2013 IL App (1st) 112329-U

SECOND DIVISION
March 26, 2013

Nos. 1-11-2329 & 1-11-2457 (cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ECONOMY PREMIER ASSURANCE COMPANY, Plaintiff/Counterdefendant-Appellant/ Cross-Appellant/Appellee, v. FAITH IN ACTION OF McHENRY COUNTY, Defendant/Counterplaintiff and FIRST NONPROFIT INSURANCE COMPANY, Defendant/Counterplaintiff-Appellee/ Cross-Appellee/Appellant	)	Appeal from the Circuit Court of Cook County, Illinois. 09 CH 05316 Honorable Martin S. Agran and Lee Preston, Judges Presiding.

JUSTICE SIMON delivered the judgment of the court.
Quinn and Connors, JJ., concurred in the judgment.

ORDER

¶ 1 *HELD*: Where the complaint provided the potential of coverage for an insured and no doubt to remove coverage, but insurer waited over 21 months after denying coverage to argue the police report of the accident indicated the insured owned the vehicle and insured's personal automobile insurer admitted as much in response to insurer's counterclaim for declaratory judgment, trial court did not err in finding insurer had a duty to defend because insurer waited to seek declaratory judgment and there was no

admission by insured or other conclusive proof that he owned vehicle to meet non-owned vehicle exception of insured's policy and overcome potential for coverage in complaint.

¶ 2 *HELD*: Where insurer denies coverage but does not defend under a reservation of rights and seeks declaratory action over 21 months after denial of coverage, only after insured filed declaratory action, trial court properly determined insurer was estopped from asserting policy defenses, including claim it was merely an excess insurer, for failure to timely seek declaration of rights.

¶ 3 *HELD*: Trial court properly granted motion for new counsel where, despite insured's defense without reservation of rights, counsel raised possible issue that insured could benefit by not providing vigorous defense for co-insured, thereby retaining benefit of co-insured's coverage.

¶ 4 *HELD*: Where trial court found insurer estopped from asserting policy defenses, it correctly determined estopped insurer could not find refuge in proposition that claim is covered by co-insurer to avoid duty to indemnify and the trial court's reconsideration and modification of that determination was in error.

¶ 5 These consolidated appeals and cross-appeal arise from the parties' counterclaims for declaratory judgment concerning the duty to defend parties in an underlying wrongful death action. Plaintiff and counter-defendant, Economy Premier Assurance Company (Economy), is the insurer of Herbert Reckamp. As a volunteer for defendant/counterplaintiff, Faith In Action of McHenry County (FIA), Reckamp was driving Marcyn Matuszek to the hospital on September 1, 2005, when his vehicle was struck by a dump truck, killing Matuszek. The executor of Matuszek's estate filed the underlying action on May 3, 2007, naming Reckamp and FIA among the defendants. The complaint was amended on July 10, 2007, without modifying the allegations against Reckamp and FIA.

¶ 6 On February 6, 2009, Economy filed its declaratory judgment action, naming FIA and its insurer, First Nonprofit Insurance Company (FNIC), defendants. Economy sought a declaration whether or not FIA was insured under Economy's policy and whether

Economy was entitled to control FIA's defense. On May 18, 2009, FIA and FNIC filed a counterclaim for declaratory judgment and to stay Economy's complaint, seeking: a declaration that Economy had a primary duty to defendant FIA and that FNIC did not owe FIA a duty to defend; a finding that a conflict of interest existed between the defense of Reckamp and FIA as owed by Economy and that FIA was entitled to select independent counsel under *Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187 (1976); a declaration that Economy had a duty to reimburse FNIC for costs and fees and to pay prejudgment interest for the costs paid by FNIC in its defense of FIA; and a stay of Economy's complaint as premature until the underlying wrongful death action was resolved. On August 12, 2009, Economy amended its complaint to raise the argument that FNIC breached its duty to defend Reckamp and was estopped from raising its claims and defenses.

¶ 7 FNIC moved for summary judgment on the *Peppers* issue in its counterclaim and that motion was granted on March 23, 2010. The parties filed cross-motions for partial summary judgment on Economy's assertion that FNIC breached its duty to defend Reckamp and was estopped from raising its arguments. On September 29, 2010, following briefing and argument, the trial court issued a memorandum opinion granting Economy's motion and denying FNIC's motion. The court found that FNIC has a duty to defend Reckamp, FNIC breached that duty by disclaiming coverage and failing to seek a declaratory judgment of its rights and responsibilities, and that FNIC was estopped from asserting noncoverage. FNIC was ordered to "bear the full burden of Reckamp's defense and primary coverage." FNIC filed a motion to reconsider the September 29, 2010, order. On May 25, 2011, the trial court granted the motion in part, modifying the first

order to remove the language requiring FNIC to bear the full burden of Reckamp's defense and primary coverage. It is this order that is the subject of this appeal.

¶ 8 On appeal, FNIC argues that the trial court erred in finding that it had a duty to defend Reckamp, that it breached that duty, and was estopped from refusing to defend Reckamp. FNIC also contends that the trial court committed plain error in denying its motions to reconsider. Economy argues in its cross-appeal that the trial court properly placed the full burden of defense on FNIC in the September 29, 2010, order and erred in reconsidering and modifying that decision. In its consolidated appeal, Economy maintains that there was no conflict of interest between FIA and Economy to require independent counsel. The underlying complaint was tried before a jury and a verdict against Reckamp for damages totaling $253,561.78 was entered on August 24, 2012. The jury also found FIA not liable.

¶ 9 On August 28, 2012, FNIC moved this court to stay deliberations and reopen the case to allow supplemental briefing regarding the foregoing jury verdict and its effect, if any, on the instant matter. With leave of court, FNIC filed its supplemental brief on September 12, 2012, and FIA and Economy filed supplemental response briefs with this court on September 24 and 28, 2012, respectively. Considering the entire record and for the following reasons, we affirm in part and reverse in part.

¶ 10 I. BACKGROUND

¶ 11 On September 1, 2005, Reckamp was driving Matuszek to the hospital in Coral Township, Illinois, as a volunteer for FIA. When he entered an intersection, Reckamp's vehicle was struck by a dump truck which caused Matuszek to suffer fatal injuries. As

executor of the estate, Matuszek's son filed the underlying action on May 3, 2007, naming Reckamp and FIA among the defendants.

