2017 IL App (1st) 162926-U
Order filed: September 22, 2017

FIFTH DIVISION

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CRUM AND FORSTER SPECIALTY INSURANCE COMPANY, Plaintiff-Appellee, v. IMPERIAL CRANE SERVICES, INC., Defendant-Appellant (Hammer and Steel, Inc., Rudolf Das, and Jona Das, Defendants).	)	Appeal from Circuit Court Cook County. No. 15 CH 05285 Honorable Rodolfo Garcia, Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman concurred in the judgment.
Justice Delort dissenting.

ORDER

Held: We reversed the circuit court's order granting summary judgment in favor of plaintiff-insurer and against defendant, a lessor of construction equipment, and denying summary judgment in favor of defendant on cross-motions, as defendant qualified as an additional insured under the primary policy issued by plaintiff to the lessor and, thus, defendant's duty to defend was triggered.

¶ 1 Plaintiff-appellee, Crum and Forster Specialty Insurance Company (Crum), brought this declaratory judgment action against defendant-appellant, Imperial Crane Services, Inc. (Imperial), K&S Engineers, Inc. (K&S), the lessee of a construction crane, and others, to determine its coverage obligations under primary and excess liability policies it had issued to

K&S for a personal injury action brought by Rudolf and Jona Das. The circuit court granted summary judgment in favor of Crum after finding that Imperial did not qualify as an additional insured under the primary policy and, therefore, Crum did not owe Imperial a duty to defend. We reverse.

¶ 2 In 2014, the Illinois State Toll Highway Authority hired Kenny Construction Company (Kenny) and Edward Kraemer & Sons (Kraemer) as the general contractors for a road and bridge project near the Fox River in Elgin, Illinois. On May 30, 2014, Kenny and Kraemer hired geotechnical engineering company, K&S, as a subcontractor to install large caisson pipes in the bed of the river to support the bridge.

¶ 3 K&S rented a vibratory hammer from Hammer & Steel, Inc. (Hammer & Steel) to drive the caisson pipes into the riverbed. Additionally, K&S leased both a Terex hydraulic crane and the use of a crane operator from Imperial. The crane was to be used to hoist the vibratory hammer.

¶ 4 The leasing agreement required that K&S purchase primary noncontributory commercial general liability insurance prior to the crane's arrival on the job site and that Imperial be included as an additional insured on all K&S's liability insurance policies. The lease also contained the following provision defining the further obligations of K&S:

> "It is expressly agreed by and between [K&S and Imperial] that the equipment and all persons operating, repairing, or maintaining the equipment are under the exclusive jurisdiction, supervision and control of [K&S] under this lease. It shall be the duty of [K&S] to give specific instructions and directions to all persons operating, repairing and maintaining the leased equipment. [K&S] specifically agrees that *** [Imperial] has absolutely no control over any person operating or assisting in operating, repairing or

> maintaining the leased equipment. [Imperial] may provide an operator with the equipment. [K&S] may reject this operator, however, if [the] operator is not rejected, the operator is under *** [K&S's] exclusive direction and control and is [K&S's] agent, servant, and employee."

¶ 5 Rudolf was employed by K&S as a field engineer and inspector on the construction site; his duties included inspecting the caisson pipes during the installation process. On December 1, 2014, during such an inspection, the jib of the crane became detached and struck Rudolph, causing severe injuries.

¶ 6 In the underlying action, the Dases sued six different entities, including Kenny, Kraemer, Hammer & Steel, and Imperial, alleging construction negligence, premises liability, and loss of consortium.[1] Their second-amended complaint alleged that Rudolf was employed by K&S and was working on the premises at the time of his injury. Plaintiff claimed that defendants, including Imperial, "individually and through their agents, servants, and employees" participated in coordinating the work being done and had the authority to stop the work "in the event the work was being performed in a dangerous manner." The Dases' complaint alleged that Rudolf was injured when he was struck by the jib of the crane which was owned and operated by Imperial. The complaint charged that defendants were negligent for, among other things, failing to: (1) "properly secure and store the crane jib while hammering [caisson] pipes;" (2) "provide adequate crane communication systems;" (3) "properly operate" the crane; and (4) "warn [Rudolf] of the dangerous conditions."

