FIRST DIVISION
November 5, 2012

No. 1-11-3573

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEKIN INSURANCE COMPANY, Plaintiff-Appellant/Cross-Appellee, v. PRINCE CONTRACTORS, INC., an Illinois Corporation, and 4929 FOREST, LLC, an Illinois Limited Liability Company, Defendants-Appellees/Cross-Appellants, and ROBERT RYBALTOWSKI, Defendant.	)	Appeal from the Circuit Court of Cook County. No. 09 CH 51277 Honorable Rita M. Novak, Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's finding that Pekin Insurance Company owed a duty to defend Prince Contractors, Inc., as an additional insured under a policy issued to Chicago Masonry Construction, Inc., was affirmed where the underlying complaint against Prince Contractors, Inc., alleged facts bringing the case potentially within policy coverage. The circuit court's finding that Pekin Insurance Company owed no duty to defend 4929 Forest, LLC, as an

additional insured was affirmed where 4929 Forest, LLC, did not fall within the definition of an additional insured under the policy.

¶ 2 Defendant, Robert Rybaltowski, filed a lawsuit against Chicago Masonry Construction, Inc. (Chicago Masonry), Prince Contractors, Inc. (Prince), and 4929 Forest, LLC (Forest), alleging that their various negligent acts caused him to be struck and injured by certain masonry equipment as it was being lifted by Paszko Masonry, Inc., at a job site located at 4929 Forest Avenue in Downers Grove, Illinois. Forest and Prince tendered their defense of Mr. Rybaltowski's complaint to Pekin Insurance Company (Pekin), claiming they were covered as additional insureds under an insurance policy Pekin issued to Chicago Masonry. Pekin filed a declaratory judgment action, seeking a declaration that it had no duty to defend either Forest or Prince. The parties filed cross-motions for summary judgment. The circuit court granted the motions in part and denied them in part, finding Pekin had no duty to defend Forest because Forest was not an additional insured under the policy, but that Pekin had a duty to defend Prince. Pekin appeals the portion of the order finding it had a duty to defend Prince; Forest cross-appeals the portion of the order finding Pekin had no duty to defend Forest. We affirm on the appeal and on the cross-appeal.

¶ 3 In the underlying complaint, Mr. Rybaltowski alleged that on September 21, 2007, he was employed by a contractor named Peter Koshiba doing business as Rain Coat Solutions and, in the course of his employment, performed work at 4929 Forest Avenue in Downers Grove, Illinois, in connection with the construction of residential units. Mr. Rybaltowski alleged that Prince and Forest "and each of them" were contracted to serve as "a construction manager and general contractor" for the project. Chicago Masonry subcontracted with Prince to serve as a supervising masonry

contractor for the project.[1] Chicago Masonry hired Paszko Masonry to perform masonry work at the job site.

¶ 4 Pekin issued a commercial general liability insurance policy (the Pekin policy) to Chicago Masonry as named insured. The Pekin policy contains a blanket additional insured endorsement that provides as follows:

> "**1. Who Is An Insured (Section II)** is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability incurred solely as a result of some act or omission of the named insured and not for its own independent negligence or statutory violation."

¶ 5 In its contract with Prince, Chicago Masonry agreed to name Prince and Forest as additional insureds.

¶ 6 Mr. Rybaltowski alleged that Chicago Masonry, Forest, and Prince each retained control of supervision of the work at the job site, were in charge of safety at the job site, and had in place safety

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[1]The written contract, which is contained in the record on appeal, was signed by Chicago Masonry but not by Prince. "Generally, one of the acts forming the execution of a written contract is its signing. [Citation.] Nevertheless, 'a party named in a contract may, by his acts and conduct, indicate his assent to its terms and become bound by its provisions even though he has not signed it.' " *The Carlton at the Lake, Inc. v. Barber*, 401 Ill. App. 3d 528, 531 (2010) (quoting *Landmark Properties, Inc. v. Architects International-Chicago*, 172 Ill. App. 3d 379, 383 (1988)). The parties here do not dispute that Prince assented to the terms and that a binding, written contract between Prince and Chicago Masonry exists.

programs that were in full force and effect at the job site. They each also allegedly had the right to stop the work for safety violations, conducted safety meetings at the job site, and employed safety specialists who walked the job site to assure safe practices were followed, and to correct any safety violations.

