2015 IL App (1st) 140415-U

FIRST DIVISION
January 20, 2015

No. 1-14-0415

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BNSF RAILWAY COMPANY, Plaintiff-Appellant, v. LEXINGTON INSURANCE COMPANY, and QUALITY TERMINAL SERVICES, LLC, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 2013 CH 09822 Honorable Jean Prendergast Rooney, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 ***Held*:** The trial court correctly granted the defendant insurer's motion to dismiss because the claim at issue occurred before the inception of the underlying policy, and the insurer was not estopped from asserting that defense. The trial court also correctly found that plaintiff's breach of contract claim against the insured was barred by the doctrine of *res judicata*.

¶ 2 Plaintiff BNSF Railway Company (BNSF) filed a complaint for declaratory judgment and breach of contract against defendants Lexington Insurance Company (Lexington) and Quality Terminal Services, LLC (QTS). Lexington filed a motion to dismiss under section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)), and QTS moved to

dismiss the complaint under section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)). The trial court granted defendants' motions, and BNSF appeals those dismissals. Specifically, BNSF contends that (i) Lexington was estopped from asserting a policy period defense; (ii) the trial court erroneously found that BNSF was not an additional insured under QTS's insurance policy; and (iii) the trial court erred in finding that *res judicata* barred BNSF's breach-of-contract claim against QTS. We affirm.

¶ 3 BACKGROUND

¶ 4 The Lexington Insurance Policy

¶ 5 Lexington issued a "claims-based" policy in favor of QTS for the period October 1, 2006 through October 1, 2007. In relevant part, the policy provided coverage for bodily injury and personal injury "to which this insurance applies and for which a claim is first made *** during the policy period *** and reported to [Lexington] during the policy period ***." The policy had limits of $25 million per occurrence and a $25 million aggregate limit. In addition, there was a "self insured retention" of $500,000 per occurrence.

¶ 6 The policy also had a section entitled, "Who is an insured," providing in pertinent part that an insured party is any "organization whom you [QTS] have agreed by written insured contract prior to an occurrence *** to include as insureds, but only for liability arising out of your railroad operations and not *** out of the sole negligence of the aforementioned *** organization." An "insured contract" was defined in part as that part of "any other contract or agreement pertaining to your [QTS's] business *** in which you assume the tort liability of another party for bodily injury *** to a third person ***." Further, the policy provided that "[t]ort liability means a liability that would be imposed by law in the absence of any contract or agreement."

¶ 7 The Underlying Litigation

¶ 8 In August 2006, Anthony Williams filed suit against his employer, BNSF, under the Federal Employers' Liability Act (FELA) (45 U.S.C. § 51 *et seq.* (2000)). Williams alleged that he was injured in August 2003 due to BNSF's negligence. Specifically, Williams's complaint alleged that BNSF:

> "(a) Carelessly and improperly allowed the cylinder and casting that [Williams] was working on to exist in an unsafe condition in that the cylinder and casting were rusted and not lubricated although it knew or reasonably should have known of such condition as the chassis and container had been inspected;
>
> (b) *Carelessly and improperly failed to provide [Williams] with sufficient manpower to perform his work* although it knew or should have known that requiring [Williams] to perform his work without sufficient manpower assistance was unsafe;
>
> (c) Carelessly and improperly failed to provide [Williams] with a safe place within which to perform his work;
>
> (d) Carelessly and improperly failed to provide [Williams] with safe tools and/or equipment with which to perform his work." (Emphasis added.)

¶ 9 About one year later, in August 2007, BNSF tendered the defense of the underlying litigation to Lexington and demanded indemnity as an additional insured under the policy. In

September 2007, Lexington responded by stating it was not accepting the tender. BNSF continued to defend itself in the underlying litigation. In various letters to Lexington in May and July 2010, October and November 2011, and in August 2012, BNSF reiterated its demand that Lexington defend and indemnify it as an additional insured. Lexington responded in September 2010, October and December 2011, and September 2012, refusing each time to defend or indemnify BNSF as an additional insured under the policy.

