

2014 IL App (1st) 132693-U

No. 1-13-2693

June 11, 2014

THIRD DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

LIBERTY INSURANCE CORPORATION,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 10 CH 15886
)	
J&A GENERAL CONTRACTORS, INC.,)	
)	The Honorable
Defendant-Appellee.)	Kathleen M. Pantle,
)	Judge presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held:* The exclusion endorsement in a workers' compensation and employers' liability insurance policy that clearly and expressly excludes coverage to officers of the insured employer for workers' compensation claims does not also exclude coverage for third party contribution claims where the exclusion does not contain clear, specific and definite terms expressly excluding coverage under the employers' liability insurance provisions in the policy.

¶ 2 Liberty Insurance Corporation (Liberty), plaintiff, filed a complaint for declaratory judgment against J&A General Contractors, Inc. (J&A), Liberty's insured, asserting that an exclusion in J&A's insurance policy excluded coverage for third party contribution claims filed against J&A. The trial court held that the exclusion did not preclude coverage and that Liberty had a duty to defend and indemnify J&A against third party actions.

¶ 3 We find that the exclusion in J&A's policy did not contain terms that were clear, specific and definite, and that expressly excluded coverage for third party claims filed against J&A under the employers' liability insurance provisions. Therefore, we hold that the trial court did not err when it found that Liberty had a duty to defend and indemnify J&A against the third party claims for contribution. Accordingly, we affirm the trial court's order that granted summary judgment in favor of J&A.

¶ 4 Background

¶ 5 Jacek Pawelczak, an employee and the president of J&A, brought a personal injury action against GJB Development, Inc., Bill Spentzos, Glenbrook Custom Homes, Inc., Murray Masonry, Exemplary Builders, Inc., Alright Concrete Co., Comfort Solutions, John Koudounis, Barrett Masonry, Inc. and 447 West Superior, LLC based on an injury that occurred in the course of his employment with J&A on a construction site, which was owed or allegedly under the control of the named defendants. Bill Spentzos, Glenbrook Custom Homes, Inc., Barrett, Exemplary and Alright filed third party contribution actions against J&A, and Koudounis filed a cross claim against J&A for damages beyond their *pro rata* share in the event they were found liable for Pawelczak's injuries.

¶ 6 J&A tendered the case to Liberty claiming coverage under a "Workers Compensation and Employers' Liability Insurance Policy" issued by Liberty with J&A as the named insured. The policy covered the period from October 11, 2005 to October 11, 2006.

¶ 7 The policy provided coverage, in pertinent, part as follows:

"GENERAL SECTION

A. The Policy

"This policy includes at its effective date the Information Page and all endorsements and schedules listed there***. The terms of this policy may not be changed or waived except by endorsement by us to be part of this policy."

PART ONE-WORKERS COMPENSATION INSURANCE

B. We Will Pay

We will pay promptly when due the benefits required of you by the workers compensation law.

PART TWO-EMPLOYERS LIABILITY INSURANCE

"We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance.

The damages we will pay when recovery is permitted by law, include damages: for which you are liable to a third party by reason of a claim or suit against you by that third party to recover the damages claimed against such third party as a result of injury to your employee."

¶ 8 Section G of Part II is titled "Limits of Liability" and provides that "[o]ur limits of liability are shown in item 3.B. of the information page." Item 3.B provides that the "limits of our liability under Part Two" are bodily injury by accident (100,000 for each accident); bodily injury by disease (\$500,000 policy limit); and bodily injury by disease (\$100,000-each employee).

¶ 9 The policy also includes an endorsement schedule entitled "Workers Compensation Forms and Endorsements," which lists a number of forms and endorsements all having numbers starting with the letters "WC." One such endorsement was WC000308--"Partners, Officers and Others Exclusion Endorsement," and provides as follows:

"PARTNERS, OFFICERS AND OTHERS EXCLUSION ENDORSEMENT

The policy does not cover bodily injury to any person described in the Schedule.

The premium basis for the policy does not include the remuneration of such persons.

You will reimburse us for any payment we must make because of bodily injury to such persons.

