FIFTH DIVISION
June 17, 2016

No. 1-14-1650

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

FHP TECTONICS CORPORATION,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
NES RENTALS HOLDINGS, INC.	)	
	)	
Defendant-Appellee	)	No. 10 CH 55239
	)	
and	)	
	)	
AMERICAN HOME ASSURANCE COMPANY and VICKY JEAN COOPER, individually and as Special Administrator of the Estate of John I. Rivera, Deceased,	)	
	)	The Honorable
Defendants.	)	Rita Mary Novak,
	)	Judge presiding.

JUSTICE BURKE delivered the judgment of the court.*
Justices Gordon and Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court's judgment is affirmed where the court properly granted summary judgment to the defendant on the plaintiff's claims for (1) breach of contract and

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* This case was recently reassigned to Justice Burke.

(2) a declaration that the defendant owed the plaintiff a duty to defend in underlying litigation.

¶ 2 Plaintiff FHP Tectonics Corporation (FHP) appeals from the trial court's order denying FHP's motion for summary judgment and granting summary judgment to NES Rentals Holdings, Inc. d/b/a NES Traffic Safety (NES) on FHP's claims that (1) NES had a duty to defend and indemnity FHP in underlying litigation and (2) NES breached its contract to procure certain insurance. On appeal, FHP argues that it was entitled to summary judgment on both of its claims. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. The Subcontract Between FHP and NES

¶ 5 FHP entered into a contract with the Illinois State Toll Highway Authority for construction on the Tri-State Tollway. FHP then subcontracted with NES to provide traffic control and signage work. Section 22(a) of FHP and NES's subcontract contained a general indemnification provision which provided, in relevant part, as follows.

> "To the fullest extend [*sic*] permitted by law, Subcontractor shall indemnify, defend, protect and hold harmless the Contractor, Owner, Architect/Engineer, and their respective parents, members, subsidiaries, related corporations, officers, agents and employees *** from and against any and all liabilities, injuries, claims, demands, damages, losses, costs and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such liability, injury, claim, demand, damage, loss, cost or expense is attributable to

> bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, including the loss of use resulting there from, but only to the extent caused or alleged to be caused in whole or in any part by the negligent acts or omissions of the Subcontractor, anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.
>
> Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this paragraph."

¶ 6 Another portion of the subcontract, Schedule D, required NES to obtain certain insurance and to submit a "Certificate of Insurance" before commencing work. Under subsection 2 of section A, which contains the heading "Commercial General Liability Insurance (Primary and Umbrella)," the subcontract required NES to obtain

> "Commercial General Liability Insurance or equivalent with limits of not less than $5,000,000 per occurrence for bodily injury, personal injury, and property damage liability. Coverages shall include the following: All premises and operations, products/completed operations, (for a minimum of two (2) years following project completion) explosion, collapse, underground, independent contractors, separation of insureds, defense, and contractual liability (with no limitation endorsement).

> FHP Tectonics Corp. **** and all their officers, agents, and Employees are to be named as an additional insured on a primary, non-contributory basis for any liability arising directly or indirectly from the work."

¶ 7 B. The American Policy

¶ 8 NES obtained a commercial general liability policy from American. The policy states that American "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit" seeking those damages." However, a self-insured retention (SIR) endorsement deletes the aforementioned paragraph in its entirety and instead provides as follows.

> "We will pay on behalf of the Insured those sums in excess of the 'Retained Limit' that the Insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right but not the duty to defend any 'suit' seeking those damages. We may at our discretion and expense, participate with you in the investigation of any 'occurrence' and the defense or settlement of any claim or 'suit' that may result."

The "retained limit" is listed as $500,000 per "occurrence." The SIR provides that "you are responsible" for the payment of costs and fees. The policy defines "you" and "your" as the "Named Insured," while "insured" is defined as any person qualifying as an insured.

¶ 9 The policy contains an "Other Insurance" clause which states that where "other valid and collectible insurance is available to the insured for a loss" American covers "under Coverages A or B of this Coverage Part," American's insurance will be primary except in certain cases when it is excess. The SIR is not listed among the instances in which American's insurance is excess. An "Additional Insured- Primary Insurance" (AI-PI) endorsement modifies the "Other Insurance" section of the policy to provide that "coverage under this policy afforded to an additional insured will apply as primary insurance where required by contract, and any other insurance issued to such additional insured shall apply as excess and noncontributory insurance."

¶ 10 C. The Underlying Case

¶ 11 The underlying action arose after Vicky Jean Cooper, individually and as special administrator of the estate of John I. Rivera, filed suit against FHP and several other defendants. NES was not named as a defendant. In her seventh amended complaint, Cooper alleged that Rivera was driving his car on I-294 when Joseph Cannarozzi, an employee of one of FHP's subcontractors, abruptly changed lanes and stopped or slowed in front of Rivera's vehicle. Rivera crashed into Cannarozzi's truck, sustaining fatal injuries.

¶ 12 FHP filed a third-party complaint against NES, arguing that NES acted negligently and was liable for the accident at issue. Other defendants also filed third-party complaints against NES.

¶ 13 FHP also sent letters seeking coverage in the underlying action to American and NES. In January 2009, American denied coverage because (1) the additional insured endorsement provided coverage only if liability arose out of NES's performance of ongoing operations and the loss did not involve any activities of NES, and (2) its policy sat over a $500,000 retention limit and did not provide coverage for any entity until the $500,000 retention was met.

¶ 14 In March 2012, FHP filed a motion to dismiss the underlying claim against it. FHP argued, *inter alia*, that Cannarozzi had been charged with and pled guilty to reckless homicide for his actions at the time of the accident. FHP argued it did not owe Cooper a duty to protect against Cannarozzi's criminal actions. The parties agree that FHP was dismissed from the underlying litigation.[1]

¶ 15 NES entered into a settlement with the underlying plaintiff.[2] In August 2013, the trial court granted NES's motion for a good-faith finding, dismissing all third-party complaints filed against NES.