¶ 10 BNSF's Third-Party Complaint Against QTS

¶ 11 In August 2008, BNSF filed a separate third-party complaint against QTS for contractual indemnity (count I) and contribution (count II). BNSF reiterated the nature of Williams's injuries and that Williams had alleged that, at the time of his injuries, a QTS employee had supervised him and directed him to perform his job as a crane operator without the assistance of a "crane director." In count I, BNSF relied on the "Intermodal Facility Service Agreement," dated July 23, 2001 (hereinafter the Agreement). Paragraph 1(e) of the Agreement, entitled "Staffing Levels," provided in relevant part as follows:

> "[QTS] shall provide the services and functions [at the Cicero rail yard] as needed by [BNSF], up to 24 hours per day, seven days per week, regardless of the number of positions or employees utilized. [QTS] shall furnish a level of staffing for the contracted services which is sufficient to provide services *** which meet [BNSF's] required high levels of performance given varying volumes of business and hours of service. *** The parties agree to cooperate to achieve and maintain efficient and effective operations ***."

Paragraph 6(a) of the Agreement also required QTS to maintain commercial general liability insurance coverage of at least $5 million per occurrence and $5 million in the aggregate. BNSF was required to be named as an additional insured, but there was nothing prohibiting the inclusion of a self-insured retention in the policy.

¶ 12 BNSF claimed that, under the Agreement, QTS agreed to: (1) "defend, hold harmless and fully indemnify" BNSF against any injuries resulting from the acts or omissions of QTS or its employees; and (2) maintain insurance providing coverage to BNSF for "all acts and omissions of QTS under the Agreement." As such, BNSF asked the trial court to order QTS to defend and indemnify BNSF in the underlying litigation and to "provide insurance and indemnity" for the underlying claims. In count II, BNSF claimed that QTS was negligent in failing to adequately supervise Williams or in directing him to work alone, or was "otherwise careless and negligent."

¶ 13 During the discovery phase of BNSF's third-party complaint, BNSF filed a motion to compel with the trial court specifically stating that BNSF's "position" was that QTS was contractually required to obtain insurance coverage for Williams's alleged injuries, "*but in breach of this obligation*," QTS purchased insurance with the self-insured retention of $500,000.

¶ 14 The Jury's Verdict in the Underlying Litigation

¶ 15 In November 2011, the jury in the underlying litigation reached a verdict in favor of Williams and against BNSF, awarding Williams approximately $2.6 million. The jury allocated fault as follows: Williams, 50%; BNSF, 37.5%; and QTS, 12.5%. With respect to BNSF's third-party claim, the jury rendered a verdict in favor of BNSF and against QTS on BNSF's contribution claim, but it rejected BNSF's contractual indemnity claim, finding in favor of QTS and against BNSF.

¶ 16 The Declaratory Judgment Proceedings

¶ 17 On April 11, 2013, BNSF filed a complaint for declaratory judgment (against Lexington) and breach of contract (against QTS). BNSF alleged in its complaint that, at the time of Williams's injury, QTS had a contract with BNSF to provide management services at the Cicero rail yard where Williams worked and was injured. BNSF attached a copy of the Agreement to its complaint. BNSF further alleged in its complaint that it first became aware of the potential claim against QTS in May 2007, when Williams testified in his deposition that Frank Stephenson, a ramp supervisor with QTS, directed Williams to continue working without the assistance of a crane director. In addition, BNSF stated that Stephenson reported Williams's injury to BNSF but did not inform BNSF that Stephenson had told Williams to work without a crane director. As to its breach of contract claim against QTS, BNSF asserted that QTS breached the Agreement by failing to procure insurance in accordance with the terms of the Agreement.

¶ 18 Lexington and QTS each moved to dismiss BNSF's complaint. Lexington's motion was brought under section 2-615 of the Code and alleged, *inter alia*, that BNSF's claim arose prior to the inception date of the policy. QTS filed its motion under section 2-619 and argued in part that BNSF's breach of contract claim against QTS was barred under *res judicata*. At the hearing on the motions to dismiss, BNSF conceded that, at the time of the underlying litigation, it knew of the self-insured retention provision in the policy and that there was nothing "pleading-wise that would have precluded" BNSF from adding a breach of contract claim at the time of its third-party complaint. On December 11, 2013, following arguments of the parties, the trial court granted both motions to dismiss. This appeal followed.