[1] The Dases could not sue K&S because section 5(a) of the Illinois Workers' Compensation Act (820 ILCS 305/5a (West 2014)) provides tort immunity to the injured worker's direct employer, which bars the injured worker from bringing a personal injury action against his or her employer. See *Pekin Insurance Company v. Centex Homes*, 2017 IL App (1st) 153601, ¶ 36.

¶ 7 Imperial, Hammer & Steel, Kraemer, and Kenny filed third-party complaints against K&S in the underlying action.[2] In their joint third-party complaint, Kenny and Kraemer alleged that, as the general contractors at the construction site, they "entered into a subcontract agreement with K&S to perform certain work in connection with the installation of casings," and that Rudolf, when injured, was "employed by K&S and was working in the course and scope of that employment." The Kenny and Kraemer third-party complaint alleged that K&S breached its duty of care and was negligent, in part, by failing to (1) "make a reasonable inspection of the premises and the work being done thereon;" (2) properly operate, manage, maintain and control the aforesaid premises; (3) warn [Rudolf] of the [existing] dangerous conditions;" (4) "properly secure and store the crane jib while hammering [caisson] pipes;" and (5) "provide adequate crane communication systems." Kenny and Kraemer alleged that the negligence of K&S was a proximate cause of Rudolf's injuries.

¶ 8 Hammer & Steel's third-party complaint alleged that K&S was a subcontractor working on the construction project and had rented a crane from Imperial to be used as part of K&S's work on the project. Hammer & Steel alleged that K&S was negligent, among other ways, because it: (1) "[f]ailed to properly inspect the [c]rane and its component parts to ensure that the unused jib was safely attached to the boom;" (2) "[f]ailed to ensure that [Imperial] properly inspected the [c]rane and its component parts;" (3) "[f]ailed to stop the work when it knew or should have known of the danger associated with hoisting the [v]ibratory [h]ammer with a [c]rane that had an unused jib attached to the boom;" and (4) [a]llowed [Imperial] to hoist the [v]ibratory [h]ammer with the [c]rane when it knew or should have known of the danger in doing

[2] Imperial's third-party complaint may not be considered in determining whether Crum had a duty to defend Imperial (*National Fire Insurance of Hartford v. Walsh Construction Co.*, 392 Ill. App. 3d 312, 320-22 (2009) (citing *American Economy Insurance Co. v. Holabird & Root*, 382 Ill. App. 3d 1017, 1021, 1023, 1031-32 (2008)), and will not be discussed further.

so given that an unused jib was attached to the boom of the [c]rane." Hammer & Steel asserted that the negligence of K&S was a cause of Rudolf's injuries.

¶ 9 Crum issued a primary CGL policy and an excess policy to K&S for the relevant time period. Section III of the primary policy's common provisions delineated "who is an insured," including certain individuals and/or entities designated in the "Declarations." The primary and excess policies' declarations did not designate Imperial as a named insured.

¶ 10 The primary policy, however, included three additional-insured endorsements that modified the policy to name a person or organization as an additional insured "[w]here required by contract." The additional insured provision for "owners, lessees or contractors" stated:

> "SECTION III – WHO IS AN INSURED within the Common Provisions is amended to include as an additional insured the person(s) or organization(s) indicated in the Schedule shown above, but only with respect to liability caused, in whole or in part, by 'your work' for that insured which is performed by you or by those acting on your behalf."

¶ 11 The endorsement for "primary and non-contributory additional insured with waiver of subrogation" stated:

> "SECTION III – WHO IS AN INSURED within the Common Provisions is amended to include as an additional insured the person(s) or organization(s) indicated in the Schedule shown above, but solely with respect to 'claims' caused in whole or in part, by 'your work' for that person or organization performed by you, or by those acting on your behalf."