SCHEDULE

PARTNERS

OFFICERS

OTHERS

JACEK PAWELCZAK-

PRESIDENT"

¶ 10 Liberty refused to defend J&A and on April 12, 2010, Liberty filed a complaint for declaratory judgment. Liberty amended its complaint on September 21, 2011, and named J&A, Pawelczak, and the third party plaintiffs, John Koudounis, Bill Spentzos, Glenbrook

Custom Homes, Inc., Barrett Masonry Inc., Exemplary Builders Inc. and Alright Concrete Co. as defendants. Liberty's amended complaint had two counts. Count I alleged that Liberty owed no duty to defend and indemnify J&A against the third party complaints and cross claim for contribution because of the policy's exclusion provision. Count II requested that the trial court determine the parties' rights and duties under the policy and find that Liberty was entitled to reimbursement for any payment it must make because of Pawelczak's injuries. On June 27, 2012, Bill Spentzos and Glenbrook Custom Homes, Inc. filed a motion to withdraw their answer to Liberty's complaint and to be bound by the judgment of the court. The court granted the motion.

¶ 11 J&A answered Liberty's amended complaint and filed affirmative defenses and counterclaims. On February 23, 2012, J&A filed a three count second amended counterclaim. Count I alleged that Liberty had breached the insurance contract with J&A when it refused to defend J&A in the underlying suit. Count II alleged that Liberty violated section 155 of the Illinois Insurance Code because its denial of coverage to J&A was vexatious and unreasonable. Count III requested a declaration that Liberty owed a duty to defend and indemnify J&A against the third party actions for contribution. J&A argued that the exclusion endorsement was meant to exclude coverage for bodily injuries to Pawelczak under the workers' compensation insurance provisions, but it was not intended to also exclude coverage under the employers' liability insurance provisions for third party contribution claims filed against J&A.

¶ 12 On March 8, 2012, the trial court entered an order indicating that Pawelczak and the named defendants had entered into a settlement agreement as a result of voluntary mediation.

The court's order dismissed with prejudice Pawelczak's negligence action against all the defendants.

¶ 13 On September 12, 2012, J&A filed a motion for partial summary judgment on count I of Liberty's amended complaint and count III of J&A's second amended counterclaim asking the court to find as a matter of law that Liberty had a duty to defend and indemnify J&A against the third party actions for contribution.

¶ 14 On September 13, 2012, Liberty filed a cross motion for summary judgment on its two count amended complaint and on J&A's three count second amended counterclaim. Liberty supported its motion for summary judgment with the affidavit of Cindy Thiel, Liberty's senior customer account representative. Thiel averred in paragraph 10 of her affidavit that J&A, through its agent, Krzysztof Placek, had requested in the application that Pawelczak be excluded from the policy. Thiel also averred in paragraphs 11 and 12 that Pawelczak marked the section in the coverage selection form indicating that he was waiving his right to be covered under the Illinois Workers' Compensation Act and that Liberty issued the policy of insurance to J&A based on the information provided in the application and the coverage selection form. Thiel further averred in paragraph 13 that Pawelczak's salary was not included in the premium calculation for the policies. Thiel attached J&A's insurance application and a copy of the coverage selection form to her affidavit.

¶ 15 Liberty argued in its motion for summary judgment that because Pawelczak was named on the "Partners, Officer, and Others Exclusion Endorsement," the exclusion endorsement voids all coverage under the policy for bodily injury to Pawelczak, including third party claims brought under the employers' liability insurance provisions in the policy, where such claims seek damages for the bodily injuries sustained by Pawelczak.

¶ 16 J&A filed a response to Liberty's motion for summary and a motion to strike paragraphs 10 and 13 of Thiel's affidavit. J&A argued that Thiel failed to provide factual support for her assertion in paragraph 10 of her affidavit that Placek was J&A's agent. J&A also argued that the court could review the application without relying on Thiel's interpretation. J&A also moved to strike paragraph 13 of Thiel's affidavit where Thiel averred that Pawelczak's salary was not included in the premium calculation for J&A's policies. J&A argued that Thiel's averment was a conclusion and purposely misleading because the premium calculator worksheet indicated that Pawelczak's salary was not used to calculate the initial premium, instead the premium was based on a minimum payment of \$750 and that Thiel had purposefully excluded two pages of the documents from her attached exhibits because those pages undermined Liberty's arguments against coverage.