¶ 7 In count I, Mr. Rybaltowski alleged Chicago Masonry, Forest, and Prince each had a duty to plaintiff to exercise ordinary reasonable care in the execution of their safety responsibilities, and that they each breached that duty in one or more of the following ways: failed to advise Mr. Rybaltowski concerning proper safety equipment; failed to require Paszko Masonry, Inc., to secure the area over which it was lifting equipment; failed to inspect the equipment of Paszko Masonry, Inc.; failed to inspect for proper rigging techniques; failed to coordinate lifts of equipment with the work activities of other trades; failed to require safety inspections as part of its safety program; and was "otherwise careless and negligent in exercise of its retained control of safety."

¶ 8 Mr. Rybaltowski alleged that as a proximate result of one or more of these alleged negligent acts or omissions, a support fell off certain masonry equipment as it was being lifted by Paszko Masonry, Inc., and "struck [Mr. Rybaltowski] causing him to sustain injuries of a personal and pecuniary nature, including but not limited to a closed head injury." In count I, Mr. Rybaltowski sought to hold Chicago Masonry, Forest, and Prince liable under section 414 of the Restatement (Second) of Torts (Restatement), which states:

> "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise

his control with reasonable care." Restatement (Second) of Torts § 414, at 387 (1965).

¶ 9 Section 414 provides an exception to the general rule that "one who employs an independent contractor is not liable for the acts or omissions of the latter." *Martens v. MCL Construction Corp.*, 347 Ill. App. 3d 303, 313 (2004).

¶ 10 In count II, Mr. Rybaltowski sought to recover from Prince, Forest, and Chicago Masonry for his injuries pursuant to section 343 of the Restatement. Under section 343, "a person who owns, possesses, or otherwise has control over land may be liable to someone who is injured on the land, if the first person knew or reasonably should have known of the dangerous condition that caused the injury and should have expected that others would be injured but failed to take adequate safety measures." *Pekin Insurance Co. v. Hallmark Homes, L.L.C.*, 392 Ill. App. 3d 589, 591 (2009) (citing Restatement (Second) of Torts § 343 (1965)).

¶ 11 In support thereof, Mr. Rybaltowski alleged in count II that on September 21, 2007, Chicago Masonry, Forest, and Prince were each in control of the premises located at 4929 Forest Avenue and they each had the duty to use ordinary reasonable care in the maintenance of the property at said location. Mr. Rybaltowski alleged Chicago Masonry, Forest, and Prince each committed one or more of the following negligent acts or omissions that proximately caused his injuries: negligently permitted workers to walk under an area in which the lift was moving and/or operating; failed to warn of falling objects from the moving lift; failed to properly secure items to the moving lift; and was, otherwise, careless and negligent.

¶ 12 Claiming to be additional insureds under the Pekin policy, Forest and Prince tendered the Rybaltowski complaint to Pekin and requested that Pekin provide them a defense in that action.

Pekin declined the tender and filed the instant action, seeking a declaration that it had no duty to defend either Forest or Prince. Pekin asserted that Forest was not insured under the Pekin policy because Chicago Masonry, the named insured, did not agree in a written contract with Forest to include Forest as an additional insured as required by the express terms of the additional insured endorsement. Pekin also asserted that it owed neither Forest nor Prince a defense under the additional insured endorsement because the Rybaltowski complaint did not contain allegations that created the possibility for Prince and/or Forest to be held liable solely as a result of Chicago Masonry's acts or omissions.

¶ 13 On the parties' cross-motions for summary judgment, the trial court granted the motions in part and denied them in part, finding Pekin owed a defense to Prince but not to Forest. First we address Pekin's appeal from the portion of the order finding it owed a duty to defend Prince; then we address Forest's cross-appeal from the portion of the order finding Pekin owed Forest no duty to defend.

¶ 14 I. Pekin's Appeal

¶ 15 "In determining whether an insurer must defend a party that is an additional insured under the policy, the court must compare the allegations of the underlying complaint against the party to the provisions of the policy, liberally construing both in favor of the additional insured party." *Hallmark Homes,* 392 Ill. App. 3d at 593.

> " 'If the underlying complaints allege facts within or *potentially* within policy coverage, the insurer is obliged to defend its insured even if the allegations are groundless, false, or fraudulent. [Citation.] 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. [Citation.] Moreover, if the underlying complaints allege several theories of recovery against the insured, the duty to defend arises even if only one such theory is within the potential coverage of the policy. [Citation.]
>
> The underlying complaints and the insurance policies must be liberally construed in favor of the insured. Where a policy provision is clear and unambiguous, its language must be taken in its 'plain, ordinary and popular sense.' [Citation.] A provision is ambiguous if it is subject to more than one reasonable interpretation. [Citation.] All doubts and ambiguities must be resolved in favor of the insured. [Citations.]" (Emphases in original.) *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73-74 (1991).