¶ 12 The complaint alleged that at the time of the accident, Reckamp was the "agent, employee and servant" of FIA which had assigned Reckamp to transport Matuszek to the hospital for her kidney dialysis because she was unable to drive due to her condition. The complaint further alleged that Reckamp was negligent in several ways in operating the vehicle and, as a result, Matuszek suffered various injuries that caused her death.

¶ 13 A. The FNIC and Economy Policies

¶ 14 The section of FIA's FNIC policy relevant to the instant matter is entitled "Non-Owned and Hired Auto Liability (Coverage L)." The limit of coverage under Coverage L is $1,000,000 per accident. Coverage L provides, in pertinent part:

"**A. Coverage Agreement**

We will pay on behalf of the **Insured** those sums that the **Insured** becomes legally obligated to pay as **damages** because of **bodily injury or property damage** to which this coverage applies, caused by an **accident** and arising out of the use, including **loading and unloading** of any **non-owned** or **hired automobile** used in the operations of the **Named Insured**.

***

We also cover **accidents** that take place while a covered automobile is being transported within the **coverage territory**. We have the right and duty to defend any **suit** seeking those damages. We will not provide a defense or pay attorneys fees or defense costs, however, for any loss, claim proceeding, suit or any other legal or administrative action or part thereof to which this coverage

does not apply and/or for which there is no coverage or indemnification afforded except at our sole discretion.

Also:

1. The amount we will pay for **damages** is limited as described in **Limit of Coverage**;

2. We may investigate and settle any claim or **suit** at our own discretion; and

3. Our right and duty to defend ends when we have paid the applicable **Limit of Coverage** in judgments or settlements.

4. If this coverage does not apply, we have no duty to defend.

We will have the right and duty to defend any **suit** seeking those **damages** to which this coverage applies. We will not pay defense costs nor shall we be obligated to provide a defense for claims or legal actions in any way requesting punitive or exemplary damages, except at our discretion.

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E. Definitions

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2. **Insured** means:

a. You for any covered automobile;

b. Anyone to whom you have given permission to use a covered automobile you hire or borrow except:

(1) The owner or anyone else from whom you hire or borrow a covered automobile;

(2) Your employee or volunteer if the covered automobile is owned by that employee or volunteer or a member of his or her household.

***

5. **Hired Autos** – This means only those autos you lease, hire, rent or borrow. This does not include autos you lease, rent or borrow from your employees, volunteers or members of their households.

6. **Non-owned Autos** – This means only those autos you do not own, lease, hire, rent or borrow that are used in connection with the Named Insured's nonprofit organization. This includes autos owned by employees or used in the Named Insured's nonprofit organization.

* * *

F. Coverage Conditions

* * *

2. **Other Insurance**

Coverage provided by **Coverage L** is excess and applies over any other valid and collectible insurance available to the **Insured**." (Emphasis in original.)

¶ 15 Additionally, Endorsement 4 of the policy provided the following change to the "Other Insurance" sections from Coverage G through N of the policy, but specifically excluded Coverage L:

"A. Primary Insurance

This insurance is primary except when B. below applies.

* * *

C. Excess Insurance

This insurance is excess over:

Any of the other insurance, whether primary, excess, contingent or on any other basis:

* * *

When this insurance is excess, we will have no duty under this Coverage Part to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit." If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

A. The total amount that all such other insurance would pay for the loss in the absence of the insurance;

* * *

C. Method of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers."

¶ 16 B. The Economy Policy With Reckamp

¶ 17 Reckamp carried personal automobile insurance from Economy with liability limits of $250,000 per person and $500,000 per occurrence. The Economy policy provides, in pertinent part:

" '**INSURED**' means

1. With respect to a covered automobile:

a. you;

b. any **relative**; or

c. any other person using it within the scope of **your** permission.

* * *

3. any other person or organization if liable due to the acts or omissions of any person described in 1. or 2. above. This provision does not apply if the vehicle is a **non-owned automobile** owned or hired by the person or organization.

* * *

OTHER INSURANCE

If there is other similar insurance, **we** will pay our fair share.

However, with respect to a **non-owned automobile** or a **substitute automobile**, this insurance will be excess over any other insurance. If there is other excess or contingent insurance, **we** will pay **our** fair share.

Our fair share is the proportion that **our** limit bears to the total of all applicable limits." (Emphasis in original.)

¶ 18 C. FNIC's Denial of Defense, Reservation of Right, and Tender to Economy

¶ 19 On May 24, 2007, FNIC wrote to Reckamp, acknowledging its receipt of the summons

and complaint in the underlying action and informing Reckamp that it determined that there was no coverage under its policy with FIA to defend or indemnify him relating to the allegations of the complaint for which he was cited. FNIC quoted to portions of its policy in support of its determination, namely the "Non-owned and Hired Auto Liability (Coverage L)" section of its policy. The portions of that section quoted by FNIC stated that "[t]he police report confirms you were the owner and driver of the 1998 Olds involved in the accident on 9/2/2005" and, citing the above section, concluded that the exception to non-owned vehicles applied. Therefore, FNIC denied coverage to Reckamp. In concluding, FNIC "reserve[d] all of its rights and defenses regardless of whether stated above," and invited Reckamp to provide any additional information he wished FNIC to consider.

¶ 20 In a June 11, 2007, letter, FNIC tendered its defense of FIA to Economy. In the letter, FNIC explained that the counts directed at FIA were based on a theory of *respondeat superior* for the alleged negligence of Reckamp. It noted that FIA was served on May 10, 2007, and FNIC had denied coverage to Reckamp on May 24, 2007, due to the non-owned auto exception in its policy. FNIC asserted that the complaint alleged that Reckamp was identified as the owner of the vehicle in the accident and was operating that vehicle as the agent, employee and servant of FIA and tendered its defense under Economy's primary policy. FNIC stated that Economy owed the primary obligation under its Reckamp policy with limits of $250,000/$500,000 and an additional $2 million under an umbrella policy. It therefore tendered against the umbrella policy for the full limits "after exhaustion of the primary policies of both [Economy] and FNP."