¶ 19 ANALYSIS

¶ 20 Motions to Dismiss under Sections 2-615 and 2-619

¶ 21 A motion to dismiss under section 2-615 of the Code challenges the legal sufficiency of a complaint. *Kanerva v. Weems*, 2014 IL 115811, ¶ 33. The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the nonmoving party, are sufficient to establish a cause of action upon which relief may be granted. *Id.* A cause of action should not be dismissed under section 2-615 unless it is clearly apparent from the pleadings that no set of facts can be proven that would entitle the plaintiff to recover. *Id.*

¶ 22 In contrast, section 2-619 of the Code provides for involuntary dismissal based upon certain defects or defenses. 735 ILCS 5/2-619 (West 2012). Section 2-619(a)(4) permits involuntary dismissal of a claim where the claim is barred by other affirmative matters defeating or avoiding the legal effect of the claim, such as a claim of *res judicata*. 735 ILCS 5/2-619(a)(4) (West 2012); *Yorulmazoglu v. Lake Forest Hospital*, 359 Ill. App. 3d 554, 558 (2005).

¶ 23 When ruling on a motion to dismiss under either section 2-615 or section 2-619, a court must accept all well-pleaded facts in the complaint as true and draw all reasonable inferences from those facts in favor of the nonmoving party. *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003). Therefore, a motion to dismiss under either section cannot be granted unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006) (section 2-615); *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8 (section 2-619). Additionally, it is well established that exhibits attached to a complaint become a part of a complaint, and if there is any conflict between the factual matters in the exhibits and those alleged in the complaint, the factual matters in the exhibit control. *Charles Hester Enterprises,*

Inc. v. Illinois Founders Insurance Co., 114 Ill. 2d 278, 287 (1986) ("Where an exhibit is the instrument being sued upon, it controls over the facts alleged in the complaint."). We review *de novo* the trial court's decision on motions to dismiss brought under both sections 2-615 and 2-619. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006). Finally, we review the judgment, not the reasoning, of the trial court, and we may affirm on any grounds in the record, regardless of whether the trial court relied on those grounds or whether the trial court's reasoning was correct. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995). We now turn to BNSF's contentions.

¶ 24 Lexington's Duty to Defend

¶ 25 BNSF first contends that Lexington is estopped from denying coverage (including a denial based upon the defense that the claim arose before the policy period) because it failed to either defend BNSF under a reservation of rights or seek a declaratory judgment that it owed no duty to BNSF. In the alternative, BNSF contends that, even if Lexington is not estopped, the trial court erred in finding that the claim arose before the onset of the policy. Although the trial court did not reach these issues because of its finding that the claim arose prior to the policy period, BNSF further contends coverage is warranted because (1) its "service agreement" with QTS qualifies as an "insured contract" under the policy, and (2) it is not required to satisfy the self-insured retention of $500,000 before coverage would arise.

¶ 26 While an insurer's duty to indemnify arises only if the facts alleged actually fall within coverage, the duty to defend is much broader. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 398 (1993). "To determine whether the insurer has a duty to defend the insured, the court must look to the allegations in the underlying complaint and compare these allegations to the relevant provisions of the insurance policy." *Outboard Marine Corp.*, 154 Ill.

2d at 107-08. If the underlying complaint alleges facts that fall "within or *potentially* within" the coverage of the policy, the insurer is obligated to defend its insured even if the allegations are "groundless, false, or fraudulent." (Emphasis in original.) *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991). "An insurer may not justifiably refuse to defend an action against its insured unless it is *clear* from the face of the underlying complaints that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage." (Emphasis in original.) *Id.* The threshold requirement that the complaint must satisfy to present a claim of potential coverage is minimal; the complaint need present only a possibility, not a probability, of recovery. *Bituminous Casualty Corp. v. Gust K. Newberg Construction Co.*, 218 Ill. App. 3d 956, 960 (1991).

¶ 27 In determining whether the allegations in the underlying complaint meet that threshold requirement, both the underlying complaint and the insurance policy are liberally construed in favor of the insured. *Wilkin Insulation Co.*, 144 Ill. 2d at 73. "[T]he duty to defend does not require that the complaint allege or use language affirmatively bringing the claims within the scope of the policy." *International Insurance Co. v. Rollprint Packaging Products, Inc.*, 312 Ill. App. 3d 998, 1007 (2000). In addition, the plaintiff in a declaratory judgment action bears the burden of proof. *Farmers Automobile Insurance Ass'n v. Gitelson*, 344 Ill. App. 3d 888, 896 (2003). All doubts are resolved in the insured's favor. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 154 (1999) (citing *Wilkin Insulation Co.*, 144 Ill. 2d at 74).

¶ 28 The doctrine of estoppel provides that, where an insurer believes that a policy that includes a duty to defend does not cover a complaint potentially alleging coverage, the insurer may not simply refuse to defend the insured. *Id.* at 150. Instead, the insurer must either defend the suit under a reservation of rights or seek a declaratory judgment that there is no coverage. *Id.*

If the insurer fails to take either of these steps *and is later found to have wrongfully denied coverage*, the insurer is estopped from raising policy defenses. *Id.* at 150-51.

