IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Jordan Lake and Michelle Lake,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
CSR Roofing Contractors, Inc., an Illinois corporation,	)	
	)	No. 13 L 3098
Defendant/Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
Zamastil Exteriors and All Insurance Services, Inc.,	)	
	)	
Third-Party Defendants.	)	

MEMORANDUM OPINION AND ORDER

A party may through its acts and omissions impliedly waive its rights under a contract. Further, the Construction Contract Indemnification for Negligence Act voids a construction contract provision requiring one party to indemnify another's negligence and may also void an insurance-purchase provision if the two are inextricably linked. So it is in this case. As a result, the third-party-defendant's motion to dismiss the third-party-plaintiff's second-amended complaint must be granted with prejudice.

FACTS

In early 2012, CSR Roofing Contractors, Inc. presented Zamastil Exteriors with a master subcontract agreement under which Zamastil would provide roofing services for a number of apartment buildings in Wauconda, Illinois. The agreement contains an indemnification provision in paragraph 7 that states, in part:

To the fullest extent permitted by law, the Subcontractor . . . shall defend, indemnify and hold harmless Contractor . . . from and against all claims . . . from injury to and/or death of any person (specifically including Subcontractor's employees) . . . resulting from the acts, omissions, breach or default of the Subcontractor . . . provided that any such claim . . . is caused in whole or in part by any negligent act or omission of the Subcontractor . . . regardless of whether or not it is caused in part by any party indemnified hereunder. Subcontractor will defend and bear all costs of defending any action or proceedings brought against the indemnified parties. . . .

In the event such indemnity as described above is prohibited by law, then said indemnity shall only be to the extent caused by the negligent acts or omissions of the Subcontractor. . . . Subcontractor hereby expressly permits the Contractor to pursue and assert claims against the Subcontractor for indemnity, contribution and Common law negligence arising out of claims for damages for death and personal injury.

The subcontract agreement also contains an insurance-purchase provision in paragraph 8 that reads, in part:

Prior to commencing any Work, Subcontractor shall purchase and maintain at Subcontractor's sole expense . . . such insurance [sic] will protect Contractor . . . from the following types of claims which may arise out of or result from the Subcontractor's operations performed under this Agreement.

B. **Commercial General Liability**

- The policy shall include an endorsement naming Contractor . . . as Additional Insured's [sic]. Coverage for the Additional Insured's [sic] must be primary/non-contributory and must include ongoing and completed

operations coverage's (via ISO Forms **CG2010 10/101** and **CG2037 10/01** or their equivalent(s) as may be approved on [sic] writing by Contractor) — coverage must NOT be limited to vicarious liability.

G. Additional Insured Schedule:

The obligation of the Subcontractor . . . to provide the insurance herein specified shall not limit in any way the liability or obligations assumed by the Subcontractor elsewhere in this Agreement.

All Certificates of Insurance verifying the existence of the above required insurance, along with copies of all required endorsements, shall be sent to Contractor within ten (10) days of the date of execution of this Agreement, and in any event prior to the Commencement of any Work pursuant to this Agreement. No Work at the Project Site may be started . . . until all insurance certificates and copies if [sic] of required endorsements have been delivered to and accepted by Contractor. All Certificates of Insurance and required endorsements shall be in [sic] form and content satisfactory and acceptable to Contractor . . . and shall be submitted to Contractor in a timely manner so as to confirm Subcontractor's full compliance with the insurance requirements stated herein. . . .

(Emphasis in original.)

Zamastil contacted All Insurance Services, Inc. (AIS) to broker the purchase of the insurance required by the subcontract agreement and, to that end, sent AIS a copy of the agreement. AIS placed the proposal with Pekin Insurance Company. Pekin wrote an insurance policy naming CSR as an additional insured and including the two required endorsements. Otherwise, the policy did not conform to the insurance-purchase provision because it excluded from coverage any indemnification for CSR's direct liability. Regardless, Zamastil purchased the policy as written by Pekin.

On March 6, 2012, AIS prepared a certificate of insurance for a policy identified as 003102284P. The certificate explicitly states that is does not constitute a contract between the issuer and the certificate holder, which is identified as CSR. The certificate also indicates that the underlying policy includes additional-insured coverage, but does not name CSR as the additional insured. The coverage term is one year ending on March 6, 2013. CSR received the certificate of insurance, and on March 11, 2012, CSR and Zamastil executed the subcontract agreement.

On June 19, 2012, AIS prepared a second certificate of insurance for a policy identified as 003169332P. This certificate explicitly states that it confers no rights on the certificate holder and does not amend, extend, or alter the policy's coverages. The certificate names CSR as the certificate holder. The certificate also indicates that the policy includes additional-insured coverage but, once again, does not identify the additional insured. The monetary limits of some types of insurance in the underlying policy are different than reflected on the March 2013 certificate. The certificate indicates that the policy expires on June 19, 2013.

The policy included three endorsements related to additional-insured coverage. The subcontract agreement explicitly required two of them – CG 20 10 10 01 and CG 20 37 10 01. The first endorsement concerns ongoing operations and includes the language: "**Who is An Insured** is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured." (Emphasis in original). The second endorsement contains nearly identical language concerning completed operations, "but only with respect to liability arising out of 'your work' . . . and included in the 'products-completed operations hazard.'"