¶ 21 In its tender letter, FNIC also noted that it had retained Stellato & Schwartz as counsel to

investigate the matter and render an opinion as to FIA's claims exposure. FNIC further stated that FIA and Reckamp should not be represented by the same counsel because: (1) there was a conflict of available coverage because Reckamp would be covered by Economy's umbrella policy while FIA would have coverage through FNIC before that umbrella protection would be applied; and (2) if *respondeat superior* was not applicable, counsel could be conflicted by the ability to dismiss FIA while making Economy's umbrella policy an earlier target. Recognizing that Economy had the right to select counsel and control the defense, FNIC requested that Stellato & Schwartz be selected as counsel for FIA.

¶ 22 Economy sent written response to FNIC on June 27, 2007, asserting that its appointed counsel could represent both FIA and Reckamp because there were no independent causes of action. Economy did not include any reservation of rights and added that FNIC was free to defend FIA at its own cost. However, Economy's representative admitted to confusion regarding FNIC's stated reasons in support of its conclusion that a conflict existed. He suggested that, if FNIC continued to be concerned, it attempt to rephrase its concerns to Economy.

¶ 23 D. Dispute Over Counsel

¶ 24 In a November 24, 2008, e-mail to Economy and FNIC, appointed counsel updated the insurers on the discovery process. Counsel also stated that a motion for summary judgment on behalf of FIA could be filed after fact depositions were completed. However, counsel expressed concern that if FIA was granted summary judgment it could reduce Reckamp's possible coverage, raising a conflict between the interests of the two parties and requiring new counsel.

¶ 25 On December 22, 2008, FNIC wrote a letter to Economy responding to Economy's November 26, 2008, letter that is not of record. FNIC stated that counsel's e-mail raised the same concerns FNIC presented in its tender letter and Economy's response that counsel only raised the issue of priority thereby demonstrating Economy's failure to appreciate the issues raised. FNIC maintained that using independent *Peppers* counsel was the only proper way to remove any potential conflict of interest going forward. FNIC further noted that its original requested counsel, Stellato & Schwartz, was familiar with FIA and the case and should be appointed for the most seamless transition possible for its client.

¶ 26 FNIC wrote Economy again on December 29, 2008, this time demanding the appointment of independent counsel to represent FIA. Because of Economy's conflicting interests, FNIC stated that Illinois law clearly granted it the right to choose its own independent counsel to represent FIA at Economy's expense. FNIC requested confirmation that FIA was entitled to separate, independent counsel and that the choice of Stellato & Schwartz was acknowledged.

¶ 27 E. Declaratory Judgment Action and Counterclaim

¶ 28 On February 6, 2009, Economy filed its action against FIA and FNIC seeking a declaration as to whether FIA was insured under Economy's policy and Economy was entitled to control FIA's defense. On May 18, 2009, FIA and FNIC filed their counterclaims for declaratory judgment and to stay proceedings on Economy's complaint. Specifically, they sought a declaration that: Economy had a primary duty to defendant FIA; FNIC did not owe FIA a duty to defend; a conflict of interest existed between the defense of Reckamp and FIA as owed by Economy; FIA was entitled to select

independent counsel under *Peppers*; Economy had a duty to reimburse FNIC for costs, fees and payment of prejudgment interest for the costs paid by FNIC in its defense of FIA; and that a stay of Economy's complaint was premature. On August 12, 2009, Economy amended its complaint by claiming that FNIC breached its duty to defend Reckamp and was estopped from raising its claims and defenses.

¶ 29 During this time, Economy refused to appoint Stellato & Schwartz as FIA's counsel and, instead, appointed another firm from its list of approved panel counsel. The parties sent several letters to each other concerning this issue and FNIC continued to demand that Stellato & Schwartz be retained as counsel. The selection of counsel was resolved when FIA's motion to substitute Stellato & Schwartz as counsel was granted by the court on June 2, 2009.

¶ 30 The parties filed answers and affirmative defenses to the declaratory judgment actions. In its September 29, 2009, answer to FNIC's counterclaim for declaratory judgment, Economy initially denied FNIC's claim that the 1998 Oldsmobile was owned by Reckamp, but later admitted that Reckamp owned the automobile.

¶ 31 FNIC moved for summary judgment on the *Peppers* issue raised in its counterclaim, which motion was granted on March 23, 2010. The parties then filed cross-motions for partial summary judgment on Economy's count asserting that FNIC breached its duty to defend Reckamp and was estopped from raising its arguments. On September 29, 2010, following briefing and argument, the trial court issued a memorandum opinion granting Economy's motion and denying FNIC's motion. The court found that: FNIC had a duty to defend Reckamp; FNIC breached that duty by disclaiming coverage and failing to seek a declaratory judgment of its rights and responsibilities; and, was estopped from denying

insurance coverage. FNIC was ordered to "bear the full burden of Reckamp's defense and primary coverage."

¶ 32 F. Motions to Reconsider Summary Judgment Order

¶ 33 On October 13, 2010, FNIC filed two motions to reconsider the September 29, 2010, order. Its first motion was based on the prior record and alleged that the court: (1) overlooked the fact that Economy admitted in its answer to the counterclaim that it issued its policy to Reckamp for the 1998 Oldsmobile Silhouette owned and driven by Reckamp at the time of the accident; (2) erred in ignoring the split in case law on estoppel for excess versus primary coverage disputes; (3) erred by misreading case law regarding estoppel and should not have estopped FNIC from asserting policy defenses to Economy's filings; and (4) improperly applied the law resulting in the reforming of FNIC's policies so as to require FNIC's coverage of Reckamp.

¶ 34 In its second motion to reconsider, FNIC argued that the judicial admissions from Reckamp's deposition and Economy's answer to FNIC's complaint that Reckamp owned the 1998 Oldsmobile Silhouette were supported by newly discovered evidence. FNIC attached the affidavits of a claims manager and a claims adjuster for FNIC about research completed regarding Reckamp's ownership of the vehicle. The information indicated that FNIC determined the vehicle was Reckamp's based on: conversations with FIA and Economy; a newspaper article stating that Reckamp was driving his vehicle, a 1998 Oldsmobile Silhouette, at the time of the accident; Reckamp's volunteer driver form for FIA that indicated he held automobile insurance with Economy; the police report of the accident that had the make, model, year and VIN number of Reckamp's vehicle and confirmation that he owned the vehicle; and a copy of Economy's policy that listed the

1998 Oldsmobile Silhouette. FNIC also argued that the statement in the original underlying complaint that Reckamp "was controlling and operating the 1998 Oldsmobile Silhouette that he was driving at the time of the accident" supported the finding that Reckamp owned the vehicle and the non-owned vehicle exclusion applied.