¶ 16 D. The Declaratory Judgment Action

¶ 17 In December 2010, FHP filed a complaint for declaratory judgment against NES, American, and Cooper. In August 2011, a hearing commenced. On NES's motion, the trial court dismissed the counts of FHP's complaint directed at NES without prejudice. On American's motion, the court also dismissed with prejudice the counts of FHP's complaint relating to American's duty to defend. In doing so, the court considered the "right but not a duty to defend" language in the SIR endorsement and stated as follows. "And, in fact, the other provisions of the contract to me are consistent with the right to defend, but not a duty to defend, because, in essence, as a contract that for lack of a better word kicks in when the SIR is exhausted." The court further stated that in its experience, "in those kinds of excess or additional coverage kind of cases, it's not unusual to find the right to defend, but not the duty to defend."[3]

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[1] The record shows that the court granted FHP's motion and dismissed the fifth underlying complaint in June 2012; however, the court did so with leave to replead. A seventh amended underlying complaint, naming FHP as a defendant, appears in the record. Nonetheless, the parties agree that FHP has been dismissed from the underlying action.

[2] The record contains the trial court's order finding the settlement was made in good faith, and the parties do not dispute that NES entered into a settlement with Cooper.

[3] Following the hearing, additional proceedings took place between American and FHP. FHP filed a separate appeal from those proceedings, which was docketed as 1-13-0291.

¶ 18 In April 2012, FHP filed a second amended complaint for declaratory judgment and other relief against NES and Cooper.[4] In count I, FHP argued NES owed a contractual duty to defend and indemnify FHP. FHP cited to section 22 of the parties' subcontract. In its prayer for relief, FHP sought, *inter alia*, a finding that NES had "a duty to defend FHP in the [underlying] litigation, which includes the duty to pay any and all defense costs." In count II of the complaint, FHP alleged that NES breached the parties' subcontract by failing to (1) procure insurance naming FHP as an additional insured on a primary, non-contributory basis; (2) provide FHP a defense; and (3) satisfy the self-insured retained limit of the policy.

¶ 19 NES filed an answer denying the material allegations of FHP's second amended complaint. In addition, NES filed an affirmative defense, asserting FHP waived its argument regarding improper insurance by allowing NES to complete the project, after receiving a certificate of insurance, without challenging the insurance NES obtained.

¶ 20 In October 2013, the parties filed cross-motions for summary judgment. FHP's motion argued that NES had a contractual duty to defend FHP under section 22 of the subcontract. FHP also posited that NES had a duty to defend pursuant to the terms of the insurance policy, as the American insurance policy was excess and the SIR was primary insurance. FHP's motion posited that the allegations in the underlying complaint fell within the realm of work that NES was hired to perform. In addition, FHP alleged that NES was in breach of contract because it did not obtain primary non-contributory insurance, and it was estopped from raising a policy defense.[5]

¶ 21 In its motion for summary judgment, NES alleged that section 22(a) of the subcontract was unenforceable because it failed to conform to the good-faith settlement provisions of the Joint Tortfeasor Contribution Act (Contribution Act) (740 ILCS 100 *et. seq.* (West 2006)).

[4] In its second amended complaint, FHP referenced the fifth amended complaint in the underlying action.
[5] The underlying complaint that FHP attached to its motion for summary judgment was the seventh amended underlying complaint.

Further, NES claimed, even if section 22(a) was enforceable, the underlying injury was not caused by NES's negligence or omissions. NES posited that the underlying complaint contained no allegations against NES. Further, NES attached to its motion an appellate court order reflecting that Cannarozzi was charged with and pled guilty to reckless homicide for the collision. NES argued the complaints against FHP were dismissed due to Cannarozzi's criminal acts. Thus, NES claimed it had been clearly established that the plaintiff's injuries in the underlying case were due to Cannarozzi's criminal acts, not the acts of NES. As to FHP's claim that NES obtained improper insurance, NES posited (1) it procured the proper insurance, (2) FHP waived any breach of contract claim, and (3) FHP had not incurred any damages.

¶ 22 A hearing on the parties' motions commenced in December 2013. Following the hearing, the trial court granted NES's motion for summary judgment and denied FHP's motion. The court found NES's contractual obligation to defend or indemnify FHP had not been triggered because the underlying complaint contained no allegation that NES performed any act negligently, and no finding had been made that the injury in the underlying action was caused in whole or in part by NES. The court further found that FHP could not recover defense costs from NES after NES was found to have settled claims against it in good faith. Finally, the court found NES did not breach its contract by failing to procure the proper insurance because by its own terms, the American policy was a primary policy for an additional insured.

¶ 23 FHP filed a motion to reconsider. Relying on the trial court's ruling in the matter between FHP and American, in which the court found the insurance policy did not set out a duty to defend, FHP argued NES failed to procure primary insurance. FHP also posited that if NES was not the primary insurer, then NES breached its subcontract. FHP argued the facts alleged in the underlying matter were within section 22 of the subcontract, which did not require a finding of

liability. In addition, FHP asserted that NES had a duty to defend pursuant to the SIR, and the good-faith settlement did not preclude FHP from obtaining partial defense costs up to a certain point.

¶ 24 Following a May 2014 hearing, the trial court denied FHP's motion. This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, FHP argues the trial court should have granted summary judgment in its favor on both its breach of contract claim and its duty to defend claim.

¶ 27 Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(d) (West 2012). When the parties file cross-motions for summary judgment, they concede that no genuine issue of material fact exists and only questions of law are at issue. *Jones v. Municipal Employees' Annuity and Benefit Fund of Chicago*, 2016 IL 119618, ¶ 26. Our review of the trial court's decision is *de novo*. *MemberSelect Insurance Co. v. Luz*, 2016 IL App (1st) 141947, ¶ 20. We may affirm the grant of summary judgment on any basis in the record, regardless of whether the court relied on that basis. *AMCO Insurance Co. v. Erie Insurance Exchange*, 2016 IL App (1st) 142660, ¶ 19.