The third endorsement – CG 50 35 01 07 – is entitled, "**ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – WHEN REQUIRED IN CONSTRUCTION**

AGREEMENT WITH YOU – PRIMARY AND NONCONTRIBUTORY." This endorsement explicitly provides that:

> The Additional Insured is covered only with respect to vicarious liability for "bodily injury" or "property damage" imputed from You to the Additional Insured as a proximate result of your ongoing operations performed for that Additional insured during the Policy Period.
>
> This insurance does not apply to . . . Liability for "bodily injury" or "property damage" arising out of or in any way attributable to the claimed negligence or statutory violation of the Additional Insured other than vicarious liability which is imputed to the Additional Insured solely by virtue of the acts or omissions of the Named Insured.

CSR neither admits nor denies receiving the endorsement pages.

Jordan Lake worked for Zamastil as a roofer. On November 19, 2012, Lake was tearing off an old roof and installing a new one on an apartment building in Wauconda. Lake was pushing a wheelbarrow filled with shingles from one roofing platform to another when the wheelbarrow jammed, causing him to lose his balance. Lake was not tied off; consequently, after he lost his balance, he fell 27 feet from the roof and landed on a concrete pad. Lake suffered severe injuries as a result.

On March 26, 2013, Jordan and his wife, Michelle, filed a four-count complaint against CSR. Counts one and two are brought under negligence and premises-liability theories, while counts three and four are Michelle's derivative loss-of-consortium claims based on the same two causes of action. The Lakes predicated CSR's liability, in part, on its knowledge of and failure to adhere to Occupational Health and Safety Administration guidelines requiring contractors to ensure that persons working above eight feet of the ground be tied off or otherwise secured to prevent falls. On April 5, 2013, a Cook County sheriff served CSR with the summons and complaint.

On May 24, 2013, CSR tendered its defense and indemnification to Pekin pursuant to paragraph 8 of the construction contract. On June 27, 2013, Pekin, through its attorney, refused the tender. In its denial letter to CSR, Pekin stated that its policy[1] with Zamastil covered only vicarious liability caused by Zamastil's acts and omissions and not CSR's direct negligent conduct. Neither the record nor the electronic docket indicates that after receiving Pekin's letter CSR filed a declaratory action to obtain a judgment adjudicating its right to a defense or indemnification.

On February 19, 2014, CSR filed a third-party complaint against Zamastil. On December 1, 2014, CSR filed an amended third-party complaint against AIS only and eliminated all claims against Zamastil. CSR brings three causes of action against AIS – count one in negligence, count two for a violation of the Insurance Placement Act, 735 ILS 5/2-2201, and count three for a breach of the subcontract agreement. As to the first two counts, CSR alleges that Zamastil contacted AIS to broker the placement of insurance and, to that end, supplied AIS with a copy of the construction contract. CSR further alleges that, despite AIS knowing the specific requirements and undertakings required by the construction contract, AIS procured non-conforming insurance that failed to indemnify CSR for its direct negligence. CSR specifically alleged that paragraph eight of the subcontract agreement "required that the procured coverage must not be limited to coverage for vicarious liability incurred by CSR for the errors, omissions or negligence of Zamastil. . . ." (Emphasis in original.) CSR claims that AIS breached its duty of care owed to CSR by failing to: (1) inform Pekin of the need to add CSR as an additional insured not limited to vicarious liability arising from Zamastil's negligence; (2) perform all action necessary to ensure that CSR was listed as an additional insured not limited to vicarious liability; (3) obtain the types and amounts of insurance required by the subcontract agreement; (4) investigate whether Zamastil was

[1] Pekin's letter refers to policy CL0162367-0 with a one-year term beginning September 13, 2012 and ending September 13, 2013. It is unclear why this policy number and term are different than the ones listed on the certificates of insurance.

performing pursuant to the agreement that required CSR to be listed as an additional insured not limited in coverage to vicariously liability; (5) inform CSR that it had not been included as an additional insured not limited to vicarious liability; (6) advise CSR that the Pekin policy did not list CSR as an additional insured not limited to vicarious liability; and (7) represent that CSR was covered as an additional insured not limited to vicarious liability. Based on these claims, CSR alleges that it has, "suffered and will continue to suffer damages, including attorney's fees, costs and any amounts found by the court to be owing to Plaintiffs, Jordan and Michelle Lake. . . ." CSR's prayer for relief in each count seeks judgment, "for any amounts it may be required to pay in connection with a judgment or settlement concerning Plaintiff's litigation. . . ."

AIS filed a motion pursuant to the Code of Civil Procedure to dismiss CSR's third-party complaint for contribution. *See* 735 ILCS 5/2-619.1. AIS presents four arguments, the first two pursuant to section 2-615 and the second two pursuant to 2-619. *See* 735 ICLS 5/2-615 & 5/2-619. First, AIS contends that the Code of Civil Procedure bars CSR's third-party complaint because such a pleading cannot raise an independent claim against a third party. *See* 735 ILCS 5/2-406(b). According to AIS, its alleged liability, if any, is not derivative of CSR's potential liability to the Lakes. Second, AIS argues that it, as an insurance broker, owed CSR, as an additional insured, no duty. Third, AIS argues that CSR waived any contractual requirement that additional-insured coverage must not be limited to vicarious liability by permitting Zamastil to begin work after CSR had received the certificates of insurance and endorsements indicating non-conforming insurance. Fourth, AIS argues that CSR's third-party complaint is time barred by the two-year statute of limitations for claims against insurance brokers. *See* 735 ILCS 5/13-214.4.

In response to AIS's motion to dismiss, CSR filed a motion to amend its third-party complaint to add a fourth count for implied indemnification against AIS. In support of this cause of action, CSR alleged that CSR was: (1) a third-party intended beneficiary to the subcontract agreement's indemnification and insurance-purchase

provisions; (2) an additional insured under the Zamastil-Pekin insurance policy; and (3) a business associate. Further, CSR alleges that it relied on Zamastil and AIS to provide the additional-insured coverage mandated by the subcontract agreement.