¶ 35 With respect to the duty to defend, the court pointed to FNIC's failure to direct the court to Economy's answer when it briefed and argued the motions for summary judgment. The court added that Economy's answer to FNIC's complaint was not an admission by Reckamp because it was completed by Economy. Therefore, it found that the proffered new evidence by FNIC was either inadmissible or unavailing. The court also concluded that it did not err in finding the possibility of coverage from the four corners of the complaint.

¶ 36 The trial court granted the motions to reconsider in part and denied in part. Citing *Nationwide Mutual Insurance Co. v. Filos*, 285 Ill. App. 3d 528 (1996), the court agreed that the doctrine of estoppel cannot be used to create primary liability or increase coverage, but denied the remainder of FNIC's motion. Relevant to this appeal, the court modified the trial court's first order finding that the language that FNIC was estopped from asserting any policy defenses to coverage and removing the language that FNIC was ordered to bear the full burden of Reckamp's defense and primary coverage. These appeals and cross-appeal followed.

¶ 37 G. Jury Verdict

¶ 38 During the briefing of this appeal, the jury entered a verdict in the underlying wrongful death action on August 24, 2012. The jury found FIA not liable, but entered a verdict against Reckamp, awarding damages totaling $253,561.78. The verdict was subject to a

$210,000 setoff for a settled codefendant, leaving the final judgment against Reckamp at $43,561.78. On August 28, 2012, FNIC filed an emergency motion to stay deliberations in the instant appeals and reopen the case to allow supplemental briefing. That motion was granted and the parties filed supplemental briefs.

¶ 39 II. ANALYSIS

¶ 40 A. Standard of Review

¶ 41 Summary judgment is proper where the pleadings, depositions, affidavits, admissions, and exhibits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is thus entitled to judgment as a matter of law. *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102, 106 (2007). On the other hand, a triable issue of fact exists where there is a dispute as to one of the material facts, or where a reasonable trier of fact might differ in drawing inferences from facts that are not in dispute. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 162-63 (2007). A party may nevertheless succeed on its motion for summary judgment by disproving the opponent's case with uncontradicted evidence that would entitle it to judgment as a matter of law or by establishing that the plaintiff lacks sufficient evidence to prove an essential element of its cause of action. *Argueta v. Krivickas*, 2011 IL App. (1st) 102166, ¶ 6. For appeals such as this, on the circuit court's grant of defendant’s motion for summary judgment, this court will review the motion *de novo*. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004).

¶ 42 B. Duty to Defend

¶ 43 An insurer's duty to defend arises when: (1) the action is brought against an insured; and

(2) the facts as alleged in the complaint fall, or potentially fall, within the policy's coverage. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010). In determining whether these factors are met and the insurer owes a duty to defend, courts look to the four corners of the complaint. *Peppers*, 64 Ill. 2d at 735. The burden is on the insured to prove that the claim falls within the coverage of an insurance policy and the burden then shifts to the insurer to demonstrate if a limitation or exclusion applies. *Addison Ins. Co. v. Fay*, 232 Ill. 2d 446, 453-54 (2009). Any doubts about potential coverage and whether the duty to defend exists are to be resolved in favor of the insured. *Lorenzo v. Capital Indemnity Corp.*, 401 Ill. App. 3d 616, 619 (2010).

¶ 44 Unless it is clear that the complaint fails to state facts that bring the case within or potentially within the insured's policy coverage, an insurer may not justifiably refuse to defend an action. *General Agents Insurance Company of America, Inc. v. Midwest Sporting Goods*, 215 Ill. 2d 146, 154 (2005). The duty to defend remains even if the allegations are groundless, false or fraudulent or if the insurer has knowledge that the allegations are untrue or the facts of the case will exclude coverage. *Lorenzo*, 401 Ill. App. 3d at 619. However, if the complaint demonstrates that the claim is potentially within the scope of the insurance policy, the insurer may seek a declaratory judgment that there is no coverage or defend the suit under a reservation of rights. *Murphy v. Urso*, 88 Ill. 2d 444, 452 (1981).

¶ 45 1. Duty to Defend Based on the Complaint and Insurance Policy

¶ 46 FNIC first asserts that the trial court incorrectly determined that it had a duty to defend Reckamp based on the facts before the court. Prior to delving into the "necessary comprehensiveness" of the remainder of its arguments, FNIC claims that this case may

be resolved in short order by considering this court's opinion in *Federal Insurance Co. v. Economy Fire & Casualty Co.*, 189 Ill. App. 3d 732 (1989). FNIC comments that it is ironic that in *Federal Insurance*, Economy was the prevailing party on the same points of law FNIC raises in the instant matter. It asserts that *Federal Insurance* provides the only three principles of law necessary to reverse and vacate the trial court's granting Economy's motion for summary judgment and grant FNIC's cross-motion for summary judgment, namely that: (1) an action must be brought against an insured before the insurer has a duty to defend; (2) an excess insurer has no immediate duty to defend until the primary underlying insurance is exhausted; and (3) estoppel generally applies where the insurer failed to defend based on a policy exclusion or where the primary insurer's duty to defend is at issue. *Id.* at 735-38.

¶ 47 In *Federal Insurance*, Jay Michel was involved in an accident while driving an automobile owned by his employer, Michel Masonry. A passenger riding with Jay was injured and filed a personal injury suit against Jay, Michel Masonry and the driver and owner of the dump truck involved in the collision. *Id.* at 734. Jay's father owned Michel Masonry and had a personal estate protector umbrella policy with Economy for excess coverage; however, Jay's father was not named in the complaint and no third-party action was filed against him. *Id.* at 736. Federal Insurance and another insurer defended the claim after Economy denied coverage and brought an action for declaratory judgment against Economy alleging it breached its duty to defend. The trial court granted Economy summary judgment dismissing the action brought against it. *Id.* at 734.