¶ 12 Finally, the endorsement for an additional insured, "owners, lessees or contractors – completed operations," provided:

"SECTION III – Who Is An Insured within the Common Provisions is amended to include as an insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for 'bodily injury' or 'property damage' caused, in whole or in part, by 'your work' at the location designated and described in the schedule of this endorsement performed for that additional insured and included in the 'products-completed operations hazard.' "

¶ 13 The primary policy defined "your work" as follows:

"39. 'Your work':

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

* * *

(2) The providing of or failure to provide warnings or instructions."

¶ 14 On December 11, 2014, Imperial selectively tendered its defense of the underlying action to Crum, asserting that it qualified as an additional insured under the primary and excess policies. Crum rejected the tender and declined to defend Imperial. In its denial letter, Crum asserted that, "[K&S] was not performing work for [Imperial] at the construction project in question. As such, [Imperial] does not qualify as an additional insured under the [p]rimary [p]olicy and is therefore not entitled to a defense or insurance coverage under the [p]rimary [p]olicy."

¶ 15 On March 30, 2015, Crum filed this declaratory judgment action against Imperial, Hammer & Steel, and the Dases, seeking declarations that its primary and excess policies did not provide coverage to Imperial and Hammer and Steel for the underlying action and that it did not have a duty to defend or to indemnify Imperial.

¶ 16 Imperial, Crum, and Hammer and Steel filed cross-motions for summary judgment each seeking a declaration as to Crum's obligations under the primary and excess policies in connection with the defense of the underlying action. The circuit court granted summary judgment in favor of Crum and denied the cross-motions of Imperial and Hammer and Steel after finding that Imperial and Hammer and Steel did not qualify as additional insureds under the primary policy and, thus, Crum had no duty to defend them in the underlying action. Only Imperial has appealed.

¶ 17 ANALYSIS

¶ 18 Before addressing the merits of this appeal, we note that Imperial attached photographs to its opening brief as background information which, Imperial acknowledged, were not presented to the circuit court and are not part of the official record on appeal. In its response brief, Crum moved to strike the photographs as improper. As the photographs were never presented to the circuit court and are not capable of accurate and unquestionable verification before this court *(Revolution Portfolio, LLC v. Beale*, 341 Ill. App. 3d 1021, 1024 (2003); *Dawdy v. Union Pacific Railroad Co.*, 207 Ill. 2d 167, 177 (2003)), we strike the photographs.

¶ 19 Turning to the merits of this appeal, Imperial argues that the circuit court erred in ruling that it was not an additional insured under Crum's policies. Imperial also argues that the mend-the-hold doctrine prohibited Crum from ignoring the policy definition of "your work" and

arguing, as it did before the circuit court, that an employment-type relationship between K&S and Imperial was necessary to trigger the duty to defend.

¶ 20 We first consider whether Imperial qualifies as an "additional insured" under the primary policy, which is an issue requiring interpretation of the policy language.

¶ 21 In construing an insurance policy, a court determines the intent of the parties to the contract by construing the policy as a whole, with due regard to the risk undertaken, the subject matter that is insured and the purposes of the contract. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992). Where the words in the policy are clear and unambiguous, "a court must afford them their *plain, ordinary, and popular meaning*." (Emphasis in original.) *Id.* "The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law." *Konami (America), Inc. v. Hartford Insurance Co. of Illinois*, 326 Ill. App. 3d 874, 877 (2002). We review such an issue *de novo*. *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill.2d 141, 153 (2004).

¶ 22 As "[t]he construction of an insurance policy" and the determination of the rights and obligations thereunder are questions of law for the court, the issues are appropriately addressed by way of summary judgment. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). Since the parties filed cross-motions for summary judgment, they conceded that no material question of fact exists and that there is only a question of law which the court may decide on the basis of the record. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28.