The parties fully briefed AIS's motion, and on May 21, 2015, this court presented its ruling.[2] This court found that neither AIS nor CSR had addressed the fundamental issue of whether the subcontract agreement's indemnification and insurance-purchase provisions violated the Construction Contract Indemnification for Negligence Act, familiarly known as the Anti-Indemnification Act. This court focused on two sections of the act. Section one provides that:

> With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.

740 ILCS 35/1. The statute provides an exception to the general prohibition that reads:

> This Act does not apply to construction bonds or insurance contracts or agreements.

740 ILCS 35/3.

At the May 21 ruling, this court found that the construction contract's indemnification provision violated section one of the Anti-Indemnification Act by requiring Zamastil to indemnify CSR for its own negligence. This court also found that the construction contract's insurance-purchase provision violated section one because it explicitly

[2] A transcript of the May 21, 2015 proceedings is contained in the record.

required Zamastil to purchase insurance for the prohibited purpose of Zamastil indemnifying CSR for its own negligence. To that end, this court also found that the subcontract agreement's insurance-purchase provision is not an insurance contract or agreement as that term is used in the Anti-Indemnification Act. The court did not rule on CSR's motion to amend the third-party complaint to add a count for implied indemnification.

At the close of the ruling, CSR's counsel asked to brief the issue of how the construction contract's insurance-purchase provision does not run afoul of the act. Rather than enter a judgment and then consider what was sure to be CSR's motion to reconsider, this court concluded that the wiser course was to order another round of briefs before entering judgment. Subsequently, CSR filed a sur-response and AIS a sur-reply to present clarifying and additional arguments in light of the court's initial analysis of the issues in this case.

ANALYSIS

Code of Civil Procedure section 5/2-619.1 authorizes AIS's motion to dismiss pursuant to sections 5/2-615 and 5/2-619. *See* 735 ILCS 5/2-615, 5/2-619 & 5/2-619.1. A section 2-615 motion to dismiss attacks a complaint's legal sufficiency. *See DeHart v. DeHart*, 2013 IL 114137, ¶ 18. Such a motion does not raise affirmative factual defenses, but alleges only defects appearing on the face of the complaint. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484-85 (1994). A section 2-615 motion must identify the complaint's defects and specify the relief sought. *See* 735 ILCS 5/2-615(a) (2008).

A court considering a section 2-615 motion is to consider only the allegations presented in the pleadings. *See Illinois Graphics*, 159 Ill. 2d at 485. All well-pleaded facts and reasonable inferences arising from them must be accepted as true, *see Doe v. Chicago Bd. of Ed.*, 213 Ill. 2d 19, 28 (2004), but not conclusions unsupported by facts, *see Pooh-Bah Enterps., Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). Conclusory statements cannot state a cause of action even if they generally inform the defendant of the nature of the claims. *See Adkins v. Sarah Bush Lincoln Health Cntr.*, 129, Ill. 2d

497, 519-20 (1989). The paramount consideration is whether the complaint's allegations construed in the light most favorable to the plaintiff are sufficient to establish a cause of action for which relief may be granted. *See Bonhomme v. St. James*, 2012 IL 112393, ¶ 34. If not, section 2-615 authorizes the dismissal of a cause of action. *See DeHart*, ¶ 18; *Illinois Graphics*, 159 Ill. 2d at 488.

In contrast, a section 2-619 motion to dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics*, 159 Ill. 2d at 485. The motion must be directed against an entire claim or demand. *See id.* A court considering a section 2-619 motion is to construe the pleadings and supporting documents in a light most favorable to the nonmoving party. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. *See Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008). A court is not to accept as true those conclusions unsupported by facts. *See Pooh-Bah*, 232 Ill. 2d at 473.

As noted above, AIS presents four arguments, two pursuant to Code of Civil Procedure section 5/2-615, and two pursuant to section 5/2-619. Each will be addressed seriatim. One issue this court did not address on May 21, 2015 was CSR's motion for leave to amend the third-party complaint to add a cause of action for implied indemnification. So that this court may discuss all relevant facts and address every possible cause of action, CSR's motion for leave is granted.

I. CSR's Third-Party Complaint Complies With Code of Civil Procedure Section 5/2-406(b).

Third-party practice in Illinois courts is governed generally by the Code of Civil Procedure. The code provides that: "a defendant may by third-party complaint bring in as a defendant a person not a party to the action who is or may be liable to him or her for all or part of the plaintiff's claim against him or her." 735 ILCS 5/2-406(b). Illinois courts have determined that, "[o]nly those claims [on] which a

third-party defendant is or may be liable to the original defendant for all or part of the plaintiff's claims against him are proper under third-party proceedings. . . ." *Ketcham v. Consolidated Rail Corp.*, 146 Ill. App. 3d 196, 201 (1st Dist. 1986) (distinguishing sections 2-406(b) & 2-614(a)). In other words, "[a] third party complaint must state a cause of action and disclose some relationship upon which a duty to indemnify may be predicated." *Import Sales, Inc. v. Continental Bearing Corp.*, 217 Ill. App. 3d 893, 906 (1st Dist. 1991).

AIS argues that CSR's causes of action are unrelated to the Lakes' personal injury and loss-of-consortium causes of action and, therefore, are not proper third-party claims within the meaning of section 2-406(b). CSR responds that third-party practice is not restricted to contribution and indemnification claims, but may include other theories such as subrogation and breach of warranty. *See People v. Brockman*, 143 Ill. 2d 351, 365 (1991), *citing* Richard A. Michael, Illinois Practice, Civil Procedure Before Trial § 25.5 (1989). In this instance, both parties are correct.