¶ 29 Thus, estoppel applies *only* where an insurer has breached its duty to defend. *Id.* at 151. Application of this doctrine is inappropriate where either there is no duty to defend or the duty to defend is not properly triggered, such as "where the insurer was given no opportunity to defend; *where there was no insurance policy in existence*; and where, when the policy and the complaint are compared, there clearly was no coverage or potential for coverage." (Emphasis added.) *Id.*

¶ 30 In this case, the policy at issue was a claims-based policy. Under a claims-made policy, no coverage is provided unless two events occur: (1) the claim must be made during the policy period, and (2) the claim must be reported during the policy period. *Continental Casualty Co. v. Cuda*, 306 Ill. App. 3d 340, 349 (1999). It is undisputed that BNSF reported the claim during the policy period. Resolution of this issue thus turns on when the claim arose.

¶ 31 Here, the trial court properly found that Lexington owed no duty to defend. The parties agree that the policy at issue began on October 1, 2006. The claim, however, arose in August 2006, when Williams (the plaintiff in the underlying litigation) filed his complaint against BNSF. Although BNSF asserts that it was unaware that QTS was implicated in the underlying litigation until May 2007 (when Williams testified in a deposition that a QTS employee told Williams to work without the assistance of a crane director), BNSF's assertion is belied by the record.

¶ 32 The record reveals that BNSF and QTS entered into the Agreement in which QTS would manage the Cicero rail yard, including ensuring a sufficient level of staffing to meet BNSF's "high levels of performance" even in the event of "varying volumes of business and hours of service." Two years after entering into this Agreement, Williams filed his complaint alleging that he was injured in part because BNSF "carelessly and improperly failed to provide [him] with

sufficient manpower to perform his work" at the Cicero rail yard. There is no meaningful difference between Williams's allegation that there was insufficient manpower at the Cicero rail yard and his deposition statement that a QTS employee directed him to work without a supervisor. Upon reading Williams's allegation regarding a lack of sufficient manpower at the Cicero rail yard, BNSF was reasonably on notice of a claim that implicated QTS, the insured. On these facts, the claim clearly arose before the inception date of the policy. Dismissal of BNSF's declaratory judgment action against Lexington was therefore warranted.

¶ 33 BNSF, nonetheless, insists that Lexington is estopped from asserting any policy defenses based upon the holdings of *Ehlco* and *Uhlich Children's Advantage Network v. National Union Fire Co. of Pittsburgh, PA*, 398 Ill. App. 3d 710 (2010). BNSF's reliance on these cases is, however, misplaced. In both cases there was no issue regarding whether the relevant insurance policy was in effect and provided coverage at the time the claim arose; rather, the issue on appeal was whether the insurer could be estopped from asserting a policy defense of "late notice." See *Ehlco*, 186 Ill. 2d at 147; *Uhlich*, 398 Ill. App. 3d at 715.

¶ 34 Specifically, in *Ehlco*, the plaintiff insured Edwards Hines Lumber Company (Hines)[1] and its subsequently-acquired subsidiary, Nebraska Bridge Supply and Lumber Company (Nebraska Bridge) from January 1, 1968, to October 1, 1971. *Ehlco*, 186 Ill. 2d at 130-32. Hines was subsequently sued for environmental contamination for the operation of wood-treatment facilities in Arkansas and Wyoming from 1967 to 1978, and 1967 to 1972, respectively. *Id.* at 132-35. The insurer received notice of the Arkansas and Wyoming litigation in March 1982 and January 1992, respectively. *Id.* at 132-34. The plaintiff claimed on appeal

[1] When Hines dissolved, the defendant *Ehlco* was created to resolve Hines's contingent liabilities. *Ehlco*, 186 Ill. 2d at 131.

that the notice it received was untimely by several years (even decades). *Id.* at 149-50. Nowhere in *Ehlco* did the insurer claim that the policy was not in effect at the time of the claim.