We review a court's decision as to cross-motions for summary judgment *de novo*. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004).

¶ 23 Under Illinois law, an insured contracts for, and has a right to expect, two separate and distinct duties from an insurer: (1) the duty to defend if a claim is made against the insured; and (2) the duty to indemnify if the insured is found legally liable for the occurrence of a covered risk. *Chandler v. Doherty*, 299 Ill. App. 3d 797, 801 (1998). While an insurer's duty to indemnify arises only if the facts alleged actually fall within coverage, the duty to defend is much broader. *Crum*, 156 Ill. 2d at 398.

¶ 24 The appeal here is from an order granting summary judgment in favor of the insurer solely on the duty to defend. When the insurer has no duty to defend, there is, of course, no duty to indemnify. *Id.*

¶ 25 "To determine whether the insurer has a duty to defend the insured, the court must look to the allegations in the underlying complaint and compare these allegations to the relevant provisions of the insurance policy." *Outboard Marine Corp.*, 154 Ill. 2d at 107-08. If the underlying complaint alleges facts that fall "within or *potentially* within" the coverage of the policy, the insurer is obligated to defend its insured even if the allegations are "groundless, false, or fraudulent." (Emphasis in original.) *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991). "An 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.) *Id.* The threshold requirement that the complaint must satisfy to present a claim of potential coverage is minimal; the complaint need present only a

possibility, not a probability, of recovery. *Bituminous Casualty Corp. v. Gust K. Newberg Construction Co.*, 218 Ill. App. 3d 956, 960 (1991).

¶ 26 In determining whether the allegations in the underlying complaint meet that threshold requirement, both the underlying complaint and the insurance policy must be liberally construed in favor of the insured. *Wilkin Insulation Co.*, 144 Ill. 2d at 74. "[T]he duty to defend does not require that the complaint allege or use language affirmatively bringing the claims within the scope of the policy." *International Insurance Co. v. Rollprint Packaging Products, Inc.*, 312 Ill. App. 3d 998, 1007 (2000). Further, when comparing the allegations of the pleadings to the policy language, doubts which arise from that comparison are resolved in favor of the insured. *Id.*

¶ 27 Under certain circumstances, a court may look beyond the underlying complaint in order to determine an insurer's duty to defend. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 458-59 (2010). Indeed, "the trial court should be able to consider all the relevant facts contained in the pleadings, including a third-party complaint, to determine whether there is a duty to defend." *Holabird & Root*, 382 Ill. App. 3d at 1031-32. Illinois courts have also recognized "that it may be appropriate to consider the written agreements between the named insured and the additional insured in determining whether the insurer has a duty to defend an additional insured." *Centex Homes*, 2017 IL App (1st) 153601, ¶ 35.

¶ 28 As set forth above, in considering whether Imperial qualifies as an additional insured, we must liberally construe the allegations of the various pertinent complaints in the underlying action, as well as the policy language in favor of Imperial and against Crum, and may consider the language of the leasing agreement, to determine whether there is a possibility of recovery against Imperial.

¶ 29 The holding in *Indiana Insurance Co. v. Powerscreen of Chicago, Ltd.*, 2012 IL App (1st) 103667, requires a finding that Crum & Foster owes Imperial a duty to defend.

¶ 30 In *Powerscreen of Chicago, Ltd.*, defendant-appellee, Powerscreen of Chicago, Ltd. (Powerscreen) rented a concrete crusher to defendant Terrell Materials Corporation (Terrell), for use on a construction site where it was a subcontractor. *Id.* ¶ 3. The lease required that Terrell include Powerscreen as an additional insured on its liability policy and that Terrell " 'operate and maintain the equipment with factory authorized parts and to make any repairs which may become necessary.' " *Id.* Terrell's insurance policy had an additional insured provision which allowed coverage for an individual or entity that Terrell had agreed to, in writing, to be added as an additional insured but "only with respect to liability arising out of *** [y]our ongoing operations performed for that person or organization." *Id.* ¶ 5.