It is true that "proper third-party practice requires derivative liability," *Brockman*, 143 Ill. 2d at 365, *citing* cases. Yet it is also true that CSR's claims sought indemnification even before this court granted CSR leave to add an implied indemnification count. The reason is that in each of its original causes of action, CSR alleges that it, "suffered and will continue to suffer damages, including attorney's fees, costs and any amounts found by the court to be owing to Plaintiffs, Jordan and Michelle Lake. . . ." And in each prayer for relief, CSR seeks judgment, "for any amounts it may be required to pay in connection with a judgment or settlement concerning Plaintiff's litigation. . . ."

Those allegations and prayers for relief unquestionably meet the Illinois Supreme Court's definition of indemnification: "[r]eimbursement or compensation for loss damage, or liability in tort; esp[ecially], the right of a party who is secondarily liable to recover from the party who is primarily liable for reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common-law duty." *Virginia Surety Co. v. Northern Ins.*

Co. of New York, 224 Ill. 2d 550, 566 (2007), *quoting* Black's Law Dictionary 784 (8th ed. 2004). In this case, CSR claims that AIS is liable for failing to provide Zamastil with additional-insured coverage for CSR's direct liability as required by the subcontract agreement to which CSR is an intended third-party beneficiary. Those claims derive directly from the underlying case in which the Lakes seek compensation for their injuries; the third-party action merely focuses on who will pay that compensation, if any.

In sum, since CSR's causes of action seek indemnification based on derivative claims, AIS's motion to dismiss based on Code of Civil Procedure 5/2-406(b) is denied.

II. AIS Owed CSR A Duty Of Ordinary Care.

AIS argues next that it owed CSR no duty and, without a duty, there can be no tort. A duty may arise from a statute or the common law. *See Brockman*, 143 Ill. 2d at 372. The question of whether a duty exists is one of law for a court to decide. *See Burns v. City of Centralia*, 2014 IL 116998, ¶ 13. To determine if a duty exists, a court is to analyze whether a relationship existed between the plaintiff and the defendant for which the law would impose a duty on the defendant for the plaintiff's benefit. *See Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. of Directors*, 2012 IL 112479, ¶ 22, *quoting Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436 (2006). The "relationship" is "a shorthand description for the analysis of four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing the burden on the defendant." *Id.*, *citing Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶ 18. A court's analysis of the duty element focuses on the policy considerations inherent in these four factors and the weight accorded to each based on the case's particular circumstances. *Id.*

According to AIS, an insurance agent or broker owes no duty to an additional insured. AIS cites to three opinions from New York state courts supporting the proposition. AIS then writes that, "[t]hese decisions are wholly consistent with Illinois law." Yet AIS

fails to cite a single Illinois case reaching the same conclusion, let alone any case at all. Certainly, if the proposition were Illinois law, AIS would have had no reason to cite to New York law.

The omission is not surprising since AIS's argument is contradicted by Illinois statute. The Illinois Insurance Placement Liability Act contained in the Code of Civil Procedure explicitly provides that, "An insurance producer . . . shall exercise ordinary care and skill in renewing, procuring, binding, or placing the coverage requested by the insured or proposed insured." 735 ILCS 5/2-2201(a). The definition of "insurance producer" extends to both captive insurance agents and independent insurance brokers. *See Skaperdas v. Country Cas. Ins. Co.*, 2015 IL 117021, ¶ 27. A fiduciary relationship is unnecessary to impose a duty of care on an insurance broker and arises, instead, from the common-law principle that, "'every person owes a duty of ordinary care to all others to guard against injuries which naturally flow as a reasonably probable and foreseeable consequence of an act . . . .'" *Id.*, ¶ 25, *quoting Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶ 19, *quoting, in turn, Widlowski v. Durkee Foods*, 138 Il. 2d 369, 373 (1990). "Thus, if a defendant's action creates a foreseeable risk of injury, the defendant has a duty to protect others from that injury." *Id., citing Simpkins*, ¶ 19. This duty to exercise ordinary care arises, however, only after coverage is, "requested by the insured or proposed insured." 735 ILCS 5/2-2201(a). "At that point, section 2-2201 requires insurance producers to exercise ordinary care and skill in responding to the request, 'either by providing the desirable coverage or by notifying the applicant of the rejection of the risk.'" *Skaperdas*, at ¶ 37, *quoting Talbot v. Country Life Ins. Co.*, 8 Ill. App. 3d 1062, 1065 (3d Dist. 1973). Such communication presents a minimal burden. *Id.*, ¶ 39.

Skaperdas controls the result here. Since Zamastil gave AIS a copy of the subcontract agreement, AIS knew the terms and conditions for the purchase of insurance required by CSR and accepted by Zamastil. AIS must have concluded that the insurance CSR and Zamastil sought could not be procured because the policy ultimately written by Pekin was non-conforming. As directed by

Skaperdas, AIS had a duty to share its conclusion with both Zamastil and CSR, regardless of whether it did (since that issue appears to be disputed). AIS's motion to dismiss based on a lack of duty must, therefore, be denied.

III. No Statute Of Limitations Bars CSR's Third-Party Complaint.

AIS next argues that CSR's third-party complaint is barred by the applicable statute of limitations. AIS looks to one Code of Civil Procedure section providing that causes of action against insurance producers, "concerning the sale, placement, procurement, renewal cancellation of, or failure to procure any policy of insurance shall be brought within 2 years of the date the cause of action accrues." 735 ILCS 5/13-214.4. AIS argues that CSR knew or should have known no later than June 19, 2012 that the insurance procured by Zamastil was non-conforming, meaning that the statute would have expired on June 19, 2014. Since CSR filed its third-party complaint on December 1, 2014, section 13-214.4 would bar the third-party complaint.

