercial general liability, and umbrella liability policies. The Blake lawsuit was filed in June 2006. Auto-Owners received notice of the Blake lawsuit the following month. Auto-Owners assigned panel counsel to defend Southwest, Crutcher, and Skyline by July 2006. Auto-Owners then proceeded to "fully control" the defense of Southwest, Crutcher, and Skyline from October 2006 until the case settled in early 2010. However, in November 2009, just two months prior to trial, Auto-Owners Insurance tendered the defense to Acuity. Throughout these intervening months and years during which Auto-Owners fully controlled

the defense, it failed to inform Acuity at any time that it was planning to tender the defense to Acuity.

¶ 36 Waiver is an express or implied relinquishment of a known right. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 326-27 (2004); *Lumbermen's Mutual Casualty Co. v. Sykes*, 384 Ill. App. 3d 207, 219 (2008) ("Waiver is an equitable principle invoked to further the interests of justice whenever a party initially relinquishes a known right or acts in such a manner as to warrant an inference of such relinquishment"). Our supreme court has addressed waiver in the context of insurance coverage and subrogation claims:

> "Waiver arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 396 (1993). A waiver may be either express or implied, arising from acts, words, conduct, or knowledge of the insurer. *Crum & Forster Managers Corp.*, 156 Ill. 2d at 396; *Western Casualty & Surety Co. v. Brochu*, 105 Ill. 2d 486, 499 (1985). An implied waiver arises when conduct of the person against whom waiver is asserted is inconsistent with any intention other than to waive it. *Liberty Mutual Insurance Co. v. Westfield Insurance Co.*, 301 Ill. App. 3d 49, 53 (1998). Where there is no dispute as to the material facts and only one reasonable inference can be drawn, it is a question of law as to whether waiver has been established. *Liberty Mutual*, 301 Ill. App. 3d at 53. The failure of a paying insurer to reserve its rights against a nonpaying insurer may constitute a waiver of the right to equitable remedies. 15 Couch on Insurance 3d § 218:32 (rev. 2004). An insurer desiring to reserve its rights

against a second insurer must make this position clear in its correspondence with the second insurer[.]" *Home Insurance Co.*, 213 Ill. 2d at 326-26.

¶ 37 Because Auto-Owners accepted the defense with no reservation of rights, and then actively worked on said defense through panel counsel for over three years, during which time it reviewed coverage and still did not notify Acuity it was considering seeking Acuity's involvement, Auto-Owners waived its right to Acuity's contribution. Any responsibility Acuity may have had was relinquished when Auto-Owners took over the defense without reserving any rights and then made no attempt to tender the defense until the eve of trial.

¶ 38 Because Auto-Owners waived its right to seek contribution from Acuity, the circuit court is affirmed.

¶ 39 III. CONCLUSION

¶ 40 For all of the foregoing reasons, the decision of the circuit court of Cook County is affirmed.

¶ 41 Affirmed.