¶ 28 A. FHP's Breach of Contract Claim

¶ 29 FHP first argues the trial court erred by finding that NES did not breach its obligation under Schedule D of the subcontract to obtain primary, non-contributory insurance. FHP maintains (1) NES breached its contract to procure primary insurance which provided a duty to defend, (2) the court rendered inherently contradictory rulings when it first referred to the

American policy as an excess policy and then, at a later hearing, referred to the policy as a primary policy, and (3) if the SIR did not provide coverage for FHP, NES breached its contractual obligation to procure $5 million in primary, non-contributory insurance.

¶ 30 To establish a claim for breach of contract, a plaintiff must show the existence of a contract, performance of the contract by the plaintiff, breach of contract by the defendant, and that the plaintiff suffered injury as a result. *Horwitz v. Sonnenschein Nath and Rosenthal* LLP, 399 Ill. App. 3d 965, 973 (2010).

¶ 31 As to its first claim, FHP posits that NES agreed to procure commercial liability insurance that would actually afford coverage to FHP, and NES's decision to self-insure effectively rendered the insurance illusory. FHP argues that the inclusion of both an indemnification provision and insurance procurement provision in the subcontract shows the parties intended NES to procure insurance providing actual, as opposed to illusory, coverage. FHP further posits NES was required to procure insurance that included a duty to defend based on the language in Schedule D specifying that "[c]overages shall include," *inter alia*, "defense."

¶ 32 These are not the same arguments that FHP made in the trial court. In its second amended complaint, FHP alleged NES breached the subcontract by failing to (1) "procure insurance naming FHP as an additional insured on a primary, non-contributory basis," (2) provide FHP a defense in the underlying litigation, and (3) satisfy the self-insured retained limit of the Policy. FHP cited to portions of Schedule D, but not to the language in Schedule D specifying that coverages were to include "defense." Further, in its motion for summary judgment, FHP argued that NES breached the subcontract by obtaining excess insurance instead of primary, non-contributory insurance. FHP based its argument solely on the language in Schedule D requiring NES to name FHP "as an additional insured on a primary, non-contributory basis." In its

response to NES's motion for summary judgment, FHP likewise argued NES breached its contract because it failed to obtain primary insurance.

¶ 33 FHP has pointed to no portion of the trial court proceedings in which it made the arguments it now makes, *i.e.*, that the inclusion of both an indemnity agreement and insurance procurement agreement shows the parties intended NES to procure insurance providing actual coverage, and that the "defense" language in Schedule D shows the parties intended NES to procure insurance that provided a duty to defend. Arguments that are not raised in the trial court are forfeited and cannot be raised for the first time on appeal. *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 24; see also *Daniels v. Anderson*, 162 Ill. 2d 47, 58 (1994) ("the theory upon which a case is tried in the lower court cannot be changed on review." (Internal quotation marks omitted)). Accordingly, we will not consider FHP's arguments.

¶ 34 We turn then to FHP's assertion that the trial court found American's insurance policy provided both excess coverage and primary coverage at two separate hearings. FHP maintains that the court's "inherently contradictory" rulings cannot stand pursuant to the law of the case doctrine. See *Alwin v. Village of Wheeling*, 371 Ill. App. 3d 898, 911 (2007) ("the law of the case doctrine provides that where an issue has been litigated and decided, a court's unreversed decision on that question of law or fact settles that question for all subsequent stages of the suit." (Internal quotation marks omitted.)).

¶ 35 At the August 2011 hearing, the trial court found the SIR endorsement in American's policy did not provide for a duty to defend. In doing so, the court stated as follows.

> "I have frankly looked for other indicators in this contract to see whether or not there was anything inconsistent with that provision, that is that sometimes these contracts are somewhat

> confusing about whether or not there really is a duty to defend, even though the inartful language, but I saw nothing here to suggest that. And, in fact, the other provisions of the contract to me are consistent with the right to defend, but not a duty to defend, because, in essence, as a contract that for lack of a better word kicks in when the SIR is exhausted. And I think it's more typical is my experience in sitting in this courtroom indicates that in those kinds of excess or additional coverage kinds of cases, it's not unusual to find the right to defend, but not the duty to defend."

Later, at the December 2013 hearing on the parties' cross-motions for summary judgment, the court found that American's policy was a primary policy for an additional insured.

¶ 36 Contrary to FHP's claims, the trial court's rulings were not "inherently contradictory." The issue before the trial court at the earlier hearing was whether American's policy provided a duty to defend. Based on the SIR endorsement, the court found the policy did not set out a duty to defend. However, the court did not decide whether the policy was primary or excess. FHP's argument to the contrary hinges on its assertion that the use of the term "primary insurance," by definition, includes a duty to defend. Yet, neither of the cases cited by FHP supports such an assertion. In *Royal Insurance Co. v. Process Design Associates, Inc.*, 221 Ill. App. 3d 966, 978 (1991), our court discussed the nature of primary insurance in the context of distinguishing primary insurance from excess insurance, stating as follows: "Primary insurance is coverage whereby liability attaches immediately upon the happening of the occurrence that gives rise to liability; excess insurance provides coverage whereby liability attaches only after a predetermined amount of primary coverage has been exhausted." Likewise, in *Home Indemnity*

Co. v. General Accident Insurance Co. of America, 213 Ill. App. 3d 319, 321 (1991), the appellate court discussed the differences between primary and excess insurance, explaining that "the protections under the excess policy do not begin until those of the primary policy end" and "[t]hus, a primary insurer has the primary duty to defend and pay defense costs." Neither *Royal Insurance Co.* nor *Home Indemnity Co.* stated that a primary insurance policy, by definition, always includes a duty to defend. Accordingly, the trial court's rulings were not inherently contradictory.