Since the complaint at issue here is, in fact, a third-party complaint, a second statute of limitations must be considered. The Code of Civil Procedure provides that the statute of limitations to file a third-party complaint is two years and begins to run on either the date the defendant/third-party-plaintiff is served in the underlying action or knew or should reasonably have known of an act or omission giving rise to the action, "whichever period expires later." 735 ILCS 5/13-204(b). Specifically for all indemnification claims, this statute of limitations preempts all others. *See* 735 ILCS 5/13-204(c). Therefore, even if AIS were correct and CSR knew or should have known of the non-conforming insurance no later than June 19, 2012, the statute of limitations on CSR's third-party complaint would have started to run on April 5, 2013 – the date of service – and expired on April 5, 2015. Since CSR filed its third-party complaint on December 1, 2014, CSR complied with the statute.

Neither AIS nor CSR addresses a third statute of limitations applicable to CSR's claims based on a violation of the Insurance Placement Act in count two and a breach of contract in count three. Code of Civil Procedure section 13-206 applies to written contracts and requires that such a cause of action must be filed "within 10 years next after the cause of action accrued." 735 ILCS 5/13-206. Once again, even if AIS is correct and CSR knew of the non-conforming insurance no later than June 19, 2012, CSR would have until June 19, 2022 to file suit.

In short, no applicable statute of limitations bars CSR's third-party complaint; consequently, AIS's motion to dismiss based on this argument is denied.

IV. CSR Waived Its Contract Rights Against AIS.

Whether CSR may enforce its right to the terms of the subcontract agreement's insurance-purchase provision against AIS hinges on the issue of waiver. Illinois law provides that waiver may be express or implied and arises from acts, words, conduct, and knowledge of a party. *See Crum & Forester Managers Corp. v. Resolution Trust Corp.*, 156 Ill. App. 3d 384, 396 (1993). Regardless of whether it is express or implied, "[w]aiver requires that a known right be voluntarily and intentionally relinquished." *Lehman v. IBP, Inc.*, 265 Ill. App. 3d 117, 119 (3d Dist. 1994), *citing Lavelle v. Dominick's Finer Foods, Inc.*, 227 Ill. App. 3d 764, 771 (1st Dist. 1992). Illinois courts also acknowledge that the analysis of whether waiver has occurred is fact based and limited to those facts. *See Lehman*, 265 Ill. App. 3d at 120, *citing Batterman v. Consumers Illinois Water Co.*, 261 Ill. App. 3d 319, 321 (3d Dist. 1994).

It is uncontested that CSR never expressly waived any of its rights under the construction contract; therefore, the only factual and legal question before this court is whether CSR impliedly waived its rights. "The key to implied waiver . . . is establishing a clear inference, under the circumstance, of an intention to waive. Implied waiver may be established when 'the conduct of the person against whom waiver is asserted is inconsistent with any other intention than

to waive. . . .'" *Lehman*, 265 Ill. App. 3d at 119, *quoting Whalen v. K-Mart Corp.*, 166 Ill. App. 3d 339, 343 (1st Dist. 1998).

CSR relies heavily on *Lehman* in support of the argument that a general contractor that receives certificates of insurance from a subcontractor demonstrating non-conforming insurance coverage does not waive benefits under a construction contract. CSR reads *Lehman*'s holding far too broadly, and its reliance is misplaced because *Lehman* is factually distinct in several significant ways. First, the *Lehman* court explicitly found that the indemnification and insurance provisions in the underlying construction contract did not violate the Anti-Indemnification Act because they did not require the third-party-defendant subcontractor to indemnify the defendant-third-party-plaintiff owner from its own negligent or intentional conduct. *See Lehman*, 265 Ill. App. 3d at 121 & 123. As addressed more fully in section V, the plain language of the subcontract agreement's insurance provision requires Zamastil to purchase insurance to indemnify CSR's own negligence.

Second, the owner in the *Lehman* case recognized that the insurance policy purchased by the subcontractor failed to conform to the construction contract's requirement that the owner be listed as an additional insured. *Id.* at 118. To that end, the owner wrote to the subcontractor asking for proof of additional-insured coverage. *Id.* "This conduct does not indicate an intent to waive the coverage," *id.* at 120, and, in fact, "expressed [the owner's] intent to endorse its contract rights. . . ." *Id.* As the court reasoned: "'A party to a contract may not lull another into a false assurance that strict compliance with a contractual duty will not be required and then sue for noncompliance.'" *Id.*, *quoting Whelan*, 166 Ill. App. 3d at 343.

In contrast here, it is undisputed that CSR never contacted Zamastil or AIS to complain about the non-conforming insurance coverage. That is a substantial factual distinction noted by the *Lehman* court in other scenarios, particularly *Whelan* and *Geier v. Hamer Entrps., Inc.*, 226 Ill. App. 3d 372 (1st Dist. 1992). The court notes that *Whelan* and *Geier*, "are distinguishable because in those cases the waiving parties allowed the contractors to start and finish

work, then paid them in full, without ever objecting to the lack of coverage. The insurance issue was only raised after the underlying litigation began." *Lehman*, 265 Ill. App. 3d at 120. As in *Whelan* and *Geier*, there is nothing in the record to indicate that CSR objected to the lack of conforming insurance coverage at any time prior to Zamastil beginning work at the site or CSR's filing its third-party complaint.