¶ 16 In the present case, Pekin argues that although Chicago Masonry contractually agreed with Prince to add it as an additional insured, the express terms of the additional insured endorsement to the Pekin policy provide coverage only for an additional insured whose liability is incurred "*solely* as a result of some act or omission of the named insured [Chicago Masonry] and *not* for its own independent negligence or statutory violation." (Emphasis added.) Pekin contends the trial court erred in finding it had a duty to defend Prince as an additional insured under the Pekin policy because the underlying complaint in the Rybaltowski litigation alleged liability based on Prince's *own* negligence. Pekin argues that "[t]he underlying complaint accuses Prince itself of several acts and omissions, and seeks to hold Prince directly liable for committing them itself. *** While it also accuses Chicago Masonry of the same acts and omissions, it does so only in an effort to hold

Chicago Masonry liable for *its* own negligence. Nowhere does Rybaltowski suggest that any party might be liable *solely* because of another's negligence and despite having done nothing negligent itself." (Emphasis in original.) Accordingly, Pekin asks us to reverse the grant of summary judgment in favor of Prince.

¶ 17 " 'The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court[,] which are appropriate subjects for disposition by way of summary judgment.' [Citation.] Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. [Citation.] We review cases involving summary judgment *de novo*. [Citation.] As in this case, 'where the parties file cross-motions for summary judgment, they invite the court to decide the issues presented as a matter of law.' [Citation.]" *Pekin Insurance Co. v. Pulte Home Corp.*, 404 Ill. App. 3d 336, 339 (2010).

¶ 18 The circuit court here did not err in granting summary judgment for Prince and finding Pekin owed Prince a duty to defend, as count I of the underlying Rybaltowski complaint against Prince alleged liability based on section 414 of the Restatement, pursuant to which Prince potentially could be found vicariously liable *solely* for the acts or omissions of Chicago Masonry. As discussed, section 414 provides that one who entrusts work to an independent contractor, "but who retains the control of any part of the work," is liable for physical harm to persons for whose safety the employer owes a duty of reasonable care, which is caused by his failure to exercise his control with reasonable care. Restatement (Second) of Torts, § 414, at 387 (1965).

¶ 19 Comment *a* to section 414 states:

> "If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. The employer may, however, retain a control less than that which is necessary to subject him to liability as a master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others." Restatement (Second) of Torts, § 414, Comment *a*, at 387 (1965).

¶ 20 "Comment a to section 414 explains the requirements to find vicarious liability. That is, if the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein." *Maggi v. RAS Development, Inc.*, 2011 IL App (1st) 091955, ¶ 44.

¶ 21 Comment *c* to section 414 provides further clarification of the issue:

> "In order for the rule stated in this Section to apply, *the employer must have retained at least some degree of control over the manner in which the work is done*. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations

> which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way." (Emphasis added.) Restatement (Second) of Torts, § 414, Comment *c*, at 387 (1965.)

¶ 22 In the present case, count I of the Rybaltowski complaint alleged, in pertinent part, that Prince was a general contractor for a project to construct residential units at 4929 Forest Avenue, that Chicago Masonry was employed as a subcontractor and that at all relevant times, Prince retained control of supervision of the work at the aforementioned job site.[2] The Rybaltowski complaint further alleged, in pertinent part, that Prince was in charge of safety at the job site, had in place safety programs and conducted safety meetings, and employed safety specialists who walked the job site to assure safe practices were followed and to correct any safety violations. Prince had the right to stop work for safety violations. Construed liberally in favor of Prince, said allegations were sufficient to indicate Prince "retained at least some degree of control over the manner in which the work is done" and that Chicago Masonry was not "entirely free to do the work in [its] own way" (Restatement (Second) of Torts, § 414, Comment *c*, at 387 (1965)), so as to potentially subject Prince to vicarious liability solely for Chicago Masonry's negligence, thereby triggering Pekin's duty

[2]We recognize that the complaint also alleged Forest and Chicago Masonry retained control of supervision of the work at the job site; however, for purposes of determining whether Pekin has a duty to defend Prince as an additional insured, our analysis necessarily focuses on whether the allegations regarding *Prince's* control of supervision of the work at the job site potentially fall within policy coverage.

to defend Prince as an additional insured under the policy.