¶ 37 For this same reason, we reject FHP's claim that if the SIR endorsement did not provide coverage for FHP, then NES did not provide primary insurance. FHP argues that NES knew American's policy was not primary insurance if American did not have a primary duty to defend under the policy. However, FHP's cited authority does not suggest that a primary insurance policy always imposes a duty to defend.[6]

¶ 38 Further, we reject FHP's claim that because the American policy did not provide coverage until the SIR was exhausted, it was excess over the SIR. "Primary and excess policies inherently serve different functions, cover different risks and attach at different stages." (Internal quotation marks omitted.) *Travelers Indemnity Co. v. American Casualty Co. of Reading, PA*, 337 Ill. App. 3d 435, 439 (2003). "The primary policy typically covers claims starting at the first dollar of loss or the first dollar in excess of a deductible or self-retention," whereas "[c]overage under an excess policy is triggered after the limits of the primary policy have been exhausted." *Id.* The terms of a policy determine whether it is primary or excess. *Federal Insurance Co. v. St. Paul Fire and Marine Insurance Co.*, 271 Ill. App. 3d 1117, 1122 (1995). In construing an

[6] We note that FHP claims NES's vice president testified the subcontract gave NES a duty to defend. However, our review of the vice president's deposition testimony reveals that she agreed the subcontract set forth "duties to defend" and that she agreed she would abide by the duties to defend as they were set forth in the subcontract. She did not testify, however, that NES had a duty to defend on the particular facts set forth in this case.

insurance policy, we give terms used in the policy their plain and ordinary meaning unless they are defined in the policy, in which case we give them the meaning as defined in the policy. *American National Fire Insurance Co. v. National Union Fire Insurance Co. of Pittsburgh, PA*, 343 Ill. App. 3d 93, 103 (2003).

¶ 39 The relevant provisions of the American policy make clear that it is a primary policy for FHP. First, the policy's "Other Insurance" clause states that where "other valid and collectible insurance is available to the insured for a loss" American covers "under Coverages A or B of this Coverage Part," American's insurance "is primary" except in certain listed instances when it is excess. Notably, the SIR is not included among the designated instances in which American's insurance is excess. Had the parties intended for the SIR to transform the American policy into an excess policy, presumably they would have included the SIR in this portion of the "Other Insurance" provision. Further, the AI-PI endorsement, which modifies the "Other Insurance" clause, explicitly provides that "coverage under this policy afforded to an additional insured will apply *as primary insurance* where required by contract, and any other insurance issued to such additional insured shall apply as excess and noncontributory insurance." (Emphasis added.) Accordingly, the plain language of both the AI-PI endorsement and the "Other Insurance" clause clearly show the American policy was a primary policy for FHP.

¶ 40 FHP maintains the AI-PI endorsement and "Other Insurance" clause do not show the policy was primary because the endorsement and clause apply only when coverage is triggered and here, "American has not provided coverage for any loss under its Policy." Yet regardless of whether the AI-PI endorsement and the "Other Insurance" clause were actually triggered in this case, they do show the American policy was a primary policy.

¶ 41 FHP's cited authority does not support its claim that because the American policy provided coverage only after the SIR was exhausted, the American policy was an excess policy. In *Kajima Construction Services, Inc. v. St. Paul Fire and Marine Insurance Co.*, 227 Ill. 2d 102, 106-07 (2007), the supreme court considered whether the selective tender rule, which allows an insured to select which of its insurers will defend or indemnify, superseded the principles of horizontal exhaustion, which requires an insured to exhaust all available primary insurance coverage before seeking coverage through an excess policy. The supreme court found particularly instructive Justice Freeman's explanation regarding the difference between primary and excess insurance in *Roberts v. Northland Insurance Co.*, 185 Ill. 2d 262, 275 (1998) (Freeman, C.J., concurring in part and dissenting in part). *Kajima*, 227 Ill. 2d at 114. There, "Justice Freeman explained that when excess insurance exists as part of an overall insurance package, it provides a secondary level of coverage to protect the insured where a judgment or settlement exceeds the primary policy's limits of liability." *Id.* at 114. The *Kajima* court also quoted Justice Freeman's statement that excess insurance coverage "attaches only after a predetermined amount of primary insurance or self-insured retention has been exhausted." (Internal quotation marks omitted.) *Id.*

¶ 42 The *Kajima* decision simply explained that excess insurance coverage attaches only after primary insurance or self-insured retentions have been exhausted. However, it did not hold, nor does it follow from *Kajima*, that the existence of a SIR makes a policy an excess policy.

¶ 43 For this same reason, FHP's reliance on *Missouri Pacific Railroad Co. v. International Insurance Co.*, 288 Ill. App. 3d 69 (1997), is unavailing. There, numerous current and former employees filed claims against Missouri Pacific. 288 Ill. App. 3d at 72. The employees' work histories spanned 73 years, beginning in the 1920s, and their claims sought damages for (1)

hearing losses allegedly caused by unsafe levels of noise and (2) asbestos-related injuries. *Id.* Prior to 1934, Missouri Pacific carried no insurance. *Id.* Between 1934 and 1986, Missouri Pacific maintained self-insured retentions, and between 1957 and 1986, it purchased insurance policies. *Id.*

¶ 44 On appeal, the court considered whether Missouri Pacific was required to exhaust its self-insured retentions for each period of coverage before seeking coverage from its insurers. *Id.* at 80. The insurers argued, *inter alia*, that horizontal exhaustion applied in all cases in which the insured maintained excess insurance, regardless of whether the insured's underlying coverage was primary insurance, fronting policies, or self-insured retentions. *Id.* The insurers posited that "to hold otherwise would blur the distinction between primary and excess coverage and permit policyholders like Missouri Pacific to manipulate the source of their recovery." *Id.*

¶ 45 In considering the insurers' argument on this point, the *Missouri Pacific* court reviewed the decisions in *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 283 Ill. App. 3d 630 (1996), and *United States Gypsum Co. v. Admiral Insurance Co.*, 268 Ill. App. 3d 598 (1994). *Missouri Pacific*, 288 Ill. App. 3d at 81-82. The *Missouri Pacific* court stated as follows:

> "Both *United States Gypsum* and *Outboard Marine* support the proposition that the SIRs constitute primary coverage and thus that Missouri Pacific must exhaust the SIRs before looking to the insurers for coverage. Like the fronting insurance in *United States Gypsum*, which effectively constituted self-insurance, and the period of no insurance in *Outboard Marine*, which is the equivalent of self-insurance, the SIRs in the present case constitute primary coverage. To hold otherwise would allow Missouri Pacific

> to manipulate the source of its recovery and avoid the consequences of its decision to become self-insured, conduct we found unacceptable in *United States Gypsum* and *Outboard Marine*. As such, Missouri Pacific must exhaust the SIRs before looking to the insurers for coverage." *Missouri Pacific*, 288 Ill. App. 3d at 82.