Third, *Lehman* concerned a subcontractor's failure to name the owner as an additional insured and supply that information in a timely manner to the owner. *Id.* at 118. In contrast here, neither additional-insured coverage nor timely notification is disputed; Zamastil fulfilled those terms of the construction contract. Rather, the critical issue here is the *scope* of CSR's additional-insured coverage under the purchased policy.

As a matter of law, CSR could not rely on the certificates of insurance for purposes of ensuring additional-insured coverage conforming to the construction contract. Quite simply, certificates of insurance do not constitute a contract justifying reliance. *See Lezak & Levy Wholesale Meats, Inc. v. Illinois Employers Ins. Co. of Wausau*, 121 Ill. App. 3d 954, 957 (1st Dist. 1984). The reason is that "certificates of insurance do not constitute evidence that [the] defendant had full coverage, but [are] merely evidence of the existence of a policy." *American States Ins. Co. v. Action Fire Equip., Inc.*, 157 Ill. App. 3d 34, 40 (2d Dist. 1987).

In this case, the certificates of insurance that Zamastil provided to CSR explicitly state that: (1) CSR is the certificate holder; (2) additional-insured coverage is provided; and (3) neither certificate constitutes a contract. Thus, had CSR truly wished to obtain assurance on which it could reasonably rely as to the scope of its additional-insured status, CSR would have had to look to either the complete insurance policy or, at a minimum, its relevant endorsement pages. The latter were certainly available, and Zamastil claims that it sent to CSR the endorsement pages as required by the subcontract agreement. If CSR did not receive the endorsement pages, it had a duty to obtain them.

If, in fact, CSR received the endorsement pages, it does not appear to have read them because they could not be clearer in explaining CSR's status as an additional insured for vicarious liability only. The additional-insured endorsement states that CSR, "is covered only with respect to vicarious liability . . . imputed from You [Zamastil] to the Additional Insured as a proximate result of your [Zamastil's] ongoing operations. . . ." The endorsement reemphasizes that, "[t]his insurance does not apply to . . . Liability . . . arising out of or in any way attributable to the claimed negligence . . . of the Additional Insured other than vicarious liability which is imputed to the Additional Insured solely by virtue of the acts or omissions of the Named Insured." The ongoing- and completed-operations endorsement pages use very similar language and provide CSR with coverage but only for liability arising out of its own work.

CSR's apparent failure to read the endorsement pages is, itself, problematic since an insured has an independent duty to read its insurance policy. *See American States Ins. Co.*, 157 Ill. App. 3d at 40, *citing Floral Consultants, Ltd. v. Hanover Ins. Co.*, 128 Ill. App. 3d 173, 179 (1st Dist. 1984), and *Dobosz v. State Farm Fire & Cas. Co.*, 120 Ill. App. 3d 674, 682 (2d Dist. 1983). The duty to review endorsement pages is particularly pertinent if, as in this case, the certificates of insurance explicitly state that they should not be construed to extend coverage beyond the exclusions contained in the policy. *See American States*, 157 Ill. App. 3d at 40, *citing Lezak & Levy*, 121 Ill. App. 3d at 957. CSR cannot respond by arguing that it is not a party to the Zamastil-Pekin insurance policy. While that it true, CSR seeks to enforce its status as a direct third-party beneficiary to the insurance agreement by virtue of the subcontract agreement. An argument to the contrary would undermine the contract rights CSR now seeks to enforce.

Balanced against CSR's multiple failures to enforce the subcontract agreement's terms before Zamastil began its work, is CSR's singular act of tendering its defense and indemnification to Pekin after Lake's injury. Such conduct plainly indicates CSR's intention to enforce its contract rights, yet its failure to act sooner

identifies a broader problem. Just as the Anti-Indemnification Act incentivizes all parties to a construction project to make safety the paramount priority, so, too, the common-law duty to read insurance contracts (or at least endorsement pages) incentivizes all parties to act in good faith and fair dealing. To permit a party to enforce only certain contract terms to its benefit and not others would lead to far greater contracting uncertainty. Further, a party sitting on its contract rights substantially increases the likelihood of subsequent litigation over disputed contract terms.

To conclude that CSR did not waive its contract rights would incentivize sloppy commercial practices. This court cannot encourage such behavior. Had CSR read the endorsement pages, it would have seen that AIS had procured non-conforming insurance and could have addressed the issue when it should have been addressed – during the negotiation phase with Zamastil. If, in fact, CSR read the endorsement pages and did nothing, then the result is even more emphatic. Given CSR's receipt of the endorsement pages, its duty to review them, its failure to do so, and its failure to take any steps before Lake's accident to enforce its contract rights, the inexorable conclusion is that CSR waived its rights under the subcontract agreement. AIS's summary judgment motion is granted on this basis.

V. The Subcontract Agreement's Indemnification And Insurance-Purchase Provisions Are Void.

If CSR's failures to act did not, as a matter of fact and law, waive its rights under the subcontract agreement, the agreement's validity and enforceability must be analyzed. This was the central point raised by this court at the May 21, 2015 hearing. Based on the additional briefs supplied by the parties in the meantime, it is imperative that the subcontract agreement be fully analyzed.

At issue here are two provisions, one for indemnification – paragraph seven – and one for the purchase of insurance – paragraph eight. As *Lehman* points out, "[i]nsurance and indemnification are two distinct notions. A promise to obtain and pay for insurance is conceptually different from a promise to personally indemnify, thus

assuming the responsibility for any damage or injury." 265 Ill. App. 3d at 121. This distinction requires that the indemnification and insurance-purchase provisions in the subcontract agreement receive a thorough analysis. The analysis is particularly important given that the Lakes claim that CSR's liability in the underlying complaint arises, in part, from CSR's alleged failure to adhere to OSHA guidelines.