¶ 31 John Kohn, an employee of another subcontractor, Noel Ramos Construction Company, was injured when he moved the concrete crusher on the construction site. *Id.* ¶ 4. The concrete crusher had wings which could be raised hydraulically and one was not functional. *Id.* ¶ 29. Terrell had used a pin to keep the damaged wing in an upright position. *Id.* Powerscreen had advised Terrell that it was safe to operate the concrete crusher with the pin in place. *Id.* The underlying complaint against Terrell and Powerscreen included allegations that Terrell "had a duty to exercise reasonable care to 'keep, maintain, and operate the subject concrete crusher' " and that it had failed to repair the hydraulics of the concrete crusher. *Id.*

¶ 32 Terrell's insurer argued that it had no duty to defend Powerscreen because Terrell's obligation to repair and maintain the equipment under the lease "did not constitute 'ongoing operations' performed for Powerscreen." *Id.* ¶ 31. This court rejected that argument and concluded that Powerscreen was an additional insured because Terrell's obligation, under the

lease, "to perform necessary maintenance work satisfied the 'ongoing operations' language [performed for Powerscreen] under the policy's terms thereby triggering coverage." *Id.* ¶ 34.

¶ 33 The *Powerscreen* court found the decision in *Cincinnati Insurance Co. v. Dawes Rigging and Crane Rental, Inc.*, 321 F. Supp. 2d 975 (C.D. Ill. 2004) to be "particularly persuasive." *Powerscreen of Chicago, Ltd.*, 2012 IL App (1st) 103667, ¶ 32. In *Cincinnati Insurance Co.*, the underlying plaintiff, an employee of the lessee, alleged that he was injured when the boom of a crane fell on him because the hydraulic holding valve was in disrepair. *Cincinnati Insurance Co.*, 321 F. Supp. 2d at 978. The plaintiff also contended that he was required to and was assisting in repairing the crane under the supervision of the lessor when he was injured. *Id.* The lease for the crane required the lessee to name the lessor as an additional insured and that the lessee was to " 'at [its] own expense maintain the [e]quipment in good working order and condition.' " *Id.* The additional insured provision provided coverage for the lessor, but only with respect to liability arising out of the lessee's ongoing operation performed for the lessor. *Id.* at 979. The court found that the lessee's obligation as to the maintenance of the crane under the lease satisfied the "ongoing operations" language of the applicable additional insured provision. *Id.* at 982.

¶ 34 There is no dispute here that, under the lease, K&S agreed, in writing, to include Imperial as an additional insured on its liability policies. The issue in dispute surrounds the language of the additional insured endorsements which states that the primary policy would be amended to include Imperial as an additional insured, "but only with respect to liability caused, in whole or in part, by '[K&S's] work' for [Imperial] which is performed by [K&S] or by those acting on [K&S's] behalf." The term "your work" is defined, under the policies, as "work or operations

performed by [K&S] or on [K&S's] behalf," and includes "[t]he providing of or failure to provide warnings or instructions."

¶ 35 Under the lease between K&S and Imperial, Imperial was to provide K&S with both the crane and the operator of the crane. The lease stated that K&S had the responsibility and obligation to supervise and control those persons who maintain, repair, or operate the crane and "to give specific instructions and directions to all persons operating" the crane. The Dases alleged that, while the crane was being operated at the construction site, Rudolf was injured after being struck by the jib of the crane which was then "owned and operated by [d]efendant [Imperial]." In their complaint, the Dases alleged, in part, that Rudolf was injured as a result of the failure of defendants, including Kenny and Kraemer, and Imperial *and their agents*, to give Rudy warnings as to the dangerous conditions posed by the operation of the crane; to "provide adequate crane communication systems;" to "properly operate" the crane; and to "properly secure and store the crane jib."