The *Missouri Pacific* court also concluded that before seeking coverage under the policies, Missouri Pacific was required to exhaust all underlying coverage, including its self-insured retentions, pursuant to the "other insurance" provision in the policies. *Id.* at 84.

¶ 46 The *Missouri Pacific* court found the SIRs in that case constituted primary coverage and that they had to be exhausted before the insured could seek coverage. Like *Kajima*, however, *Missouri Pacific* did not discuss or hold that the existence of a SIR, in turn, transforms a policy into an excess policy. Simply put, it does not follow from either *Kajima* or *Missouri Pacific* that the American policy in this case was an excess policy. To hold otherwise would be to ignore the plain language of the policy indicating the American policy was a primary policy. See *Federal Insurance Co.*, 271 Ill. App. 3d at 1122 (a policy's terms determine whether it is a primary or excess policy).

¶ 47 In sum, the trial court properly granted summary judgment to NES on FHP's breach of contract claim.[7]

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[7] In addition to arguing that it obtained the proper insurance, NES also sets forth additional assertions in support of its claim that the trial court's judgment should be affirmed. However, as we have found that NES did not breach its contract by failing to obtain the proper insurance, we need not address any of NES's additional arguments.

¶ 48 B. FHP'S Duty To Defend Claim

¶ 49 FHP next argues that it was entitled to summary judgment on its duty to defend claim. FHP posits NES had a duty to defend under (1) the SIR and (2) section 22 of the subcontract.

¶ 50 At the outset, NES posits that FHP's duty to defend claim is moot because FHP has been dismissed from the underlying litigation. NES acknowledges, however, that FHP's claim would not be moot if FHP were seeking money damages. Count I of FHP's complaint explicitly sought a finding that NES had a duty to defend FHP in the underlying litigation, which included "the duty to pay any and all defense costs." Notwithstanding, NES argues we should dismiss FHP's claim for money damages based on FHP's failure to present evidence of what the money judgment would be. We decline to do so.

¶ 51 In support of its argument, NES relies solely on the court's statement in *Chester v. State Farm Mutual Automobile Insurance Co.*, 227 Ill. App. 3d 320, 324 (1992), that an award of money damages as part of a declaratory judgment "is not proper where there is no evidence to substantiate what the precise extent of the money judgment should be." *Chester* is inapposite, as the trial court in that case awarded damages to the plaintiff even though the plaintiff's allegations did not set forth the precise amount of damages the plaintiff suffered and the evidence did not establish the plaintiff suffered damages to the extent that the insurer would necessarily be liable for the entire amount of its potential coverage. *Id.* at 324-25. *Chester* does not support a finding that we should dismiss FHP's claim for damages and find the remainder of its appeal moot simply because it has not yet alleged or proven the exact amount of damages to which it is purportedly entitled.

¶ 52 We now turn to the merits of FHP's arguments. We will address NES's purported duty to defend under the SIR and section 22 of the subcontract separately.

¶ 53 1. *Duty To Defend Under the SIR*

¶ 54 FHP argues NES had a duty to defend under the SIR because by taking on the obligation of a SIR in exchange for a lower premium, NES also took on the obligations of a primary insurer. According to FHP, these obligations included the duty to defend. Further, FHP alleges that the trial court should have considered the third-party complaints filed against NES when determining NES's duty to defend under the SIR. NES responds that (1) FHP forfeited its claim because it never pled a declaratory judgment cause of action based upon NES's purported duty to defend under the SIR and (2) where NES is not an insurer, the relief FHP is seeking is inappropriate.

¶ 55 We first address NES's forfeiture argument. Our review of the record indicates FHP did not cite to the SIR in the declaratory judgment count of its second amended complaint. Instead, it cited only to section 22 of the subcontract. Nonetheless, in its prayer for relief, FHP sought a declaration that "NES *** has a duty to defend FHP in the [underlying] litigation" without specifying the source of that purported duty. Further, FHP argued in its motion for summary judgment and in its response to NES's motion for summary judgment that NES had a duty to defend under the SIR because the SIR constituted primary insurance. Thus, to the extent FHP did raise the issue in the trial court of whether NES had a duty to defend under the SIR, we decline to apply forfeiture.

¶ 56 However, we agree with NES that FHP's claim fails on the merits. The appellate court has stated that "[a]n agreement to obtain insurance is not an agreement of insurance" and "a person promising to obtain insurance does not by that promise become an insurer although he may assume the liabilities of one if he breaches the agreement." *Zettel v. Paschen Contractors, Inc.*, 100 Ill. App. 3d 614, 617 (1981); see also *Duffy v. Poulos Brothers Construction Co.*, 225

Ill. App. 3d 38, 42 (1991) ("In contrast to a contract of insurance, under an agreement to obtain insurance, the promisor does not become the insurer or otherwise assume personal liability for injuries or damages for which the promisee may be liable").

¶ 57 FHP argues the *Zettel* court's statement that a promisor "may assume the liabilities" of an insurer if he breaches an agreement to obtain insurance means that NES had a duty to defend FHP in this case. We disagree. The *Zettel* court made the aforementioned statement in the context of explaining the difference between agreements to obtain insurance and indemnity agreements. *Id.* at 617. After making the statement, the court went on to explain the subcontractor was being sued for money by the party for whom it had promised to obtain insurance "not because [the subcontractor] promised to indemnify the [party]" but "because if a person breaches a contract to obtain insurance, he is liable for any damages caused by the breach." *Zettel*, 100 Ill. App. 3d at 618. Accordingly, we interpret the *Zettel* court's statement regarding a promisor's assumption of liabilities simply to mean that a promisor may be liable for breach of contract and the corresponding payment of damages if he fails to procure the appropriate insurance.