A. The Indemnification Provision Is Void.

The Anti-Indemnification Act provides that in any construction contract, "every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable." 740 ILCS 35/1. The act's purpose is to, "foster workplace safety by preventing a party from insulating itself from liability through use of a contractual indemnification provision which may deter the exercise of ordinary care." *Virginia Surety*, 224 Ill. 2d at 560. For example, the statute would render void, "a contractual provision in which a subcontractor agreed to pay all damages resulting from an injury to its employee, even the *pro rata* share of a general contractor who was partially at fault." *Id.* Illinois courts have consistently invalidated indemnification provisions that violate the statute based on their plain language. *See, e.g., Tanns v. Ben A. Borenstein & Co.*, 293 Ill. App. 3d 582, 585 (1st Dist. 1997) ("caused by . . . the work . . . whether or not . . . claims are based upon [the general contractor's] alleged active or passive negligence"); *Juretic v. USX Corp.*, 232 Ill. App. 3d 131, 132 (1st Dist. 1991) ("arising . . . out of the work performed . . . whether or not caused or alleged to be caused in whole or in part by the fault of negligence of Owner"); *Bosio v. Branigar Org., Inc.*, 154 Ill. App. 3d 611, 612 (2d Dist. 1987) ("claims that may arise on the part of any of [contractor's] employees . . . by reason of . . . any claim while in pursuit of this contract"); *Duffy v. Poulos Bros. Constr. Co.*, 225 Ill. App. 3d 38, 45-46 (1st Dist. 1991) ("claims . . . arising out of or resulting from . . . anyone directly or indirectly employed [by a subcontractor] . . . regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder").

In this case, the indemnification provision begins with an uncontroversial requirement that,

> To the fullest extent permitted by law, the Subcontractor . . . shall defend, indemnify and hold harmless Contractor . . . from and against all claims . . . resulting from the acts, omissions, breach or default of the Subcontractor. . . ."

The provision continues, however, with language requiring something wholly different,

> provided that any such claim . . . is caused in whole or in part by any negligent act or omission of the Subcontractor. . . *regardless of whether or not it is caused in part by any party indemnified hereunder.*

(Emphasis added.) The italicized phrase plainly violates the Anti-Indemnification Act section one by imposing on Zamastil a duty to indemnify CSR from claims that it caused. That interpretation is the only one possible because, according to paragraph seven, CSR is the only indemnified party. This conclusion must also be correct because the *Duffy* court considered nearly identical language (see above) and found that it violated section one's prohibition. *See* 225 Ill. App. 3d at 45-46.

If there were any question as to the invalidity of the indemnification provision, the second paragraph erases any remaining doubt. Indeed, the first sentence is a virtual confession of contractual overreach:

> In the event such indemnity as described above is prohibited by law, *then said indemnity shall only be to the extent caused by the negligent acts or omissions of the Subcontractor. . . .*

(Emphasis added.) At the same time, the sentence validates the first paragraph by severing from it Zamastil's duty to indemnify CSR for its own negligent conduct. Yet, as with the first paragraph, CSR

snatches defeat from the jaws of victory by including this concluding sentence:

> Subcontractor hereby expressly permits the Contractor *to pursue and assert claims against the Subcontractor for indemnity*, contribution and Common law negligence arising out of claims for damages for death and personal injury.

(Emphasis added.) That sentence eliminates the narrowed interpretation permitted by the first sentence. In fact, the only possible reading of this last sentence is that, as in the first paragraph, the second paragraph permits CSR to sue Zamastil for indemnification for claims arising from CSR's negligence. Since the paragraphs make the identical error, they are not severable. In sum, the singular conclusion is that the entire indemnification provision – paragraph seven – violates the Anti-Indemnification Act and is void for public policy.

B. The Insurance-Purchase Provision is Void.

The Anti-Indemnification Act contains an important exception to the general rule: "This Act does not apply to construction bonds or insurance contracts or agreements." 740 ILCS 35/3. Courts have interpreted the section-three exception to provide that, while a party may not insure its own obligations under a void indemnity agreement, "provisions that require the indemnitor to provide liability insurance for the indemnitee, making the indemnitee an insured under the policy, are valid." *Tanns*, 293 Ill. App. 3d at 586, *citing cases*. The courts have also explained that divining the validity of an insurance-coverage provision *vis-à-vis* an indemnification provision is fact driven. "[E]ach coverage case is dependent on its own unique facts, which include the exact terms of the policy and the allegations of the complaint in the underlying case. As we have noted in the past, cases involving different insurance provisions or different allegations are distinguishable." *Pekin Ins. Co. v. Hallmark Homes, LLC*, 392 Ill. App. 3d 589, 596, *citing State Auto. Mut. Ins. Co. v. Kingsport Dev., LLC*, 364 Ill. App. 3d 946, 958-59 (2d Dist. 2006) (distinguishing cases).

The Illinois Supreme Court has been careful to explain the scope of the section-three exception. In *Capua v. W.E. O'Neil Constr. Co.*, 67 Ill. 2d 255 (1977), for example, the court found that section three does not invalidate construction bonds furnished at the time the parties executed the construction contract. *Id.* at 260-61. According to the court, construction bonds are separate agreements providing indemnification and hold-harmless terms that protect construction workers and the public who may be injured through improper construction or maintenance by preserving supplemental sources of compensation for injured persons. *Id.* at 260.