¶ 23 *Hallmark Homes* is instructive. Hallmark Homes was the general contractor on a construction project. *Hallmark Homes*, 392 Ill. App. 3d at 595. One of the other entities involved in the project, MC Builders, was the named insured under an insurance policy issued by Pekin. *Id.* at 590-91. MC Builders obtained a certificate of insurance listing Hallmark Homes as an additional insured on its policy pursuant to an additional insured endorsement identical to the one at issue here. *Id*. at 591. A worker (Mr. Bremer), later, was injured on the jobsite and sued Hallmark Homes and MC Builders, among others. *Id*. The first two counts of the amended complaint sought to hold Hallmark Homes, as general contractor, liable under two theories of negligence, set out in sections 414 and 343 of the Restatement. *Id*. The fifth count also alleged negligence against MC Builders under section 343 of the Restatement. *Id*. at 591-92. The section 343 counts against both Hallmark Homes and MC Builders asserted a theory of premises liability and "were largely identical, each alleging that the defendant named in the count failed to conduct its construction activities at the site with reasonable care and negligently operated, managed, and controlled the premises in such a manner as to create the dangerous condition that caused Bremer's injury." *Id*. at 592.

¶ 24 Hallmark Homes tendered its defense to Pekin. *Id*. Pekin filed an action seeking a declaration of its obligations to Hallmark Homes and moved for summary judgment. *Id*. Pekin contended it had no duty to defend because the complaint against Hallmark Homes alleged that Hallmark Homes' own negligence made it liable to Mr. Bremer and, therefore, any possible liability could not be based solely on the negligence of MC Builders, as required by the endorsement. *Id*. Hallmark Homes responded that if MC Builders created a dangerous condition that caused Mr.

Bremer's injury, Hallmark Homes' liability could rest solely on the negligent acts of MC Builders, thereby triggering Pekin's duty to defend. *Id*. The trial court denied Pekin's motion for summary judgment and entered judgment in favor of Hallmark Homes. *Id*.

¶ 25 The appellate court affirmed, noting the allegations in the underlying complaint that Hallmark Homes " 'participated in coordinating the work being done and designated various work methods, maintained and checked work progress and participated in [the] scheduling of the work and the inspection of the work.' " *Id*. at 594. The appellate court determined that these allegations suggested Hallmark Homes retained some degree of control over the manner in which MC Builders performed its work, which could subject Hallmark Homes to vicarious liability under section 414 of the Restatement for MC Builders' negligence. *Id*.

¶ 26 The appellate court held:

> "Under the language of the policy, Hallmark Homes is an additional insured entitled to coverage so long as it is (or potentially could be) liable solely as a result of MC Builders' acts or omissions. [Citation.] In this case, that standard is met. Hallmark Homes is potentially vicariously liable solely on the basis of the acts or omissions of MC Builders. Inasmuch as Hallmark Homes was the general contractor on the project, with responsibility for overall supervision of the site, under section 414 of the Restatement it is possible that Hallmark Homes could be vicariously liable for the negligence of MC Builders. This could result if, for instance, MC Builders caused or knew of the dangerous condition that caused Bremer's injury, as alleged in the premises-liability claim against MC Builders, but Hallmark Homes had no knowledge of the condition. As at least one of the theories of negligence

alleged against Hallmark Homes could rest solely on the acts or omissions of the named insured, Pekin has a duty to defend Hallmark Homes against all of the claims raised against it by Bremer." *Id*. at 595.

¶ 27 The appellate court rejected Pekin's argument that it had no duty to defend because the underlying complaint did not specifically allege that Hallmark Homes' liability rested on the negligence of MC Builders. *Id*. The appellate court held that "the test is not whether the complaint directly alleges facts that show that the claim is within the coverage provided by the policy. Rather, the insurer owes a duty to defend unless 'the insurance cannot possibly cover the liability arising from the facts alleged' and the terms of the policy clearly preclude coverage under all of the facts consistent with the allegations. [Citations.]" *Id*. Construed liberally, the underlying complaint alleged facts potentially within policy coverage, triggering Pekin's duty to defend. *Id*. (citing *Wilkin*, 144 Ill. 2d at 73 (1991) (held that the underlying complaint and the insurance policy must be liberally construed in favor of the insured when determining whether the complaint alleged facts potentially within policy coverage)).

