2018 IL App (1st) 171774-U

SIXTH DIVISION
JUNE 29, 2018

No. 1-17-1774

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

COUNTRY MUTUAL INSURANCE COMPANY, Plaintiff/Counter-Defendant Appellant, v. BADGER MUTUAL INSURANCE COMPANY a/s/o DR. STEVE GELSOMINO and DR. STEVE GELSOMINO, Individually, Defendants/Counter-Plaintiffs Appellees (Roe Construction, Inc., James E. Roe d/b/a Roe Construction, Inc., and James E. Roe, individually, Defendants).	)	Appeal from the Circuit Court of Cook County. No. 12 CH 30943 Honorable David B. Atkins, Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court entering summary judgment against the appellant insurer is affirmed. Because the insurer breached its duty to defend its insured in the underlying action, the insurer was estopped from denying liability for the default judgment in the underlying action.

¶ 2 In this insurance coverage action, the plaintiff-appellant, Country Mutual Insurance Company (Country) sought a declaration that it was not required to indemnify its former insured, Roe Construction, Inc. (Roe), for a default judgment against Roe in an underlying lawsuit alleging damage from Roe's negligent construction work (the underlying lawsuit). The plaintiffs in the underlying action filed a counterclaim against Country, asserting that Country breached its duty to defend Roe and was thus liable for the amount of the default judgment. After cross-motions for summary judgment, the trial court determined that Country breached its duty to defend Roe in the underlying lawsuit and was thus liable for the default judgment. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 Country and Roe entered into a contract for commercial general liability insurance (the policy) effective April 13, 2005. The policy covered "bodily injury" and "property damage" but only if such damage was "caused by an 'occurrence'" during the policy period. The term "property damage" was defined to mean:

> "a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically insured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it."

The term "occurrence" was defined to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy also specified a

number of exclusions. The policy was renewed after April 13, 2006, but Roe subsequently cancelled the policy as of July 25, 2006.

¶ 5 The underlying lawsuit arose from allegations that Roe negligently performed work on a residence at 1741 N. Winchester in Chicago (the property), which was owned by Dr. Steve Gelsomino. Gelsomino had a homeowner's insurance policy for the property through Badger Mutual Insurance Company (Badger).

¶ 6 On February 8, 2012, Gelsomino and Badger filed the complaint commencing the underlying lawsuit, naming as defendants Roe Construction, Inc., "James E. Roe, d/b/a Roe Construction, Inc." and James E. Roe, individually.[1] According to the complaint, on August 1, 2005, Gelsomino "contracted with" Roe "to perform construction and remodeling work, including an addition placed on the third floor" of the property.

¶ 7 The complaint alleged that the property was damaged as a result of Roe's "negligent failure to perform construction work properly." The complaint did not specify when the property damage occurred. However, the complaint alleged that the plaintiffs "learned on March 3, 2010 [that] the property damage sustained was caused by the work performed" by Roe. The complaint included multiple counts alleging that as a result of Roe's negligence, the building "sustained property damages, including water damage."

¶ 8 The complaint further alleged that, under Gelsomino's homeowner's insurance policy, Badger compensated Gelsomino for damages that were proximately caused by Roe's negligence. Badger alleged that it had "paid the damages sustained as a result of the negligent work" and thereby became a bona fide subrogee of Gelsomino "for a claim in the sum of $212,073.80." Thus, Badger sought a judgment in this amount. The complaint also alleged that, as a result of

[1]James Roe died in November 2011. The defendants in the underlying action will be referred to collectively as "Roe."

Roe's negligence, Gelsomino sustained additional damages of $30,590.18, which were not covered under his policy with Badger. The underlying complaint also sought recovery of these damages by Gelsomino.

¶ 9 It is undisputed that Country was tendered with defense of the underlying lawsuit, but it refused to defend Roe. No one else appeared on behalf of Roe in the underlying lawsuit. On August 6, 2012, the court in the underlying lawsuit entered a default judgment against Roe in the amount of $222,108.63.