¶ 58 In any event, FHP's argument that NES had a duty to defend is premised on FHP's faulty assertion that primary insurance, by definition, includes a duty to defend. As we have already detailed, FHP has not cited any authority supporting such an assertion. Accordingly, FHP's contention that NES had a duty to defend under the SIR fails.

¶ 59 2. *Duty To Defend Under the Subcontract*

¶ 60 Finally, FHP maintains that NES had a duty to defend under section 22(a) of the subcontract, which provides as follows:

> "To the fullest extend [*sic*] permitted by law, Subcontractor shall indemnify, defend, protect and hold harmless the Contractor *** from and against any and all liabilities, injuries, claims, demands, damages, losses, costs and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such liability, injury, claim, demand, damage, loss, cost or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, including the loss of use resulting there from, but only to the extent caused or alleged to be caused in whole or in any part by the negligent acts or omissions of the Subcontractor, anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder."

Based on this language, FHP alleges that NES had a duty to defend against claims arising out of NES's work.

¶ 61 In response, NES argues that section 22(a) of the subcontract is unenforceable. NES argues that to the extent section 22(a) can be interpreted as a clause indemnifying FHP for its own negligence, it is void under the Construction Contract Indemnification for Negligence Act (Anti-Indemnification Act) (740 ILCS 35/1 *et. seq.* (West 2006)). NES further posits that if section 22(a) is construed as a clause seeking "contractual contribution," it is void under the

good-faith settlement and dismissal provisions of the Contribution Act (740 ILCS 100/1 *et. seq.* (West 2006)).

¶ 62 Under the Anti-Indemnification Act, a provision in a construction contract indemnifying a contractor for his own negligence is void against public policy. *Pierre Condominium Association v. Lincoln Park West Associates, LLC*, 378 Ill. App. 3d 770, 774 (2007); 740 ILCS 35/1 (West 2006). The Anti-Indemnification Act was created "to thwart the common construction industry practice of using indemnity agreements to avoid liability for negligence and to ensure a continuing incentive for individuals responsible for construction activities to protect workers and others from injury." *Pierre*, 378 Ill. App. 3d at 774.

¶ 63 Illinois courts construe contractual clauses seeking partial indemnity as clauses seeking contribution. *Estate of Willis v. Kiferbaum Construction Corp.*, 357 Ill. App. 3d 1002, 1006 (2005). Contribution differs from indemnity in that indemnity shifts an entire loss from one tortfeasor to another, whereas contribution distributes a loss among tortfeasors by requiring each to pay his proportionate share. *Herington v. J.S. Alberici Construction Co., Inc.*, 266 Ill. App. 3d 489, 494 (1994) (quoting Prosser, Law of Torts, sec. 51, at 310 (4th ed. 1971)).

¶ 64 In *Pierre*, the plaintiff filed suit after property damage was allegedly caused during the construction of a high-rise condominium building. *Pierre*, 378 Ill. App. 3d at 771. The developer of the project had retained a general contractor for the building's construction. *Id.* at 771-72. The general contractor subcontracted with a subcontractor for excavation services. *Id.* at 772. Their subcontract provided as follows:

> "the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages,

> losses and expenses, including but not limited to attorney's fees*** but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder." (Emphasis omitted.) *Pierre*, 378 Ill. App. 3d at 771-72.

¶ 65 The *Pierre* court construed this provision as requiring contribution, not indemnification. *Id.* at 774-75. The *Pierre* court noted that the developer was presumed to know pure indemnification clauses were void at the time the parties entered into the subcontract, and " 'the literal terms of a contract are not necessarily dispositive on the issue of whether it is void under the [Anti-Indemnification Act].' " *Id.* at 775 (quoting *Liccardi v. Stolt Terminals, Inc.*, 178 Ill. 2d 540, 549-50 (1997)).

¶ 66 Nonetheless, the *Pierre* court then went on to find that a cause of action for contractual contribution could not be sustained pursuant to the Contribution Act. *Id.* at 775. The Contribution Act provides that a tortfeasor who enters into a good-faith settlement with a claimant is discharged from all liability for any contribution to another tortfeasor. 740 ILCS 100/2(c), (d) (West 2006). The *Pierre* court noted that in *Herington v. J.S. Alberici Construction Co., Inc.*, 266 Ill. App. 3d 489, 494 (1994), the appellate court "held that construing a contract provision to create a cause of action for contractual contribution, independent of the Contribution Act's provision based on a good-faith settlement, would contravene the public policy of Illinois favoring settlements." *Id.* at 775. The *Herington* court explained that allowing such a contractual claim "would effectively eliminate settlements by joint tortfeasors under the Contribution Act."

Id. Accordingly, the *Pierre* court rejected the developer's contractual contribution claim, finding it would contravene Illinois' public policy of encouraging settlement. *Pierre*, 378 Ill. App. 3d at 778.

¶ 67 FHP acknowledges that Illinois courts construe indemnity claims based on provisions in construction contracts as contribution claims. However, FHP challenges NES's argument that section 22(a) of the subcontract was invalid under the Contribution Act. FHP posits that *Liccardi*, *Pierre*, and *Herrington* are distinguishable because the plaintiffs in those cases sought indemnity, whereas FHP is seeking defense costs and not making a claim for indemnity or contractual contribution. According to FHP, because the duty to defend is separate from and broader than the duty to indemnify, the duty to defend survives the invalidation of an indemnification provision. FHP further maintains that the reasoning used to void contractual liability provisions does not apply to the duty to defend because if an additional insured is a party to an action, the insurance carrier should not be relieved of its duty to defend even if it settles a claim given that "[t]he carrier was paid a premium to defend the insureds."