¶ 28 In the present case, the underlying complaint alleged Prince was the general contractor who had overall supervision of the work at the job site and that Prince was in charge of safety at the job site, had in place safety programs and conducted safety meetings, and employed safety specialists who walked the job site to assure safe practices were followed and to correct any safety violations. Prince retained the right to stop the work for safety violations. As in *Hallmark Homes*, when said allegations are construed liberally in favor of Prince, the additional insured, they were sufficient to indicate for purposes of section 414 that Prince retained some degree of control over the manner in

which its subcontractor, Chicago Masonry, performed its work at the job site. See, also *Moorehead v. Mustang Construction Co.*, 354 Ill. App. 3d 456 (2005) (plaintiff sufficiently alleged that the general contractor controlled the independent contractor's manner of work for purposes of section 414 where the general contractor was responsible for initiating, maintaining and supervising all safety procedures, initiated a specific safety program and designated an individual whose sole function was investigating safety hazards, had the authority to stop work being conducted in an unsafe manner, and employed a safety manager to inspect the site on a weekly basis to ensure compliance with safety standards). As such, it is possible under count I of the complaint that Prince could be vicariously liable under section 414 of the Restatement solely for one or more of the following acts of negligence allegedly committed by Chicago Masonry, if the acts were done without Prince's knowledge: failing to advise Mr. Rybaltowski concerning proper safety equipment; failing to require Paszko Masonry, Inc., to secure the area over which it was lifting equipment; failing to inspect Paszko Masonry Inc.'s equipment; failing to inspect for proper rigging techniques; failing to coordinate lifts of equipment with the work activities of other trades; and failing to require safety inspections as part of its safety program. Also, as in *Hallmark Homes* (*Hallmark Homes*, 392 Ill. App. 3d at 595) Prince potentially could be found vicariously liable under section 414 of the Restatement solely for one or more of the following acts of negligence allegedly committed by Chicago Masonry in the premises liability claim in count II of the complaint, if the acts were done without Prince's knowledge: negligently permitting workers to walk under an area in which the lift was moving and/or operating; failing to warn of falling objects from the moving lift; and failing to properly secure items to the moving lift. As at least one of the theories of negligence alleged against

Prince could rest solely on the acts or omissions of the named insured, Pekin has a duty to defend Prince against all of the claims raised against it by Mr. Rybaltowski.

¶ 29 Pekin asks us to follow a series of prior decisions, including *Village of Hoffman Estates v. Cincinnati Insurance Co.*, 283 Ill. App. 3d 1011 (1996); *Pekin Insurance Co. v. Beu*, 376 Ill. App. 3d 294 (2007); and *Pekin Insurance Co. v. United Parcel Service, Inc.*, 381 Ill. App. 3d 98 (2008). Those cases held that pursuant to an additional insured endorsement identical or nearly identical to the endorsement here, an insurer does not have a duty to defend an additional insured where the underlying complaint alleges that the additional insured's liability is based on its own acts or omissions.

¶ 30 The appellate court in *Hallmark Homes* addressed these same cases, holding in pertinent part that "the suggestion in *United Parcel Service*, *Beu*, and *Village of Hoffman Estates* that the complaint must explicitly identify the claim that is within the 'additional insured' coverage represents an unduly narrow reading of the applicable test. This approach ignores the supreme court's statements that the duty to defend exists where the facts alleged in the complaint are consistent with liability under the policy, thereby giving rise to at least one scenario in which there would be coverage." *Hallmark Homes*, 392 Ill. App. 3d at 597 (citing *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 125-26 (1992); and *Wilkin*, 144 Ill. 2d at 73-74). The appellate court cited with approval the following statement in *Illinois Emcasco Insurance Co. v. Northwestern National Casualty Co.*, 337 Ill. App. 3d 356, 361 (2003):

> "The insurer's duty to defend does not depend upon a sufficient suggestion of liability raised in the complaint; instead, the insurer has the duty to defend unless the allegations of the

> underlying complaint demonstrate that the plaintiff in the underlying suit will not be able to prove the insured liable, under any theory supported by the complaint, without also proving facts that show the loss falls outside the coverage of the insurance policy. [Citations.] The insurer may *** refuse to defend only if the allegations of the underlying complaint preclude any possibility of coverage."

¶ 31 We adhere to the analysis employed in *Hallmark Homes* and hold that the duty to defend exists here because, under a liberal construction given to the facts alleged in the underlying Rybaltowski complaint, there is at least one scenario in which Prince may be found vicariously liable solely for Chicago Masonry's negligence, giving rise to coverage under the additional insured endorsement to the Pekin policy.

¶ 32 Pekin also cites the recent case, *Pekin Insurance Co. v. Roszak/ADC, LLC*, 402 Ill. App. 3d 1055 (2010), which held that the contractor there, Roszak/ADC, LLC (Roszak), was not afforded additional insured coverage for vicarious liability under section 414 of the Restatement, where the underlying complaint did not sufficiently allege that Roszak retained the right to control the subcontractor's work. *Id*. at 1058-67. The complaint alleged that Roszak "participated in coordinating the work being done and designated various work methods, maintained and checked work progress and participated in the scheduling of the work and inspection of the work. In addition *** [Roszak] had the authority to stop the work, refuse the work and materials and order changes in the work ***." *Id*. at 1065. The appellate court (hereinafter, the *Roszak* court) acknowledged the holding in *Hallmark Homes* that similar allegations established that the general contractor retained at least some degree of control over the manner in which the subcontractor performed its work.