¶ 35 In *Uhlich*, the defendant insured the plaintiffs (Uhlich and Sowell) through two consecutive annual policies that were identical in substance: one in effect from July 1, 2004, through July 1, 2005, and a second in effect from July 1, 2005, through July 1, 2006. *Uhlich*, 398 Ill. App. 3d at 711. On January 31, 2005, the plaintiff in the underlying litigation (Leonard) filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that Uhlich discriminated against him in violation of the Americans with Disabilities Act. *Id.* at 713. Leonard amended his charge on July 13, 2005, and received a right-to-sue letter from the EEOC in August 2005. *Id.* at 713-14. Leonard then filed his complaint alleging an employment discrimination claim against the insured plaintiffs (Uhlich and Sowell) on September 29, 2005. *Id.* at 714. Nowhere in *Uhlich* did the insurer claim that the policy was not in effect at the time of the claim. Instead, the defendant insurers claimed that, although the claim was made "*during the policy period of the first policy*," Uhlich's complaint for declaratory judgment should have been dismissed because notice of the claim was untimely—*i.e.*, the claim was not reported during the first policy's period. (Emphasis added.) *Id.*

¶ 36 Here, notice of Williams's claim took place within the policy period. The claim itself, however, did not: Williams's lawsuit was filed in August 2006, two months before the inception date of the policy. *Ehlco* and *Uhlich* are therefore unavailing.

¶ 37 Because of our holding that the trial court properly granted Lexington's motion to dismiss based upon the fact that the claim at issue occurred prior to the inception of the policy and the insurer was not estopped from asserting that defense, we need not consider BNSF's alternate contention that it stated a claim for coverage as an additional insured.

¶ 38 Whether *Res Judicata* Bars the Claim Against QTS

¶ 39 BNSF also contends that the trial court erred in finding that *res judicata* barred its claim against QTS. Specifically, BNSF argues that the issue of whether QTS had obtained insurance pursuant to the Agreement was unrelated to the final judgment on the merits in the underlying litigation. Therefore, according to BNSF, since there was no final judgment on the merits with respect to whether QTS had complied with the Agreement in procuring insurance coverage for BNSF, *res judicata* does not bar its subsequent claim against QTS for breach of contract.

¶ 40 "Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction acts as a bar to a subsequent suit between the parties involving the same cause of action." *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). "The bar extends to what was actually decided in the first action, as well as those matters that could have been decided in that suit." *Id.* "For the doctrine of *res judicata* to apply, the following three requirements must be satisfied: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of cause of action, and (3) there is an identity of parties or their privies." *Id.*

¶ 41 Here, the parties agree that there is an identity of parties: indeed, BNSF directly sued QTS in its third-party complaint (in the underlying litigation) and also in its combined complaint for declaratory judgment and breach of contract. In addition, BNSF does not contest that the underlying litigation resulted in a final judgment on the merits. BNSF's challenge centers on whether there is an identity of cause of action—or, in its words, whether the underlying litigation resulted in a "final judgment on the merits" as to the issue raised in its breach of contract claim.

¶ 42 In *River Park*, our supreme court explained that, to determine whether there is an identity of cause of action, there are two tests employed by various courts: the " 'same evidence' " test

and the " 'transactional' " test. *Id.* at 307. Under the same evidence test, a second suit is barred if "the evidence needed to sustain the second suit would have sustained the first," whereas the transactional test provides that different theories of relief still results in a single cause of action if "a single group of operative facts give rise to the assertion of relief." (Internal quotation marks omitted.) *Id.* After reviewing the two tests, the *River Park* court approved use of the more liberal transactional test and rejected the more narrow same evidence test, observing that the Restatement (Second) of Judgments (1982), as well as federal courts and numerous state courts also favored use of the transactional test. *Id.* at 311-12.

¶ 43 Under the transactional test, claims are a part of the same cause of action even if there is not a substantial overlap of evidence, so long as they arise from the same transaction or "series of connected transactions" from which the action arose. *Id.* at 311 (quoting Restatement (Second) of Judgments § 24, at 196 (1982)). " 'What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.' " *Id.* at 312 (quoting Restatement (Second) of Judgments § 24, at 196 (1982)).

¶ 44 In this case, the trial court correctly found that there is an identity of cause of action. BNSF filed a third-party claim against QTS alleging that QTS owed BNSF indemnification and contribution based upon the Agreement that QTS obtain insurance coverage that, *inter alia*, would indemnify BNSF. A jury later found in favor of BNSF on its contribution claim but not its indemnification claim. BNSF subsequently alleged breach of contract against QTS for its failure to indemnify QTS and for its failure to procure insurance in accordance with the

Agreement. Both claims involve the same underlying facts: whether QTS obtained insurance in compliance with the Agreement following Williams's alleged injuries. BNSF also sought the same remedy in both actions: indemnification from QTS for any resulting liability. The claims are therefore closely related in terms of time, space, origin, and motivation.