¶ 48 Following the considerations outlined above for determining whether a duty to defend exists, this court affirmed the judgment of the trial court. In reaching that decision, it

noted that Michel Masonry was sued solely as a corporate entity and that Economy's insured, Jay's father, was not named in any action. Instead, the allegations of the complaint were directed against Jay as an agent and authorized employee of Michel Masonry. There were no allegations that Jay was acting on behalf of his father, that the automobile had been loaned to or hired for his father's use, or even that Jay was a relative of his father. *Id.* at 736. In the absence of allegations of negligence against Economy's insured, the court opined that there was no potential for coverage, no duty to defend, no responsibility for Economy to defend under a reservation of rights or seek a declaratory judgment, and no estoppel preventing Economy's refusal of coverage. *Id.* at 736-38.

¶ 49 FNIC also points to the court's analysis concerning the fact that Economy was an excess carrier and had no duty to defend until the underlying coverage was exhausted. However, this discussion was *dicta* and not important for the court's final holding because it rested on the complete lack of any duty to defend based on the complaint. While the court highlighted that plaintiff's failure to plead that a "non-owned automobile" was involved, it found, more importantly, that the alleged insured was not named in the complaint in any way.

¶ 50 In this case, FNIC's insured, FIA, was a named party to the complaint. In addition, the complaint alleged that Reckamp was acting as an agent of FIA and under FIA's direction. Thus, *Federal Insurance* is distinguishable because the key factor in that case, the failure to name or allege in the complaint any wrongdoing by the insured, evidenced a lack of potential coverage.

¶ 51 FNIC refers to its May 2007 letter to Reckamp pointing out a police report that avers that Reckamp was the owner of the 1998 Oldsmobile Silhouette involved in the accident and

supports reversal based upon the trial court's error when it refused to consider this evidence that the Oldsmobile was a non-owned vehicle under the exceptions to the FNIC policy with FIA that eliminated the potential for coverage. See *State Security Insurance Co. v. Linton*, 67 Ill. App. 3d 480, 484 (1978); *Colt Construction and Development Co. v. North*, 168 Ill. App. 3d 913, 916-17 (1988). FNIC expands upon this argument by citing a line of cases that purportedly permit a court to look beyond the allegations of a complaint to determine if a party asserting coverage is a proper insured under the policy at issue, as long as that evidence would not overlap with any material issue in the case. See *Pekin Ins. Co. v. Wilson*, 237 Ill. 2d 446 (2010); *American Economy Insurance Co. v. Holabird and Root*, 382 Ill. App. 3d 1017 (2008); *Fidelity & Casualty Co. of New York v. Envirodyne Engineers*, 122 Ill. App. 3d 301, 304-05 (1983). *Pekin* is inapposite because the complaint contained allegations of intentional acts and the applicable policy contained a self-defense exception. To resolve a motion for judgment on the pleadings, the trial court found it was proper to examine the insured's counter-pleading that suggested that the insured was acting in self-defense. *Pekin*, 237 Ill. 2d at 450-51.

¶ 52 After an examination of *Holabird* and *Envirodyne*, our supreme court affirmed. Quoting *Envirodyne*, the *Pekin* court stated that " '[t]o require the trial court to look solely to the complaint in the underlying action to determine coverage would make the declaratory proceedings little more than a useless exercise possessing no attendant benefit and could greatly diminish a declaratory actions' purpose of settling and fixing the rights of the parties.' " *Pekin*, 237 Ill. 2d at 461, quoting *Envirodyne*, 122 Ill. App. 3d at 304-05. Therefore, "it was incumbent upon the trial court, for purposes of resolving Pekin's motion for judgment on the pleadings, to consider as admitted all well-pleaded facts set

forth in the pleadings of the nonmoving party, and the fair inferences drawn therefrom. *Id.* at 464.

¶ 53 FNIC asserts that in Economy's answer to FNIC's counterclaim for declaratory judgment, Economy admitted that Reckamp owned the automobile. It contends that Economy's answer is a judicial admission binding on the party and concludes that ownership was effectively removed from issue, and that FNIC is "at a loss to understand" how any other evidence is needed to determine that no duty to defend exists.

¶ 54 We agree with Economy that the trial court properly concluded that FNIC had a duty to defend Reckamp. Economy responds that there is no dispute that Reckamp meets the initial definition of insured under FIA's policy with FNIC because he was acting as a volunteer for FIA. Because FNIC does not dispute this, the only issue is whether the allegations of the complaint remove Reckamp's status as an insured. Economy asserts that the right announced in *Pekin* and *Holabird* to examine evidence outside of the complaint exists only where the insurer timely files a declaratory action and not where it denies coverage and remains silent. Economy argues that FNIC's reading of the case law is contrary to every duty to defend case that adheres to basing the duty to defend on potential coverage and creates an "actual coverage" standard regardless of the insurer's actions.

¶ 55 The trial court found the decision in *Clemmons v. Travelers Insurance Co.*, 88 Ill. 2d 469 (1981), to be on point. In *Clemmons*, the plaintiff's complaint alleged that he was a passenger in an automobile owned by the American National Red Cross (Red Cross) when it collided with another vehicle. *Id.* at 472. Red Cross' insurer, Travelers Insurance Co. (Travelers), refused to defend the driver claiming that the complaint failed to allege

that Red Cross granted the driver permission to drive its automobile. *Id.* at 473. Following entry of a default judgment, the plaintiff filed an action for declaratory judgment seeking a declaration that Travelers breached its duty to defend the driver and was required to pay the judgment amount. *Id.* at 474.

¶ 56 Travelers countered that the complaint failed to raise an issue of potential policy coverage because it did not contain a specific allegation that Red Cross had granted the driver permission to drive its automobile. For further support, Travelers cited an unsworn police report in which the driver stated that he did not have permission to drive the vehicle at the time of the accident. Finding that the allegations in the complaint raised the potential of coverage as there clearly was the possibility that the driver was driving his employer's automobile with permission, our supreme court rejected this argument and reliance on the police report. *Id.* at 475-76. Further, the unsworn report did not justify Travelers' decision as the duty to defend must be determined solely from the language of the complaint and the policy. The court added that the driver's understanding of the expansive view of permission under the law was likely limited and could not be used to dispel the potential for coverage. *Id.*

¶ 57 As Economy maintains, the four corners of the complaint and amended complaint do not rule out the possibility of coverage. Indeed, Economy's admission that Reckamp owned the vehicle came in its September 9, 2009, answer to FNIC's counterclaim for declaratory judgment. As the trial court found, the answer was based on the information at Economy's disposal and was not admitted by Reckamp or supported by any evidence. Similar to the legal issue of permission in *Clemmons*, Economy points to several cases that note that many individuals are insured for automobile use as owners despite the fact

they do not own the vehicle.