¶ 36 The Dases' complaint did not name K&S as a defendant because they were barred from doing so. However, they did assert that Rudolf was employed by K&S, a subcontractor of Kenny and Kramer at the construction site. "[T]he allegations of the underlying complaint must be read with the understanding that the employer may be the negligent actor even where the complaint does not include allegations against that employer." *Centex Homes*, 2017 IL App (1st) 153601, ¶ 36 (citing *Ramara, Inc. v. Westfield Insurance Co.*, 814 F. 3d 660, 677-79 (3d Cir. 2016)).

¶ 37 The allegations of the underlying complaint suggest that the negligence of K&S was a cause of the injuries suffered by Rudolf and Jona, and those negligent acts and omissions were related to the operation and maintenance of the crane and the giving of warnings and instructions

as to the crane's operation. K&S had assumed these obligations under its lease agreement with Imperial. Under the reasoning of *Powerscreen*, those obligations of K&S satisfy the "work or operations" requirement of the additional insured provision and the requirement that liability must be caused in whole, or in part, by K&S on behalf of Imperial.

¶ 38 The Kenny and Kraemer third-party complaint against K&S alleged that K&S was negligent, in part, by failing "to provide adequate crane communication systems." Hammer & Steel, in its third-party complaint, claimed that K&S was negligent for failing to inspect the crane and it component parts and for failing to stop the work of the crane when it posed a danger. Hammer & Steel also claimed that K&S was negligent in failing to ensure that Imperial properly inspected the crane and its component parts and for allowing Imperial to hoist the crane when it was dangerous to do so. Again, these allegations of liability pertain to the obligations of K&S to Imperial under the lease, and meet the requirements of the additional insured provision.

¶ 39 In light of the requirement that the relevant underlying pleadings and the insurance contracts are to be liberally construed in favor of coverage, and that a duty to defend exists when the pleadings present only a possibility of recovery, we conclude that the obligations of K&S to supervise and control the operation and maintenance of the crane and to give instructions and directions to all operators of the crane, under its lease with Imperial, satisfied the policy's additional insured requirement of work or operation performed by K&S on behalf of Imperial. Further, when we compare the allegations of the underlying pleadings with the language of the additional insured provisions, and the policy's definition of "your work"—which includes the giving of warnings and instructions—the work or operations of K&S on behalf of Imperial, gave rise, in part, to the underlying claims of liability.

¶ 40 For the reasons stated, we find that Imperial qualified as an additional insured under the additional insured provisions of Crum's primary insurance policy sufficient to trigger a duty to defend Imperial in the underlying action. As we have found that Imperial qualifies as an additional insured under the policy, we need not address its arguments as to the mend-the-hold doctrine.

¶ 41 We, therefore, reverse the circuit court's order granting summary judgment in favor of Crum and denying Imperial's cross-motion for summary judgment. In that the circuit court found that Crum did not have a duty to defend, it did not need to reach any issue as to its duty to indemnify Imperial. Therefore, the issue as to whether Crum has a duty to indemnify Imperial is not before this court and, in any event, it appears from the record at hand, Imperial's duty to indemnify cannot be resolved at this juncture. See *Crum*, 156 Ill. 2d at 388 (adjudication of duty to indemnify would be premature where liability in underlying action has not been resolved). We, therefore, remand this matter to the circuit court for further proceedings consistent with this order.

¶ 42 Reversed; remanded.

¶ 43 JUSTICE DELORT, dissenting.

¶ 44 In insurance coverage disputes, Illinois requires that the underlying pleadings and the insurance policy be construed liberally. Even so, not every instance of loss triggers coverage. The specific factual and procedural circumstances presented in this case distinguish it from *Powerscreen.* Therefore, I must respectfully disagree with the majority and would affirm the decision of the circuit court granting summary judgment in favor of Crum.

¶ 45 The dispute in this case began at a construction site. At the top of the construction hierarchy is the general contractor, which has few personnel on site and is largely responsible for

overall project supervision. Construction injury claims typically arise when a worker is injured at the job site. The worker will typically file a workers' compensation action against his or her employer, and a common law negligence action against upper tier entities, *i.e.*, those parties higher up in the hierarchy.