¶ 17 On December 7, 2012, the trial court struck paragraphs 10 and 13 of Thiel's affidavit finding that Thiel had failed to provide any factual support for her assertion that Placek was J&A's agent and that paragraph 13 was conclusory. The court rejected Liberty's arguments that the heading on the endorsement should control the interpretation of the policy. The court found that because the exclusion endorsement was referenced on the endorsement schedule as one of the workers' compensation forms and endorsements, it only excluded coverage to Pawelczak under the workers' compensation insurance provisions. The court held that Liberty had a duty to defend and indemnify J&A because the policy's exclusion did not clearly and unambiguously exclude the third party claims filed against J&A for contribution. Accordingly, the trial court granted J&A's motion for partial summary judgment and denied Liberty's cross motion for summary judgment. Liberty filed a motion for reconsideration, which the trial court denied on February 28, 2013.

¶ 18 J&A and Liberty then filed cross motions for summary judgment on count II of J&A's second amended counterclaim which alleged that Liberty violated section 155 of the Insurance Code. The court granted the motion for summary judgment in favor of Liberty and against J&A.

¶ 19 On August 7, 2013, Liberty filed a motion for Supreme Court Rule 304(a) finding regarding the trial court's December 7, 2012 order granting summary judgment in favor of J&A and against Liberty on count I of Liberty's amended complaint and count III of J&A's second amended counterclaim. On August 19, 2013, the trial court granted Liberty's motion and entered a rule 304(a) finding. This appeal followed.

¶ 20 Analysis

¶ 21 We note that J&A did not file an appellee's brief. However, this court may decide issues on appeal without the aid of the appellee's brief and we choose to do so in this case. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 22 The trial court may grant a motion for summary judgment when 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. *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). An insurance policy is a contract and the construction of a contract is a question of law for the trial judge (*State Farm Fire & Casualty Co. v. Martinez*, 384 Ill. App. 3d 494, 498 (2008)), and thus suitable for summary judgment. *Srivastava v. Russell's Barbecue, Inc.*, 168 Ill. App. 3d 726, 730 (1988). We may affirm the circuit court's decision on any basis supported by the record. *People v. Greco*, 204 Ill. 2d 400, 414 (2003). Appellate review of an order granting summary judgment is *de novo*. *Thompson*, 241 Ill. 2d at 438.

¶ 23 The question presented in this appeal is whether a workers' compensation and employers' liability insurance policy containing an exclusion provision relieves the insurer of its duty to defend and indemnify the insured employer when a third party brings a contribution action against the employer.

¶ 24 Liberty argues on appeal that it has no duty to defend and indemnify J&A against the third party complaints and cross claim for contribution because the exclusion endorsement in J&A's insurance policy excluded all claims for bodily injury sustained by Pawelczak. Liberty maintains that the exclusion endorsement is unambiguous and clearly excludes coverage under both part one, the workers' compensation insurance provisions and part two, the employers' liability insurance provisions because (1) the top of the endorsement page reads "Workers Compensation and Employers' Liability Insurance Policy;" (2) the words "the policy" when used in the exclusion endorsement refers to the entire policy; and (3) the exclusion endorsement states that Pawelczak's salary was not used to calculate the policy's premium.

¶ 25 J&A's contention in the trial court was that the exclusion endorsement was only meant to exclude coverage for bodily injuries to Pawelczak under part one, the workers' compensation insurance provisions and was not intended to exclude coverage for third party claims filed against J&A for contribution under part two, the employers' liability insurance provisions.

¶ 26 The parties agree that the exclusion endorsement excludes workers' compensation benefits for Pawelczak and that Pawelczak did not seek benefits under the workers' compensation provisions in the policy. Thus, the only question we must address is whether the employers' liability insurance provisions in part two of the policy are subject to the

exclusion endorsement for partners, officers and others in the workers' compensation forms and endorsements section of the policy.

¶ 27 In construing the workers' compensation and employers' liability contract in this case, the court must determine the intent of the parties. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232-3 (2007). In order to discern the parties' intent and the meaning of the policy, the court must construe the policy as a whole with due regard to the risk undertaken, the subject matter that is insured and the purpose of the entire contract. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992). Where the words of the contract are clear and unambiguous, the court must give them their plain, ordinary and popular meaning. *Outboard Marine*, 154 Ill. 2d at 108. However, if the policy language is susceptible to more than one reasonable interpretation, the language is ambiguous and the court must construe the policy strictly against the insurer and in favor of the insured. *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004); *Outbound Marine*, 154 Ill. 2d at 108. This is especially true with respect to exclusionary clauses because there is little or no bargaining power accorded the insured. See *Outbound Marine Corp.*, 154 Ill. 2d at 119.