¶ 58 Furthermore, as stated in *Clemmons*, the police report in this matter cannot be used in support of FNIC's argument. Generally, police reports are inadmissible hearsay because they

"generally lack the earmarks of trustworthiness and reliability." *People v. Smith*, 141 Ill. 2d 40, 73 (1990). Because the duty to defend must come from the language of the complaint and policy and an unsworn accident report may be unreliable or may include statements that do not contain the awareness or context of other issues, reliance on police reports is improper. *Clemmons*, 88 Ill. 2d at 475-76.

¶ 59 As addressed above, the duty to defend remains even if the insurer has knowledge that the allegations are untrue or the facts of the case will exclude coverage. *Lorenzo*, 401 Ill. App. 3d at 619. The complaint provides no doubts about potential coverage and, as addressed below, an insurer may not wait to seek declaratory judgment and then present additional evidence to support its claim to exclude coverage. The trial court did not have evidence properly before it to determine that there was no potential for coverage and it was correct in finding that FNIC had a duty to defend.

¶ 60 2. Estoppel

¶ 61 The trial court also found that FNIC was estopped from asserting policy defenses because of the delay between the date it declined coverage and the filing of its counterclaim. Under the "familiar general rule of estoppel," if an insurer takes the position that a potential insured is not covered, it must defend the suit under a reservation of rights or seek a declaratory judgment. *Murphy*, 88 Ill. 2d at 452. If the insurer fails to do this and wrongfully denies coverage, it is estopped from raising policy defenses to coverage.

Uhlich Children's Advantage Network v. National Union Fire Co., 398 Ill. App. 3d 710, 716 (2010).

¶ 62 In *Korte Construction Co. v. American States Insurance*, 322 Ill. App. 3d 451 (2001), this court found the defendant insurer, American States, estopped from raising noncoverage as a defense. American States conceded that the plaintiff's complaint potentially brought the action within the scope of its insurance policy. However, it argued that it properly sought declaratory relief in its affirmative defense that its policy only provided excess insurance. *Id.* at 457.

¶ 63 Twelve months after the complaint was filed, Korte sought declaratory judgment. Korte had repeatedly requested that American States provide a defense, but was refused each time and American States did nothing else during this time. *Id.* at 458. While the court agreed that "there need not be a race to the courthouse and the insured should not be able to estop the insurer from asserting policy defenses by filing a complaint for declaratory judgment first," it affirmed that "the insurer must take some action to adjudicate the issue of coverage or undertake to defend the insured under a reservation of rights, and it must take the action within a reasonable time of a demand by the insured." *Id.* Therefore, the court found that because American States did not act within a reasonable period of time, it was estopped from raising policy defenses to coverage. *Id.* at 459.

¶ 64 In *West American Insurance Co. v. J.R. Construction Co.*, 334 Ill. App. 3d 75 (2002), this court followed *Korte Construction* in finding the insurer, West American, estopped from raising policy defenses to coverage. West American issued a policy to a party that subcontracted work with J.R. Construction and added J.R. Construction to that policy. In October 1997, an employee of West American's insured filed a negligence action against

J.R. Construction who tendered the suit to West American. West American wrote to J.R. Construction on November 14, 1997, to acknowledge that J.R. Construction was a named additional insured and stated that any potential coverage would be excess. *Id.* at 78. In August 1999, West American sought a declaratory judgment that it had no duty to defend J.R. Construction and also wrote to J.R. Construction denying coverage. *Id.* at 79.

¶ 65 This court disagreed, finding that West American had a duty to defend J.R. Construction and affirmed the trial court's finding that West American was estopped from raising policy defenses to coverage. *Id.* at 86. The court opined that West American breached its duty to defend by waiting 21.5 months from the time the defense was tendered until it filed its declaratory action. The court found this delay was unreasonable as a matter of law, noting that "[a]n insurance company cannot 'simply stand on the sidelines' because another insurance company performs its own contractual duties." *Id.* at 87, quoting *Central Mutual Insurance Co. v. Kammerling*, 212 Ill. App. 3d 744, 749 (1991). Unlike *Kammerling*, which involved a 10-month delay from the time of tender to the insurer's declaratory judgment action, West American's delay was almost 22 months and, "[m]oreover, the initial denial was based upon its claim that the policy was excess to any other policy." *Id.* at 87.

¶ 66 Applied to the case before us, we find that the trial court properly followed *Kammerling*, *Korte* and *J.R. Construction*, in finding FNIC estopped from asserting its policy defenses. *Korte* and *J.R. Construction* clearly hold that an insurer may not simply stand on the sidelines and wait for another insurer to act. Rather, FNIC had an affirmative responsibility to seek declaratory judgment because the allegations in the complaint raised the possibility of coverage. This responsibility exists irrespective of the actions of

another party and FNIC's claim that it filed for declaratory judgment merely three months after Economy sought declaratory judgment is unavailing. FNIC's extended delay of 19 months before filing its declaratory judgment action after denying coverage is unreasonable as a matter of law and it is estopped from asserting its policy defenses.

¶ 67 3. Application of Estoppel to Excess Versus Primary Coverage

¶ 68 Having found that FNIC has a duty to defend and is estopped from asserting policy defenses, we consider FNIC's argument that, assuming a duty to defend exists, the FIA policy provides excess coverage only and FNIC does not have a duty to defend until Economy's primary coverage is exhausted. FNIC asserts that its position is supported by the plain language of Coverage L, stating "Coverage provided by Coverage L is excess and applies over any other valid and collectible insurance available to the **Insured**." (Emphasis in original.) FNIC points out that the Economy policy is a "*pro rata*/excess" insurance policy and that only the *pro rata* aspect is at issue in this case. It asserts that, based on these types of coverage and despite the duty to defend under FNIC's Coverage L provision, Economy's duty to defend is primary.