The upshot of *Capua* is that an insurance-purchase provision in a construction contract is not, itself, an insurance contract or agreement as used in section 35/3. To find otherwise would transform all construction contracts into insurance contracts or agreements, and the exception would swallow the rule. Put another way, the insurance-purchase provision in the subcontract agreement between CSR and Zamastil is not an insurance contract or agreement and, therefore, does not fall under the exception provided by section 35/3. Rather, the only insurance contract or agreement in this case is the one between Pekin and Zamastil, and it is not the subject of this motion.

Courts justify the broad reading of the section-three exception because insurance contracts and agreements generally extend far beyond mere indemnification. The most frequently noted example is that the duty to defend is broader than the duty to indemnify. *See, e.g., Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 125 (1992); *Tanns*, 293 Ill. App. 3d at 586, *citing Western Casualty & Surety Co. v. Adams Cty.*, 179 Ill. App. 3d 752, 756 (4th Dist. 1989). In other words, an indemnitee should not be denied the indemnitor's duty to defend because the defense may ultimately be successful and make indemnification unnecessary.

In this case, there is no concern about cutting off CSR's right to Pekin's defense. The reason is, quite simply, that CSR is not seeking a defense. After Pekin refused CSR's tender of the defense and

indemnification, CSR did nothing. CSR certainly could have filed a declaratory action in the chancery division seeking a judgment that Pekin had a duty to defend CSR under a reservation of rights, but it did not do so. Further, CSR in its third-party complaint is not seeking a defense. Rather, CSR claims that it has, "suffered and will continue to suffer damages, including attorney's fees, costs and any amounts found by the court to be *owing to Plaintiffs, Jordan and Michelle Lake. . . .*" (Emphasis added.) CSR's prayer for relief in each count is consistent, seeking judgment, "*for any amounts it may be required to pay in connection with a judgment or settlement concerning Plaintiff's litigation. . . .*" (Emphasis added.) In short, CSR's third-party complaint is not seeking a defense but indemnification.

Paragraph eight requires Zamastil to purchase an insurance policy naming CSR as an additional insured. The provision also requires that the insurance be primary and non-contributory and cover ongoing and completed operations. To that end, the paragraph goes so far as to indicate specifically the two ISO endorsements to be used to provide that coverage. Finally, the paragraph explicitly provides that, "coverage must NOT be limited to vicarious liability." (Emphasis in original.)

The parties did not cite and this court could not find any reported Illinois decision addressing this particular language. Its unambiguous meaning makes interpretation by reference to case law unnecessary. Since the insurance policy CSR wants Zamastil to purchase is not limited to vicarious liability, the policy must, by virtue of elimination, require coverage for CSR's direct liability. That is precisely the type of indemnification prohibited by the Anti-Indemnification Act section one. The linkage between the insurance-purchase and indemnification provisions is the ultimate issue in this case because a party cannot be permitted to obtain in the former the type of coverage statutorily prohibited by the latter. To permit such a result would, once again, allow the exception to swallow the rule.

This conclusion is also proved true by considering the insurance-purchase provision from Pekin's perspective. It is

uncontested that Zamastil provided AIS with a copy of the subcontract agreement and that AIS provided it to Pekin. Yet, if CSR's argument were correct, it remains unexplained why AIS failed to procure and Pekin failed to write a policy conforming to the insurance-purchase provision required by the subcontract agreement.

The reason is that Pekin gave CSR precisely what it wanted. ISO endorsement form CG 20 10 10 01 explicitly states that CSR, as the named additional insured, is covered by the policy, "but only with respect to liability arising out of your[, Zamastil's,] ongoing operations. . . ." Similarly, CG 20 37 10 01 provides CSR with coverage, "but only with respect to liability arising out of 'your[, Zamastil's,] work' . . . and included in the 'products-completed operations hazard.'" As noted above, the additional-insured endorsement also makes plain that CSR's coverage is limited to vicarious liability only.

CSR cannot now complain about the inclusion of endorsements that explicitly exclude the type of coverage CSR required. If CSR did not know the contents of the ISO endorsements, CSR should not have asked that they be included. Further, to permit CSR to avoid its duty to review and approve of the endorsement pages would deny Zamastil the benefit of its bargain in contracting with CSR.

The substantial number of cases cited by both parties supporting their positions are instructive only by providing legal parameters. As noted above, this court's analysis must be driven by the words in the subcontract agreement, and no other case addresses the quintessentially unambiguous language that, "coverage must NOT be limited to vicarious liability." Since that phrase violates the prohibition contained in the Anti-Indemnification Act section one, the inexorable conclusion is that AIS's motion for summary judgment must be granted and AIS dismissed with prejudice.

CONCLUSION

This court recognizes that the legal issues raised in this memorandum opinion and order are significant and substantially affect the remaining parties in this litigation. With that knowledge and for the reasons presented above, it is ordered that:

1. CSR's motion for leave to file an amended third-party complaint adding a cause of action for implied indemnification is granted;
2. AIS's motion to dismiss the third-party complaint pursuant to Code of Civil Procedure section 2-615 is denied;
3. AIS's motion to dismiss the third-party complaint pursuant to Code of Civil Procedure section 2-619 is granted;
4. AIS is dismissed as a third-party defendant with prejudice;
5. This court finds that, pursuant to Illinois Supreme Court Rule 304(a), there is no just reason for delaying enforcement or appeal or both of this order;
6. This matter continues between the Lakes and CSR as the only defendant; and
7. The July 23, 2015 ruling and case management conference is stricken, and this matter will return for case management on August 27, 2015 at 10:00 a.m.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

JUL 22 2015

Circuit Court 2075