¶ 10 Eight days after the default judgment, on August 14, 2012, Country commenced this case by filing a complaint for declaratory judgment against Roe, Badger, and Gelsomino. The declaratory judgment complaint pleaded that "[t]he position of Country Mutual is that the [underlying] [l]awsuit does not allege an occurrence of bodily injury or property damage caused by an occurrence during the policy period, which is not otherwise excluded." Country thus pleaded that it had no duty to defend or indemnify. Country alternatively pleaded that a number of policy exclusions applied to preclude coverage. Country additionally pleaded that it had no "obligation for any covered damages after its Policy terminated or was cancelled on July 25, 2006." Country thus sought declarations that the underlying lawsuit "does not allege an occurrence of property damage during the Policy period"; "that one or more of the various exclusions" applied to preclude any potential coverage; that Country "has no obligation to defend" Roe in connection with the underlying lawsuit; and that "the Defendants have no rights under the Policy in connection with the [underlying] lawsuit."

¶ 11 On February 14, 2013, Badger and Gelsomino answered the declaratory judgment complaint. On March 27, 2013, Badger and Gelsomino filed a four count "counterclaim for declaratory judgment" against Country. The counterclaim alleged that, during Roe's work at the

property, "[w]ater penetration was observed in late 2005 and Roe was notified." The counterclaim pleaded that in February 2010, "Gelsomino contacted Country and informed them the water leaks started in 2005." According to the counterclaim, Country subsequently contacted Siebert Engineers, Inc. (Siebert) to investigate, and Siebert prepared a report concluding that "the water penetration was due to faulty workmanship of Roe." The counterclaim attached a copy of Siebert's report, which was dated March 3, 2010. The Siebert report includes a summary of an interview with Gelsomino in which Gelsomino "stated that he started having problems with moisture/water intrusion into the home *** toward the end of the construction project. He approximated that he began to notice some small problem areas in the fall of 2005, but that the moisture/water intrusion was substantially more pronounced in the spring/summer of 2006."

¶ 12 The written exhibits to the counterclaim also included a January 2012 letter in which Country denied coverage; a May 2012, letter in which Badger's attorney submitted to Country a copy of the complaint in the underlying lawsuit; and a June 2012 letter in which Badger's attorney advised Country that a motion for default judgment was pending.

¶ 13 The counterclaim contained four counts. Count I sought a declaration that Country Mutual "had a duty to defend and indemnify Roe for the property damage that happened as a result of the negligence of Roe in 2005" and that Country was liable for the full amount of the default judgment. Count II, for "estoppels," sought a declaration that "Country breached [its] duty to Roe by failing to defend under a reservation of rights, and failed to file a declaratory action during the pendency of the litigation and therefore [is] estopped from now raising policy defenses." Count III pleaded that Country's declaratory judgment action was "untimely as a matter of law" because it was commenced after the default judgment in the underlying lawsuit.

Finally, count IV alleged "bad faith claim handling" by Country, and sought attorney's fees and costs pursuant to section 155 of the Illinois Insurance Code. 215 ILCS 5/155 (West 2014).

¶ 14 Country answered the counterclaim on July 8, 2013. The parties engaged in discovery. On February 20, 2014, the trial court denied Country's motion to compel return of certain documents inadvertently produced in discovery, which Country claimed were protected by attorney-client privilege. Those documents included a June 20, 2012 letter from Country's attorney, advising Country to file a declaratory judgment action "to preclude any potential of estoppel."

¶ 15 On March 23, 2014, Country moved for judgment on the pleadings with respect to Count IV of the counterclaim. The trial court granted that motion on October 14, 2014. Thus, only counts I, II, and III of the counterclaim remained pending.

¶ 16 Country filed an Amended Complaint for Declaratory Judgment on June 12, 2015, which added a new defense to coverage based on lack of notice. Specifically, it pleaded that, although Gelsomino testified in his deposition "that he started complaining in 2005" to Roe, Country did not receive notice of any potential problem with Roe's work until February 2010. Country thus alleged that Roe had breached the "notice condition in the policy by failing to notify Country as soon as practicable of an occurrence which may result in a claim."