¶ 69 FNIC challenges the trial court's reliance on *Korte* and *J.R. Construction* as "unfortunately-reasoned cases" that provide incorrect statements of basic insurance principles and represent a split of authority on this issue. In particular, FNIC finds fault with the trial court's raising "other insurance" sections, as being the type of issue prior cases have found subject to estoppel and that conditions and terms of insurance, such as defining the insured, are not the same as a "policy defense" described in cases applying estoppel. From this, FNIC concludes that estoppel cannot create or expand coverage where it otherwise did not exist.

¶ 70 Contrary to FNIC, Economy maintains that our supreme court has held that the roots of estoppel are equitable, following the theory that "because the insurer breached one of its duties under the contract insurance (of which the putative insured is an intended third-party beneficiary), the insurer cannot later turn around and enforce another clause of the contract, to its complete protection." *Clemmons*, 88 Ill. 2d at 479. The *Clemmons* court continued to state that it "will not enforce the insurer's protections under the policy where the insurer failed to act equitably, that is, failed to defend under a reservation of rights or to bring a declaratory judgment action to determine whether there was coverage under the policy." *Id.*

¶ 71 Following *Clemmons*, *Korte*, and *J.R. Construction*, we affirm the judgment of the trial court on this issue. Economy correctly points out that while FNIC finds these cases were unfortunately-decided, FNIC does not provide case law that would dissuade us from following the holdings enunciated in *Clemmons*, *Korte* and *J.R. Construction*. Instead, FNIC cites treatises and older cases only tenuously related to the issue at hand. Having found a duty to defend and estoppel, we find that the trial court properly estopped FNIC from asserting defense to coverage, including its claim that it was merely an excess insurer.

¶ 72 C. Conflict of Interest Requiring Independent Counsel

¶ 73 In its appeal, Economy argues that there was no conflict of interest between Economy and FIA that required independent counsel and that the trial court erred in granting FNIC's motion for summary judgment on that issue. According to Economy, *Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187 (1976), a definitive Illinois Supreme Court insurance coverage case that requires independent counsel where the insurer stands to

gain in a coverage dispute by manipulating the defense, does not apply where the insurer defends the insured without a reservation of rights. Therefore, Economy maintains that the rule from *Peppers* does not apply to the facts of this case.

¶ 74 In *Peppers*, the insured owned three buildings on a single tract of land, including his home and a Pizza Hut restaurant. Due to several burglaries at the Pizza Hut, the insured had been staying in it overnight. One night, the defendant allegedly negligently and/or intentionally harmed the plaintiff when the insured, believing the plaintiff was breaking into the Pizza Hut, shouted for him to stop and then fired his shotgun at the plaintiff. *Id.* at 191-92. Our supreme court held that the allegations in the complaint did not impose a duty to defend on Maryland Casualty. Although it found that the trial court erred in determining the insured's action was intentional in the action for declaratory judgment, it upheld the trial court's ruling that St. Paul Insurance was obligated to defend the insured because additional actions were within the coverage or potentially within the coverage of its policy. *Id.* at 193. Further, because St. Paul undertook the defense of the insured, it was thereafter estopped from asserting a defense of noncoverage.

¶ 75 However, this created an unresolved conflict between the interests of the insured and the insurer because it would be in the insured's interest to be found negligent and covered by the policy, while the insurer would benefit from a finding the insured acted intentionally thereby leaving him without coverage. *Id.* at 197-98. The court stated that this posed "serious ethical questions" which prohibited counsel from representing both the insurer and the insured on remand. *Id.* at 198. It continued that this could be cured by the insured's acceptance of the defense only after full disclosure of the conflict or if the insurer waived its defense of noncoverage and defended without a reservation of rights.

Id. Therefore, "[a]bsent the acceptance of the defense by [the insured] or the waiver by St. Paul, [the insured] has the right to be defended in the personal injury case by an attorney of his own choice who shall have the right to control the conduct of the case. By reason of St. Paul's contractual obligation to furnish [the insured] a defense it must reimburse him for the reasonable cost of defending the action." *Id.* at 198-99.

¶ 76 Economy asserts that there is no dispute as to this rule of law or that Economy agreed to defend FIA without a reservation of rights. Therefore, it argues that there is no coverage-based issue and no *Peppers* issue because there is no actual conflict of interest between it and FIA but, rather, a theoretical conflict that is cured by appointing a separate attorney thereby fulfilling its duty and eliminating the requirement, right and/or need for the insured to choose its own counsel.

¶ 77 Economy contends that this was simply an issue that was up to counsel to determine if it was best to combine forces or proceed with separate strategies. Economy further argues that *Oda v. Highway Insurance Co.*, 44 Ill. App. 2d 235 (1963), is on point and requires reversal. In *Oda*, the insurer covered both the landlords and a tenant for their liability in personal injury suits against them and appointed separate attorneys. *Id.* at 245. During the course of litigation, the attorneys determined that it was in their clients' best interests to unite forces rather than blame each other. *Id.* at 248. Ultimately, a verdict was entered for the plaintiff and the landlords were granted judgments *n.o.v.*, leaving the tenant solely responsible for the judgment that surpassed the policy limit. *Id.* at 242. Failing to find any ground for malpractice or conflict requiring the parties to choose their own representation, the court found that the insurer satisfied its duty. *Id.* at 249-50. The court further found that the case did not involve a situation where the insurer had a conflict of

interest with the insured that would lead to protecting the company over the insured and stated that, if any conflicts of representation existed, it was to be resolved between the attorneys. *Id.* at 248-50.

¶ 78 We disagree with Economy's assertion that this rule from *Oda*, an Illinois appellate court opinion that preceded our supreme court's opinion in *Peppers* by eleven years, stands as good law today and the appointment of separate counsel was sufficient in this case. Economy notes that there is no mention of reserved coverage defenses in *Oda* and it cites case law from other jurisdictions holding that the appointment of separate counsel will ordinarily suffice to satisfy the insurer's duty. Economy concludes that, without an actual conflict and the appointment of separate counsel, the trial court erred in granting FIA's request to choose its own counsel.