Roszak, 402 Ill. App. 3d at 1066-67. The *Roszak* court disagreed with *Hallmark Homes*, noting that "Comment *a* to section 414 indicates a general contractor that retains the power to coordinate the order in which work is done and to stop work that is performed dangerously, as in the complaints in both *Hallmark Homes* and the instant case, does not retain sufficient control so as to be vicariously liable for the subcontractor's negligence. Restatement (Second) of Torts, §414, Comment *a* (1965)." *Roszak*, 402 Ill. App. 3d at 1067. The *Roszak* court held that nothing in the complaint before it indicated that Roszak retained sufficient control over the details of the subcontractor's work so as to be vicariously liable for the acts or omissions of the subcontractor. *Id*. at 1066. The *Roszak* court concluded that the pertinent counts of the complaint alleged direct liability against Roszak, which is not liability incurred solely as a result of some act or omission of the named insured as required for coverage. *Id*.

¶ 33 *Roszak* is factually inapposite, and its criticism of *Hallmark Homes* does not compel a result different than the one reached here, as the underlying Rybaltowski complaint contained more allegations than in *Roszak* and *Hallmark Homes* concerning Prince's role in retaining control over the manner in which Chicago Masonry performed its work. Specifically, the Rybaltowski complaint alleged more than simply that Prince retained the power to coordinate the order in which the work was done, but rather that Prince retained the broader supervisory power over all the work performed at the job site. Also, the Rybaltowski complaint alleged more than simply that Prince could stop work that was performed dangerously, but rather that Prince retained authority over maintaining safety at the job site, which it exercised by implementing safety programs and conducting safety meetings, and by employing safety specialists to walk the job site to assure safe practices were

followed and to correct safety violations. Said allegations, when liberally construed in favor of Prince, were sufficient to indicate that Prince retained more control than the general contractors in *Hallmark Homes* and *Roszak* over the manner in which Chicago Masonry performed its work, raising the possibility that Prince could be found vicariously liable under section 414 of the Restatement solely for Chicago Masonry's acts or omissions. Accordingly, Prince is covered as an additional insured, and Pekin owes a duty to defend.

¶ 34 Prince contends we may look beyond the Rybaltowski complaint and examine other evidence appropriate to a motion for summary judgment. See *Pekin Insurance Co. v. Pulte*, 404 Ill. App. 3d 336 (2010) (citing *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 462 (2010)). Prince contends such a consideration of other evidence supports a finding of coverage here. As a result of our disposition of this case (finding from an examination of the underlying Rybaltowski complaint and Pekin policy that coverage exists for Prince under the additional insured endorsement), we need not address this argument.

¶ 35 For all the foregoing reasons, we affirm the order of the circuit court finding Pekin owes Prince a duty to defend.

¶ 36 II. Forest's Cross-Appeal

¶ 37 Forest contends the trial court erred in finding it is not an additional insured under the Pekin policy. Our primary objective in construing an insurance policy is "to ascertain and give effect to the intention of the parties as expressed in the agreement. If insurance policy terms are clear and unambiguous, they must be enforced as written unless doing so would violate public policy." *Schultz v. Illinois Farmers Insurance Co.*, 237 Ill. 2d 391, 400 (2010).

¶ 38 The clear and unambiguous language of paragraph 1 of the additional insured endorsement at issue here requires two conditions to be met for an entity to qualify as an additional insured under Chicago Masonry's policy with Pekin. First, the entity must be one "for whom you [Chicago Masonry] are performing operations." Second, Chicago Masonry and that entity must "have agreed in writing in a contract or agreement" that the entity be added as an additional insured.

¶ 39 The second condition is dispositive here. Chicago Masonry did not enter into a written contract or agreement with Forest to include Forest as an additional insured. In the absence of such a written contract or agreement between Chicago Masonry and Forest, Forest cannot be an additional insured under the Pekin policy.