¶ 28 Where an exclusionary clause is relied upon to deny coverage, its applicability must be clear and free from doubt because any doubts as to coverage will be resolved in favor of the insured. *International Minerals and Chemical Corp. v. Liberty Mutual Insurance Co.*, 168 Ill. App. 3d 361, 367 (1988). Policy provisions that purport to exclude or limit coverage will be read narrowly and will be applied only where its terms are clear, definite and specific. *Gillen v. State Farm Mutual Auto Insurance Co.*, 215 Ill. 2d 381, 393 (2005). The insurer bears the burden of showing that a claim falls within an exclusion. *Continental Casualty Co. v. McDowell & Colantoni, Ltd.*, 282 Ill. App. 3d 236, 241 (1996). Accordingly, if there is

any ambiguity with the terms of the exclusion, the exclusion endorsement will be liberally construed against Liberty and in favor of J&A.

¶ 29 Workers' compensation insurance and employers' liability insurance protects the employer from two distinct sources of liability: (1) workers' compensation insurance protect the insured employer when an employee experiences a work related injury or an occupational disease; and (2) employers' liability insurance protects the insured employer from contribution lawsuits brought by third parties for injuries sustained by employees of the insured employer. See *Virginia Surety Co., Inc. v. Northern Insurance Company of New York*, 224 Ill. 2d 550, 556-57 (2007).

¶ 30 The Illinois Workers' Compensation Act allows an insurance carrier to limit its liability if the insured is involved in an extra hazardous business. A corporate officer of such business may elect to withdraw from the operation of the Act. 820 ILCS 305/3(17)(b) (West 2010). Upon an election by a corporate officer to withdraw, written notice shall be provided to the insurance carrier of such election to withdraw. A corporate officer is defined under the Act as a bona fide president, vice president, secretary or treasurer of a corporation who voluntarily elects to withdraw. 820 ILCS 305/3(17)(b) (West 2010).

¶ 31 Here, Pawelczak, J&A's president, executed a written form entitled "Illinois Workers' Compensation Coverage Selection Form" and requested that he be excluded from coverage under the Workers' Compensation Act. The coverage selection form was submitted as part of J&A's insurance application, but the form was not a part of the policy. See *Thompson*, 241 Ill. 2d at 441 (where a contract is ambiguous, as in this case, the court may look to extrinsic evidence to determine the parties' intent). Thiel averred in her affidavit that the insurance policy was issued based on the information provided in the application and the coverage

selection form. The exclusion endorsement, which is a part of the policy, references partners, officers and others, and Pawelczak's name is listed under the schedule as J&A's officer. Reading the coverage selection form together with the exclusion endorsement, it is clear that the workers' compensation exclusion endorsement was included in the policy because of Pawelczak's election, as J&A's president, to be excluded from coverage under the Workers' Compensation Act.

¶ 32 Liberty maintains that the exclusion is unambiguous and clearly excludes coverage for bodily injuries to Pawelczak under part one, the workers' compensation insurance provisions, and under part two, the employers' liability insurance provisions. To support its position, Liberty contends that the exclusion refers to "the policy" and not only "Part One." The exclusion states that Pawelczak's salary was not used to calculate the policy's premium. We are not persuaded by these arguments. As we noted earlier, sections of an insurance contract must not be read in isolation. *Gallagher*, 226 Ill. 2d at 233. Instead, the policy and endorsements of an insurance policy must be construed together to determine the meaning and effect of the insurance contract. *Protective Insurance Co. v. Coleman*, 144 Ill. App. 3d 682, 695 (1986).