¶ 79 We do not read *Peppers* as narrowly as Economy and agree with FIA that it supports the conclusion that the trial court did not err in granting its motion on the issue of the appointment of counsel. While FIA admits that the precise scenario typically addressed in this type of case is not present here, it acknowledges, as the *Oda* court stated, the "traditional truism among lawyers is that nothing can be more ruinous to the defense of cases such as the personal injury cases here involved than for one defendant to seek to prove the liability of the other." *Id.* at 248. We agree that the conflict outlined by FIA at the beginning of the case, and repeated by appointed counsel during the case, is akin to *Peppers* because it created an unresolved conflict between the interests of FIA and Economy as it would be in Economy's interest to keep FIA in the case and not take it out of FNIC's coverage.

¶ 80 Furthermore, unlike in *Oda*, where there was no dispute over representation and no

question until after the verdict in the case, FNIC raised the issue of the conflict early in this matter. While Economy did undertake the defense without a reservation of rights, that did not remove the possible conflict of Economy benefitting by not providing a vigorous defense for FIA, thereby retaining FIA's coverage in the case. FNIC raised this issue initially and original counsel appointed by Economy also raised this issue during the course of litigation, thus there was a dispute over representation and *Oda* is not dispositive of this issue. We agree with FNIC that the trial court properly granted its motion for new counsel.

¶ 81 D. Motions to Reconsider

¶ 82 FNIC argues that the trial court erred in denying its motion to reconsider. FNIC points out that the standard of review concerning a motion to reconsider is different than that for consideration of motions for summary judgment. A trial court is granted discretion in deciding a motion to reconsider and, barring an erroneous conclusion of law, its decision on a motion to reconsider will only be reversed for an abuse of discretion. *Compton v. Country Mutual Ins. Co.*, 382 Ill. App. 3d 323, 330 (2008).

¶ 83 FNIC asserts that its motion for reconsideration highlighted that the evidence fully demonstrated that the vehicle involved in the accident was not owned by FIA. FNIC recalls that Reckamp freely admitted ownership of the vehicle several times during the course of litigation and FNIC states that it argued before the trial court that Economy's answer to the counterclaim contained this admission. FNIC also contends that the trial court's statement that Economy, not Reckamp, made this admission is irrelevant because it is binding on Economy as the party-plaintiff seeking a declaration of rights.

¶ 84 Having found that the trial court did not err in finding FNIC had a duty to defend, we

reject its argument that the trial court erred in denying its motion to reconsider based on the record. With respect to the motion to reconsider based on the post-summary judgment record, we also reject FNIC's argument that the trial court erred in denying that motion. We agree with Economy that FNIC fails to overcome the well-settled rule for the introduction of new evidence on a motion to reconsider.

¶ 85 Motions to reconsider are available when there is newly discovered evidence that would affect the outcome of the case, changes in the law, or errors in the court's judgment, but not to assert arguments or facts that were available and should have been entered in the record earlier. *North River Insurance Co. v. Grinnell Mutual Reinsurance Co.*, 369 Ill. App. 3d 563, 572-73 (2006). Evidence is newly discovered only if it was unavailable at the time of the hearing and the movant provides a reasonable explanation as to how it was unavailable. *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶30. Similar to the foregoing analysis regarding estoppel, for motions to reconsider, " '[t]rial courts should not allow litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling.' " *Id.* at 572-73, quoting *Landeros v. Equity Property & Development*, 321 Ill. App. 3d 57, 65 (2001).

¶ 86 FNIC fails to state with particularity how this evidence is newly discovered other than generally alleging that the parties were fighting, Economy was undertaking "bait and switch" coverage, and "pounding" FNIC and FIA with discovery requests such that FNIC could not possibly discover this evidence. However, the allegedly newly discovered evidence was either documentary evidence that FNIC controlled long before presenting it to the court or testimony from its own employees. Accordingly, the evidence is not newly discovered for purposes of the motion and the trial court did not abuse its

discretion in denying the motion to reconsider based on new evidence.

¶ 87 In its cross-appeal, Economy contends that the trial court erred in reconsidering and modifying its judgment. As noted above, the trial court reconsidered its order and removed the determination that FNIC bear the full burden of Reckamp's defense and primary coverage. In its first order, the trial court ordered that FNIC breached its duty to defend and must "bear the full burden of Reckamp's defense and primary coverage," but removed this language on reconsideration.

¶ 88 Where a complaint potentially triggers coverage and the insurer fails to defend under a reservation of rights or seek declaratory judgment, it is "estopped from asserting any policy defenses." *Aetna Casualty and Surety Co. v. Prestige Casualty Co.*, 195 Ill. App. 3d 660, 665 (1990). Under this rule, estoppel applies and FNIC cannot find refuge in the proposition that the claim is covered under Economy's policy. *J.R. Construction*, 334 Ill. App. 3d at 87. Furthermore, under *Clemmons*, FNIC's failure to pursue its rights and its breach of the duty to defend transforms the duty to defend into a duty to indemnify and the trial court's original order was proper. *Clemmons*, 88 Ill. 2d at 479.

¶ 89 Economy adds that *Filos*, the case cited by the trial court for authority in modifying the order, is easily distinguishable. It argues that *Filos* involved the question of equitable estoppel for defending without a reservation of rights. Economy asserts that this scenario is distinct from this case, where estoppel applies for the wrongful refusal to defend. *Filos*, 285 Ill, App. 3d at 534; see also *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 158 (1999). We agree.

¶ 90 We have found that FNIC had a duty to defend and was properly estopped from asserting its policy defenses because it refused to defend and failed to timely seek declaratory

relief. As addressed above, the allegations of the complaint, the terms of its policy with FIA, and the record before this court support estoppel. Nothing in the underlying jury verdict affects the fact that FNIC breached its duty to defend Reckamp by waiting too long to seek declaratory judgment regarding its responsibilities. Accordingly, FNIC is estopped from interposing defenses to coverage and the trial court's first order finding that FNIC must "bear the full burden of Reckamp's defense and primary coverage" was correct. This matter is remanded to the trial court for reinstatement of this language from the first order.

¶ 91 III. CONCLUSION

¶ 92 For the foregoing reasons, the judgment of the trial court is affirmed in part and reversed in part and the trial court's order upon reconsideration is to be modified to reinstate the language finding FNIC responsible for the coverage.

¶ 93 Affirmed in part, reversed in part.