¶ 40 This case is similar to *Westfield Insurance Co. v. FCL Builders, Inc.*, 407 Ill. App. 3d 730 (2011). FCL Builders, Inc. (FCL), a contractor hired to work on a construction project, subcontracted steel fabrication work to Suburban Ironworks, Inc. (Suburban). *Id*. at 731. FCL's contract with Suburban required Suburban to obtain a certain amount of commercial general liability (CGL) insurance, which would cover both Suburban and FCL. *Id*. The FCL/Suburban contract required that any subcontractors that Suburban might further subcontract with must also maintain the same level of CGL insurance and include FCL as an insured under the policy. *Id*.

¶ 41 Suburban subcontracted steel erection work to JAK Iron Works, Inc. (JAK). *Id*. Their subcontract incorporated a previously existing Master Subcontract Agreement between the two parties, which included a provision requiring JAK to obtain the same level of insurance coverage required by the contract between FCL and Suburban. *Id*. In other words, "JAK was contractually required to purchase an insurance policy that would cover itself, Suburban, and FCL in the event of

a mishap on the steel erection job." *Id*. at 732.

¶ 42 JAK purchased a CGL policy from Westfield Insurance Company (Westfield) containing the following pertinent language, which is nearly identical to the additional insured endorsement in this case:

> "A. *Section II–Who Is An Insured* is amended to include as an additional insured any person or organization for whom you are performing operations when you and such a person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." *Id.*

¶ 43 Sometime later, a worker suffered an injury on the jobsite and sued FCL. *Id*. FCL tendered its defense and indemnity in the suit to Westfield. *Id*. Westfield denied coverage, asserting that FCL was not an additional insured under JAK's policy with Westfield. *Id*. Westfield filed a declaratory judgment action, seeking a declaration that it was not required to defend or indemnify FCL in the underlying tort action. *Id*. The parties filed cross-motions for summary judgment, after which the trial court ruled that FCL was not an additional insured under the policy and granted Westfield's motion. *Id*. at 732-33.

¶ 44 On FCL's appeal, the appellate court (hereinafter, the *FCL* court) affirmed. *Id.* at 737. The *FCL* court began its analysis by noting that under the plain language of the endorsement, two conditions must be met for an entity to qualify as an additional insured under JAK's policy with Westfield. *Id*. at 733. First, the entity must be one for whom JAK was performing operations. *Id*. Second, JAK and that entity must have a written contract or agreement that the entity be added as an additional insured. *Id*. The *FCL* court found the second condition dispositive because, even

assuming JAK was "performing operations" for FCL within the meaning of the policy, there was no evidence in the record that JAK had agreed in writing with FCL for FCL to be an additional insured. *Id*. at 734.

¶ 45 FCL offered three arguments for a contrary result. First, FCL argued that the terms of the JAK/Suburban contract required JAK to include FCL as an additional insured in the CGL policy it purchased from Westfield, and that this contractual obligation satisfied the additional insured provision of the insurance policy. *Id*. The *FCL* court disagreed, noting the plain language of the additional insured endorsement required a written contract or agreement between JAK and the person or organization to be added as an additional insured. *Id*. No such written contract or agreement existed between JAK and FCL, the organization to be added as an additional insured; accordingly, FCL did not qualify as an additional insured under the endorsement. *Id*.

¶ 46 Second, FCL argued that because JAK was contractually obligated to Suburban to list FCL as an additional insured, and JAK later bought a CGL policy from Westfield, then FCL must necessarily be an additional insured under that policy. *Id*. The *FCL* court disagreed:

> "[T]he question in this case is not JAK's contractual obligations to Suburban, much less any potential obligations to FCL as a third-party beneficiary of the JAK-Suburban contract. Instead, the question is Westfield's contractual obligations to its insureds, and those obligations are controlled by the insurance contract itself. The additional insured provision in this case unambiguously limits Westfield's obligations to only JAK and those entities with whom JAK directly contracts in writing for additional coverage. Regardless of whether JAK and Suburban had agreed that FCL should be an additional insured, JAK and FCL did not

agree in writing that FCL was an additional insured. The terms of the FCL-Suburban contract and the Suburban-JAK contract are consequently irrelevant to whether Westfield is obligated to cover FCL as an additional insured under this particular policy provision." *Id*. at 734-35.

¶ 47 Third, FCL argued that certain deposition testimony of both the owner of Suburban and the superintendent of JAK demonstrated that JAK and Suburban intended for FCL to be an additional insured under the policy. *Id*. at 736. The *FCL* court noted its primary objective is to determine the parties' intent, the best indicator of which is the language of the policy itself. *Id*. As the policy provision was unambiguous, the *FCL* court held it would be "inappropriate" to consider extrinsic evidence such as the deposition testimony. *Id*. The *FCL* court further held that "even if extrinsic evidence were necessary in order to determine the intent of the parties to the insurance contract, the deposition testimony refers only to what Suburban and JAK intended regarding their respective obligations under the Suburban-JAK contract. The deposition testimony consequently has no relevance to what JAK and Westfield intended for their respective obligations to be under the Westfield insurance contract." *Id*.