¶ 45 In addition, they form a convenient trial unit. In its motion to compel (during the underlying litigation), BNSF candidly admitted that its position was that QTS breached the Agreement by obtaining insurance with a self-insured retention. In addition, BNSF informed the trial court at the hearing on the motions to dismiss that it was aware at the time of the underlying litigation that the policy had a self-insured retention and that there was nothing that would have prevented it from including a breach-of-contract claim at that time. Therefore, there is no reason to believe that these claims could not have been adjudicated in one action. Finally, BNSF points to nothing to indicate that treating the two claims as a unit was contrary to the parties' expectations or to common business practices in general. To the contrary, litigating these claims in one action would be far more reasonable than the piecemeal litigation BNSF now seeks.

¶ 46 BNSF's reliance upon *Torcasso v. Standard Outdoor Sales, Inc.*, 157 Ill. 2d 484 (1993), is misplaced. To determine whether there was identity of causes of action for purposes of *res judicata*, the *Torcasso* court stated, "The test generally employed *** is whether the evidence needed to sustain the second action would have sustained the first." *Id.* at 491. This is nearly verbatim the "same evidence" test that the *River Park* court described and subsequently rejected as being unduly narrow. *River Park*, 184 Ill. 2d at 307, 310-11. Instead, as noted above, the *River Park* court expressly adopted the more liberal transactional test. *Id.* at 310-11.

¶ 47 Nonetheless, BNSF insists that the *River Park* court cited *Torcasso* "as the very basis of the [transactional] test" and that, relying also upon *Cooney v. Rossiter*, 2012 IL 113227, the court

continues to cite *Torcasso* for that purpose. BNSF misreads both *River Park* and *Cooney*. In both cases, the plaintiffs argued that there was no identity of causes of action because either there were different theories of relief (*River Park*, 184 Ill. 2d at 314) or the evidence was not " 'essentially the same' " for the different claims asserted (*Cooney*, 2012 IL 113227, ¶ 20). *River Park* and *Cooney* cited the same sentence in *Torcasso*, namely, that multiple theories or types of relief do not *ipso facto* preclude finding a single cause of action. *River Park*, 184 Ill. 2d at 314-02 (citing *Torcasso*, 157 Ill. 2d at 490-91); *Cooney*, 2012 IL 113227, ¶ 22 (citing *Torcasso*, 157 Ill. 2d at 490-91). *Torcasso*, however, then proceeded to utilize the now-rejected same evidence test. See *Torcasso*, 157 Ill. 2d at 491. BNSF's reliance upon *Torcasso* is unavailing.

¶ 48 Finally, BNSF argues that the claim for contractual indemnity (in the third-party complaint) and the claim for failure to obtain insurance (in the declaratory judgment action) were "distinct in 'time space, origin and motivation' " because Lexington's denial of coverage did not occur until after the trial in the underlying litigation, specifically, in September 2012, when Lexington made its coverage determination. BNSF cites *Saxon Mortgage, Inc. v. United Financial Mortgage Corp.*, 312 Ill. App. 3d 1098 (2000), in support of this argument. BNSF's argument, however, is meritless.

¶ 49 First, as noted above, the record indicates that BNSF was aware of the self-insured retention in the policy during the underlying litigation and conceded to the trial court that it could have raised that claim but did not. BNSF's argument is therefore belied by the record. Moreover, *Saxon Mortgage* is distinguishable. The lawsuits there involved entirely different transactions. The first suit was based on an alleged deficiency in the quality of one loan that led to a default, whereas the second sought a refund of the premiums based on the timely payment of the loans. *Saxon*, 312 Ill. App. 3d at 1106. Here, both BNSF's third-party complaint and its

declaratory judgment action center on Williams's injuries and whether QTS's insurance policy offers coverage to BNSF. BNSF's reliance upon *Saxon* is thus unavailing.

¶ 50 CONCLUSION

¶ 51 The trial court did not err in granting Lexington's motion to dismiss because the claim at issue occurred prior to the inception of the policy and Lexington was not estopped from asserting that defense. In addition, the trial court correctly found that BNSF's breach of contract claim against QTS was barred by the doctrine of *res judicata* where the claim arose from the same set of operative facts. Accordingly, we affirm the judgment of the trial court.

¶ 52 Affirmed.