¶ 33 Liberty also argues that the heading on the endorsement which reads "Workers Compensation and Employers Liability Insurance Policy," supports its position that the exclusion applied to the entire policy. Though not dispositive of the issue in this case, we note that on the endorsement schedule, the "Partners, Officers and Others Exclusion Endorsement" was listed as a workers' compensation endorsement with the number WC000308, which indicated that it was only applicable to the workers' compensation insurance provisions. Illinois law establishes that a heading or caption or title to a section of

an insurance policy does not modify the coverage provided by the actual textual language appearing in the policy. *Barth v. State Farm Fire & Casualty Insurance Co.*, 228 Ill. 2d 163, 174-75 (2008). Therefore, headings in insurance contracts do not expand, or otherwise alter the scope of the policy's text. *Barth*, 228 Ill. 2d at 174-75.

¶ 34 Part two of J&A's policy specifically provides that the insurer will pay damages for which J&A is liable to a third party by reason of a claim or suit against J&A by a third party to recover the damages claimed against such third party as a result of an injury to J&A's employee. The employers' liability insurance provisions were also subject to the following liability limits: bodily injury by accident (100,000 for each accident); bodily injury by disease (\$500,000 policy limit); and bodily injury by disease (\$100,000 for each employee). The aforementioned limits of liability are the only limits on the employers' liability insurance provisions which are expressly delineated in the policy.

¶ 35 Because the workers' compensation and employers' liability insurance contract provides coverage for third party claims and because Liberty has not met its burden of directing the court to language in the policy that expressly provides that third party actions fall within the exclusion endorsement, we must strictly construe the contract against Liberty and in favor of J&A. Therefore, we find that Liberty has a duty to defend and indemnify J&A against the third party actions for contribution because the exclusion provision does not contain clear, definite and specific terms expressly excluding third party claims under the employers' liability insurance provisions in the policy.

¶ 36 Nevertheless, Liberty contends that the facts in this case compel this court to follow *Midland Insurance Co. v. Bell Fuels, Inc.*, 159 Ill. App. 3d 780 (1987) and *Aetna Casualty & Surety Co. v. Beautiful Signs Inc.*, 146 Ill. App. 3d 434 (1986). *Midland* and *Beautiful Signs*

involved general liability insurance policies. The exclusion provision at issue in *Midland* stated that coverage did not apply "to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured or to any obligation of the insured to indemnify another because of damages arising out of such injuries." *Midland*, 159 Ill. App. 3d at 782. The exclusion provision in *Beautiful Signs* was almost identical to the one in *Midland*. *Beautiful Signs*, 146 Ill. App. 3d at 435. The *Midland* court explained that where an underlying claim falls within a policy exclusion, the third party claim is also excluded from coverage as a matter of law. *Midland*, 159 Ill. App. 3d at 782-3. *Midland* and *Beautiful Signs* found that the exclusion provisions excluded from coverage any obligation of the insured employer to indemnify a third party for damages resulting from injuries sustained by its employees. *Midland*, 159 Ill. App. 3d at 785; *Beautiful Signs*, 146 Ill. App. 3d at 436. Accordingly, *Midland* and *Beautiful Signs* held that because the policy exclusions clearly excluded coverage for employee injuries, the third party claims which sought damages for employee injuries were also excluded from coverage. *Midland*, 159 Ill. App. 3d at 786; *Beautiful Signs*, 146 Ill. App. 3d at 436.

¶ 37 We find *Midland* and *Beautiful Signs* distinguishable from this case. *Midland* and *Beautiful Signs* involved general liability insurance policies, which specifically excluded coverage for bodily injury to any employee of the insured employer and also for any third party actions brought against the insured as a result of such injury. Conversely, our case involves a workers' compensation and employers' liability insurance policy that provides coverage for bodily injuries to an employee of the insured employer and for third party actions filed against the insured as a result of an injury to an employee. Finally, unlike the exclusion provision in *Midland* and *Beautiful Signs*, the exclusion provision in J&A's policy

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does not expressly exclude coverage under part two of the policy, the employer's liability insurance provisions, for bodily injuries to Pawelczak, injured employees or for third party contribution actions asserted against J&A.

¶ 38 Conclusion

¶ 39 We find that the exclusion in J&A's insurance policy does not exclude coverage under the employers' liability insurance provisions for third party actions filed against J&A because the policy exclusion does not contain terms that are clear, definitive and specific. Therefore, we hold that Liberty has a duty to defend and indemnify J&A against the third party actions for contribution, and we affirm the trial court's order that granted summary judgment in favor of J&A.

¶ 40 Affirmed.