¶ 17 On July 14, 2015, Badger and Gelsomino answered Country's amended complaint. They also pleaded, as an affirmative defense, that Country "is estopped from raising any policy defenses" because it had failed to defend the underlying lawsuit or to commence its declaratory judgment action while the underlying lawsuit was still pending.

¶ 18 The parties subsequently briefed cross-motions for summary judgment with respect to Country's declaratory judgment complaint and the remaining counts of Badger and Gelsomino's counterclaim. On May 16, 2016, the trial court heard oral argument on the cross-motions.

¶ 19 On October 25, 2016, the trial court entered an order granting Badger and Gelsomino's motion for summary judgment, and denying Country's motion for summary judgment. The trial court began its analysis by discussing "whether this case deals with the duty to defend or the duty to indemnify." The trial court recognized that the "duty to indemnify is much narrower" than the duty to defend. The court also recognized that there were "no findings of fact" in the underlying case because it ended in a default judgment. The court reasoned that: "Accordingly, in evaluating Country Mutual's duty to indemnify, the court will use the framework of whether Country Mutual had a duty to defend Roe" in the underlying lawsuit.

¶ 20 The trial court thus analyzed whether Country had a duty to defend the underlying action, stating that it would "primarily focus on the allegations underlying the complaint *** and only consider additional materials that would otherwise be appropriate to consider." The trial court proceeded to reject Country's contention that the complaint did not allege an "occurrence" under the policy. The court found that although the underlying complaint did not specify which property was damaged, "it does generally imply damage to personal property." The court also noted that invoices and correspondence in the record indicated that Country "knew of the damage to other parts of the house besides the project" before the underlying complaint was filed.

¶ 21 The trial court next addressed "whether the occurrence happened during the term of the policy period." The trial court found that "there is no material issue of fact as to whether Country Mutual was aware of the potential that the occurrence happened during the term of the

policy period," such that "there was a potential for coverage." The trial court cited a reservation of rights letter from Country to Roe in which Country stated that its policy "may not cover the loss that [Roe] claim[s] occurred on or about July 20, 2006." The court also noted the portion of the Siebert report reflecting Gelsomino's statements about when he first noticed water intrusion. The trial court reasoned: "at minimum Country Mutual was aware of the potential that the date of loss could have been prior to July 25, 2005 and thus was aware of the potential for coverage," triggering its duty to defend Roe in the underlying lawsuit.

¶ 22 The trial court proceeded to find that Country breached its duty to defend Roe. Further, citing our supreme court's decision in *Clemmons v. Travelers Insurance Co.*, 88 Ill. 2d 469 (1981), the court recognized that an insurer who breaches the duty to defend is "estopped from denying coverage in suit to collect the judgment." In turn, the trial court concluded that Country was "also estopped from denying coverage in an action to collect on the default judgment."

¶ 23 Accordingly, the trial court granted Badger and Gelsomino's motion for summary judgment and denied Country Mutual's cross-motion for summary judgment. The court entered judgment in favor of Badger and Gelsomino and against Country with respect to both Country's complaint and counts I-III of Badger and Gelsomino's counterclaim. The order also specified that Country was liable "for the entire default judgment" entered in the underlying lawsuit.

¶ 24 Country filed a motion for reconsideration. On June 20, 2017, the motion to reconsider was denied. On July 12, 2017, Country filed a timely notice of appeal. Accordingly, this court has jurisdiction. Ill. S. Ct. R. 303 (eff. July 1, 2017).

¶ 25 ANALYSIS

¶ 26 On appeal, Country asserts that summary judgment in favor of Badger and Gelsomino should be reversed, as the trial court erred in concluding that Country had a duty to defend the

underlying action, or that estoppel applied to hold Country liable for the default judgment. Country argues that the court "erred in applying a duty to defend analysis" to determine "the earliest possible date it could identify a potential for coverage." Country claims the trial court engaged in "speculation" and "incorrectly determined" that there was covered property damage before the cancellation of the policy in July 2006. Country contends that, instead of discussing whether it had a duty to defend, the trial court should have required Badger and Gelsomino to prove that there was "covered property damage during the policy period." Country urges that there is "overwhelming" evidence that the damage occurred after the policy's 2006 cancellation. Country otherwise argues that the court improperly considered materials beyond the complaint.