¶ 46 Accordingly, while general contractors carry very little labor on a project, they are often the target of litigation and are joined as parties in construction injury cases. Thus, in a typical scenario, the upper tier entities seek to be named as "additional insureds" by the entities below it. When a general contractor is insured under its own policy and is an additional insured under the subcontractor's policy, an issue arises whether these overlapping coverages share in the general contractor's defense and indemnity, or whether the entire risk and expense associated with the injury claim can be shifted downstream.

¶ 47 In this case, Imperial, a lower tier lessor of heavy equipment, sought to shift the risk associated with the underlying action *upstream* by claiming through a targeted tender that it was an additional insured under an endorsement in K&S's policy. This factual scenario generally dovetails with *Powerscreen*, however, key facts and the procedural stance presented distinguish it.

¶ 48 Significantly, unlike this case, the parties in *Powerscreen* settled the underlying case, which allowed the reviewing court to delve into the language of the lease agreement between Powerscreen and Terrell. The *Powerscreen* court found that the underlying plaintiff's injuries at least potentially arose out of Terrell's ongoing operations for Powerscreen because it had a duty to repair and maintain the concrete crusher under the rental agreement. *Powerscreen of Chicago, Ltd.*, 2012 IL App (1st) 103667, ¶ 34.

¶ 49 Here, in contrast, the underlying action and third-party lawsuits remain pending. The majority concluded that "the obligations of K&S to supervise and control the operation and maintenance of the crane and to give instructions and directions to all operators of the crane, under its lease with Imperial, satisfied the policy's additional insured requirement of work or operation performed by K&S on behalf of Imperial." However, the majority's consideration of the rental agreement amounts to a premature material factual determination regarding whether K&S was performing any work for Imperial at the time of the accident. See *American Family Mutual Insurance Co. v. Savickas*, 193 Ill. 2d 378, 387 (2000) (finding "it is inappropriate to resolve a declaratory judgment action in such a manner as would bind the parties in the underlying litigation on any issues therein"). Accordingly, this court should rely solely on the underlying pleadings and the language of the insurance policy to determine whether coverage was triggered.

¶ 50 The central inquiry in *Powerscreen* was whether the liability arose out of Terrell's " 'ongoing operations performed' " for Powerscreen. *Powerscreen*, 2012 IL App (1st) 103667, ¶ 28. The "arising out of" language was found to be both broad and vague, requiring a liberal construction, with a "but for" causation analysis.

¶ 51 In this case, the policy defined "your work" as "[w]ork or operations performed by you or on your behalf" and included "[t]he providing or failure to provide warnings or instructions." The definition of "your work" is clear and unambiguous. The majority does not find otherwise. Although the underlying pleadings allege the failure to provide warnings or instructions, none of the allegations specifically claim that K&S failed to provide these warnings or instructions while performing work for Imperial. The policy language in this case does not implicate the same "but for" analysis as *Powerscreen*. If Crum's policy language was the same as in *Powerscreen*,

merely, "arising out of ongoing operations," then we would require a liberal interpretation of that language to find a duty to defend. Here, the policy language is unambiguous and none of the underlying pleadings alleged that K&S performed work for Imperial.

¶ 52 Furthermore, the underlying complaint in *Powerscreen* specifically alleged that Powerscreen advised Terrell to put a pin in the hydraulic wing to keep it in place and that Terrell put in the pin. That was a direct allegation that Terrell performed an "ongoing operation" for Powerscreen. Imperial has not identified a comparable allegation in any of the underlying pleadings. I would, therefore, find *Powerscreen* inapplicable.

¶ 53 Simply put, the underlying pleadings in this case contained no allegations that K&S engaged in "your work" for Imperial. Unlike the majority, I would find that the plain language of the policy, construed in light of the underlying pleadings, did not trigger coverage of the additional insured endorsement in Crum's policy.