¶ 68 We cannot agree with FHP's position. First, we note, NES is not an insurer. Accordingly, FHP's argument regarding the payment of premiums and an insurance carrier's duty to defend is unavailing here. Further, FHP has not identified any language in *Pierre* or *Herrington* suggesting that those cases would have been decided differently if the plaintiffs had made a claim for defense costs under indemnification clauses containing a duty to defend. To the contrary, the decisions in *Pierre* and *Herington* regarding the Contribution Act were grounded in the recognition that construing a contractual provision as setting forth a claim for contribution, without an accompanying dismissal provision in the event of a good-faith settlement, would violate Illinois' public policy of encouraging settlement. See *Pierre*, 378 Ill. App. 3d at 778;

Herington, 266 Ill. App. 3d at 494. Here, construing section 22(a) as allowing FHP to collect defense costs from NES, without an accompanying dismissal provision, would have the same detrimental effect of discouraging settlement.

¶ 69 Further, even if the provision was enforceable, the record shows that in February 2013, the trial court granted NES's motion for a good-faith finding and dismissed with prejudice all third-party complaints, counterclaims, or cross-claims for contribution, including those claims by FHP. FHP fails to explain how, in light of this dismissal order, it could sustain an action for defense costs from NES.

¶ 70 We find support for our decision in *Cooper v. Wal-Mart Stores, Inc.*, 959 F. Supp. 964 (1997). In *Cooper*, a plaintiff filed suit against a contractor after he was injured at a construction site. *Id.* at 966. The plaintiff set forth claims of negligence and violations of the Illinois Structural Work Act against the contractor. *Id.* The contractor then filed a third-party complaint against the subcontractor arguing, *inter alia*, that the subcontractor breached its contractual duty to defend the contractor against the plaintiff's claims of negligence. *Id.* The contract between the contractor and subcontractor contained a clause requiring the subcontractor to "indemnify and defend the Contractor against and save him harmless from" *inter alia*, "any and all claims" for injuries to persons and from any other claims on account of the Subcontractor's acts or omissions. *Id.* at 967.

¶ 71 The *Cooper* court treated the clause at issue as a clause for contribution. *Id.* at 969. However, the court then explained that a cause of action for contribution could not be sustained pursuant to the Contribution Act. *Id.* at 971. Accordingly, the *Cooper* court found the contractor's claim that the subcontractor breached the contract by failing to defend the contractor was properly dismissed. *Id.* at 971. We note that *Cooper* did not address the argument FHP

raises, *i.e.*, that the duty to defend in an indemnification clause withstands the invalidation of that clause. Further, lower federal court decisions are not binding on Illinois courts and may only be considered persuasive authority. *Wilson v. County of Cook*, 2012 IL 112026, ¶ 30. However, we find *Cooper* to be persuasive on the issue before us, particularly where FHP has cited no authority holding that a duty to defend withstands the invalidation of an indemnification clause based on the Contribution Act.

¶ 72 FHP's reliance on *Jandrisits v. Village of River Grove*, 283 Ill. App. 3d 152 (1996), does not convince us otherwise. There, the appellate court stated that it agreed with the trial court's determination that the indemnity agreement at issue violated the Indemnity Act. *Id.* at 157. Thereafter, the court stated as follows: "We turn now to the Village's contention that Triggi was obligated to defend the Village in the Jandrisits complaint. The Village correctly notes that the duty to defend is broader than the duty to indemnify." *Id.* Based on this language, FHP argues a claim based on a duty to defend survives the invalidation of an indemnification provision because the duty to defend is separate from and broader than the duty to indemnify.

¶ 73 FHP acknowledges that the provision at issue in *Jandrisits* was invalidated under the Indemnity Act, not the Contribution Act. The *Jandrisits* court was not presented with, nor did it decide, whether a party could bring a claim for defense costs based on language in an indemnification provision without violating the Contribution Act. Nonetheless, FHP suggests *Jandrisits* provides guidance because "Illinois courts have not explicitly ruled upon or discussed whether a duty to defend would survive the voiding of a contractual liability provision under the Contribution Act." We disagree. The policy concerns underlying the Contribution Act would be implicated in this case if we read section 22(a) as allowing FHP to seek defense costs from NES, without an accompanying dismissal provision. Accordingly, section 22(a) is invalid. See *Pierre*,

378 Ill. App. 3d at 778 ("a contractual agreement that is at odds with the express policy of the Contribution Act encouraging good-faith settlements is not valid or enforceable").

¶ 74 Finally, even if we were to conclude that NES could sustain an action for defense costs based on the indemnity agreement, such an action would fail because the injury in the underlying case was not caused or alleged to be caused by NES's negligence or omissions.

¶ 75 An indemnity agreement is a contract, subject to general rules of contract interpretation. *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 308 (2008). When contract language is unambiguous, we give it its plain and ordinary meaning. *Id.*

¶ 76 Here, section 22(a) of the subcontract required NES to defend FHP "from and against" claims "arising out of or resulting from performance of the Work" but "only to the extent caused or alleged to be caused in whole or in any part by the negligent acts or omissions" of NES. The trial court found NES's duty to defend under section 22(a) was not triggered because there were no allegations or finding that NES caused the injury. Relying on *Jandristis*, the court found that ordinary contract principles, rather than insurance law, governed its consideration of the contractual indemnification provision.

¶ 77 In *Jandristis*, the appellate court rejected the Village's argument that its duty to defend under an indemnification agreement could be determined by considering facts extraneous to the underlying tort complaint. *Jandristis*, 283 Ill. App. 3d at 157. The court reasoned that the Village's argument was "contrary to the long and consistently recognized principle that the existence of a duty to defend a complaint arising from an indemnity agreement is determined solely from the allegations of the complaint and the agreement; and the duty of an insured is not annulled by the insurer's knowledge that the allegations of the complaint are untrue." *Id.* In support of this proposition, the *Jandristis* court cited *Thornton v. Paul*, 74 Ill. 2d 132 (1978),

overruled on other grounds by American Family Mutual Insurance Co. v. Savickas, 193 Ill. 2d 378, 387 (2000).