¶ 48 In the present case, Forest argues that the contract between Chicago Masonry and Prince, in which Chicago Masonry agreed to name both Prince and Forest as additional insureds, was sufficient to qualify Forest as an additional insured under the Pekin policy. We disagree. As made clear by *FCL*, the relevant inquiry is not of the contract between Chicago Masonry and Prince, but rather of Pekin's contractual obligations to its insureds, and those obligations are controlled by the Pekin policy itself. Paragraph 1 of the additional insured endorsement to the Pekin policy unambiguously

limits Pekin's obligations to only Chicago Masonry and those entities with whom Chicago Masonry directly contracts or agrees in writing for additional coverage. Regardless of whether Chicago Masonry and Prince had agreed that Forest should be an additional insured, Chicago Masonry and Forest did not agree in writing that Forest was an additional insured. As such, Forest does not qualify as an additional insured under the plain language of the endorsement.

¶ 49 Forest argues that the deposition testimony of Joseph Voelker, director of operations for Chicago Masonry, shows that Chicago Masonry agreed to name both Prince and Forest as additional insureds. *FCL* makes clear that where, as here, the additional insured endorsement is unambiguous, we should not consider extrinsic evidence such as the deposition testimony in determining the intent of the endorsement. However, even if were to consider Mr. Voelker's deposition testimony, the result would be the same because the additional insured endorsement unambiguously requires a *written* contract or agreement between Chicago Masonry and Forest in order for Forest to qualify as an additional insured; in the absence of such a written contract or agreement between Chicago Masonry and Forest, Forest does not qualify as an additional insured.

¶ 50 Forest makes a cursory, two-sentence argument that, in making the contract with Chicago Masonry, Prince was acting as Forest's agent and, therefore, a written contract exists between Chicago Masonry and Forest, qualifying Forest as an additional insured. Forest's sole support thereof is its citation to an 1858 supreme court case holding a contract made by someone in the capacity of an agent "is the contract of his principal." See *Ohio & M. R. Co. v. Middleton*, 20 Ill. 629, 635 (1858). Forest has waived review of this issue by failing to cite any more pertinent authority, or to any portion of the record supporting its contention that Prince was acting as Forest's agent when it

made the contract with Chicago Masonry. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *In re Marriage of Auriemma*, 271 Ill. App. 3d 68, 72 (1994) (quoting *Thrall Car Manufacturing Co. v. Lindquist*, 145 Ill. App. 3d 712, 719 (1986)) (" '[a] reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research.' ").

¶ 51 Forest next cites paragraph 4 of the additional insured endorsement to the Pekin policy issued to Chicago Masonry, which states that "[c]overage under this endorsement is afforded only if you report to us in writing within 30 days after *you have agreed* in a written contract or agreement that the person or organization for whom you are performing operations be added as an additional insured in your policy." (Emphasis added.) Forest contends that under paragraph 4, Chicago Masonry's signature on its written contract with Prince was sufficient to afford Forest coverage as an additional insured.

¶ 52 We disagree. "A court must construe the policy as a whole." *Pulte*, 404 Ill. App. 3d at 340. Construed as a whole, paragraph 4 clearly is referencing the written contract or agreement required under paragraph 1. As discussed, paragraph 1 requires a written contract or agreement between Chicago Masonry *and Forest* in order for Forest to qualify as an additional insured. In the absence here of such a written contract or agreement between Chicago Masonry and Forest, the additional insured endorsement is not triggered.

¶ 53 Finally, Forest argues there "is no good reason to rigidly interpret the Pekin endorsement in the manner Pekin is urging. It only results in the intent of the parties to the underlying contract

[between Chicago Masonry and Prince] being frustrated." We disagree. As discussed above, the *FCL* court considered a similar argument and held that the proper focus of the analysis is on the insurer's contractual obligations to its insureds, and those obligations are controlled by the insurance policy itself. *FCL*, 407 Ill. App. 3d at 734-35. In the present case, the insurance policy requires a direct, written contract or agreement between Chicago Masonry and Forest in order for Forest to qualify as an additional insured. No such written contract or agreement between Chicago Masonry and Forest exists; accordingly, Forest is not an additional insured under the Pekin policy.

¶ 54 For the foregoing reasons, we affirm on the appeal and the cross-appeal.

¶ 55 Affirmed.