¶ 78 FHP challenges the trial court's reliance on *Jandristis*, arguing it does not support the court's finding that insurance law could not be applied to non-insurance companies. FHP maintains that *Jandristis* intermingled insurance and contract law principles. FHP further posits that the *Jandristis* court's citation to *Thornton*, in which the supreme court applied insurance law in determining whether an insurance company had a duty to defend, shows the *Jandristis* court referenced insurance law. In addition, FHP posits, *Thornton* has been expanded such that courts can now look to third-party complaints to determine whether an insurer has a duty to defend. Based on the foregoing, FHP argues the trial court should have looked beyond the underlying complaint and considered the third-party complaints filed against NES as well as NES's settlement agreement. In support of its assertion, FHP relies on *Ervin v. Sears Roebuck and Co.*, 127 Ill. App. 3d 982 (1984).

¶ 79 FHP is correct that under current law, Illinois courts are not limited only to the allegations in a complaint in determining whether an insurer has a duty to defend. See, *e.g.*, *Illinois Emcasco Insurance Co. v. Waukegan Steel Sales Inc.*, 2013 IL App (1st) 120735, ¶ 15 (recognizing that in some instances, a court can review the contract and third-party complaints to determine the insurer's duty to defend). However, FHP has cited no authority suggesting that a *non-insurer's* duty to defend can now be determined by looking to third-party complaints. FHP's reliance on *Ervin* for this proposition is misplaced.

¶ 80 In *Ervin*, Sears, Roebuck and Company (Sears) purchased underwear from Flagg-Utica Corporation (Flagg) for the purchase of underwear. *Id.* at 984. Most of the purchase contracts between the parties contained a clause in which Flagg agreed to "protect, defend, hold harmless

and indemnify [Sears] from and against any and all liability and expense arising out of *** any alleged or claimed defect in such merchandise." *Id.* Sears was sued after the plaintiff in the underlying action was burned while wearing underwear that he purchased at Sears. *Id. a*t 986. Sears tendered defense of its claim to Flagg, but Flagg refused to defend. *Id. S*ears then filed a third-party complaint, arguing Flagg had a duty to defend Sears under the purchase contracts. *Id.* The trial court entered summary judgment in favor of Sears and against Flagg. *Id.*

¶ 81 The appellate court reversed the trial court's entry of summary judgment against Flagg, finding it significant that Flagg was not an insurance company. *Id.* at 989, 991. The court recognized that an insurer's duty to defend is to be determined solely from the allegations of the underlying complaint and that an insurer has a duty to defend where a complaint alleges facts potentially within coverage, even if the allegations are groundless, false, or fraudulent. *Id.* at 988. However, the *Ervin* court noted that insurance policies differ from indemnity agreements in that insurance policies are liberally construed in favor of the insured, whereas indemnity agreements are strictly construed. *Id.* at 989-990. The court found that although an insurer could not refuse to defend a complaint based on information it discovered from " 'looking behind" the underlying complaint, no such restriction applied where a business, as part of its agreement with a purchaser of its products, agreed to defend and/or indemnify the customer in suits involving the products. *Id.* at 990. The *Ervin* court reasoned that an insurance company's agreement to defend an insured was one of the "fundamental obligations" of an insurance agreement, but the indemnity agreement between Flagg and Sears was only incidental to the main purpose of the agreement, *i.e.*, the purchase and sale of a product. *Id.*

¶ 82 In sum, the *Ervin* court held that "[g]iven the unique position of an insurance company as a professional 'seller' of protection against loss, and the fundamentally different role of the

manufacturer of goods," it was reasonable to allow a manufacturer "a greater degree of freedom to investigate" allegations in a complaint to determine what its contractual obligations to the insured in the underlying lawsuit were. *Id.* In sum, the court concluded Flagg was not obligated to defend Sears based solely on the allegations in the complaint but was instead entitled to investigate the truth of the allegations in the complaint. *Id.*

¶ 83 Thus, the *Ervin* court held that the manufacturer, as a non-insurer, was entitled to "look behind" allegations in a complaint to investigate the truth of those allegations while an insurer was not. However, *Ervin* did not hold, as FHP suggests, that a non-insurer is required to look outside of an underlying complaint to the allegations of other pleadings to determine whether it has a duty to defend. Nor did *Ervin* hold that a court should look beyond an underlying complaint and consider third-party complaints or settlement agreements in determining a non-insurer's duty to defend. Instead, the *Ervin* court recognized that non-insurers are different than insurers and should be given a greater degree of flexibility in investigating the truth of allegations against them to determine their contractual obligation to defend against those allegations.

¶ 84 Because FHP has not cited any authority suggesting a non-insurer is required to look outside of a complaint to other pleadings to determine whether it has a duty to defend under an indemnification agreement, we decline to impose such a requirement on NES and will instead follow *Jandristis* and limit our review to the allegations of the underlying complaint. FHP maintains that the underlying complaint triggered NES's duty to defend due to the similarity between the underlying allegations and the description of NES's work in the subcontract. For example, FHP argues, the underlying complaint used the same words the subcontract used to define NES's work, such as "traffic, "sign," and "plan."

¶ 85 We disagree that the underlying complaint triggered NES's duty to defend. NES was not named as a defendant in the underlying complaint, and the allegations against FHP were for FHP's negligence. Section 22(a) explicitly limited NES's duty to defend to claims against FHP that were "caused or alleged to be caused" by NES's actions. Plainly, the injury in this case was not alleged to have been caused by NES, nor was any finding ever made that the injury was caused by NES. In light of the foregoing, the trial court properly granted summary judgment in favor of NES.

¶ 86 III. CONCLUSION

¶ 87 For the reasons stated, we affirm the trial court's judgment.

¶ 88 Affirmed.