¶ 27 Country additionally argues that the "trial court erred by creating coverage by estoppel," and that estoppel cannot "create policy coverage beyond the term of the policy." Country recognizes that *Clemmons*, 88 Ill. 2d 469, relied upon by the trial court, applied estoppel to hold an insurer liable for a default judgment. However, Country argues *Clemmons* is distinguishable because in this case the evidence shows that the property damage occurred "long after" the policy expired in July 2006. Country additionally argues that issue of whether damage occurred during the policy's term is *not* a "policy defense" subject to estoppel. Thus, Country asserts that the trial court erred in using estoppel to hold it liable "for the entire amount sought by Badger and Gelsomino for all damages occurring years later" after the policy was cancelled.

¶ 28 We note the applicable standard of review. "Summary judgment is appropriate 'if the pleadings, depositions, and admissions on file, *** 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.' [Citations.]" *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 724 (2010). Where parties to an insurance coverage declaratory judgment action submit cross-motions for summary

judgment, the parties "agree that no factual issues exist and that the disposition of [the case] turns only on our resolution of purely legal issues. [Citations.] Accordingly, our review proceeds *de novo*." *Founders Insurance v. Munoz*, 237 Ill. 2d 424, 432 (2010). Further, we recognize that "on appeal, a reviewing court may affirm the trial court's ruling for any reasons supported by the record regardless of the basis relied upon by the trial court." *Pekin Insurance Co. v. AAA-1 Masonry & Tuckpointing, Inc.*, 2017 IL App (1st) 160200, ¶ 21.

¶ 29 We first address Country's suggestion that the circuit court erred by engaging in a duty to defend analysis. Country suggests that the "duty to defend was not at issue since there were no defense costs, and that any duty to indemnify was much narrower" than the duty to defend. That argument is flawed. Although there were "no defense costs" in the underlying action, that is because no one (including Country) defended Roe in the underlying action, leading to a default judgment. Country essentially suggests that, because there was a default judgment, it is not subject to a "duty to defend" analysis.

¶ 30 We disagree. Rather, "[t]he initial step in an estoppel analysis is determining whether a duty to defend exists." *L.A. Connection v. Penn-America Insurance Co.*, 363 Ill. App. 3d 259, 262 (2006). This is true even after a default judgment, as illustrated by *Clemmons*, 88 Ill. 2d 469, which was relied upon by the trial court.

¶ 31 In *Clemmons*, an insurer (Travelers) refused to defend a driver (Reed) after Reed was sued by Clemmons, a passenger in a car driven by Reed during a collision. *Id.* at 472. The car was owned by Reed's employer, the American National Red Cross (Red Cross). Travelers insured the Red Cross under a policy that "obligated [Travelers] to pay all damages due to bodily injury arising out of the use of the Red Cross car; this coverage extended to those persons using the automobile with the named insured's permission." *Id.* at 473. After the collision, Travelers

informed Clemmons that it would refuse to defend any suit against Reed, as Travelers "took the position that Reed had been operating the Red Cross automobile without permission and outside the scope of his employment and was therefore not covered by the policy." *Id.*

¶ 32 Clemmons subsequently filed a negligence complaint against Reed. *Id.* Reed notified Travelers, but Travelers refused the tender of Reed's defense. *Id.* at 473-74. Reed did not answer the complaint, and the circuit court entered a default judgment against Reed. *Id.* at 474. Clemmons then sued Travelers, seeking a declaration that Travelers wrongfully refused to defend Reed and was therefore required to pay the amount of the default judgment. *Id.* The circuit court granted summary judgment in Clemmons' favor for the full amount of the default judgment plus interest. *Id.*

¶ 33 Our supreme court in *Clemmons* thus addressed "whether Travelers was estopped from denying that Reed was covered by the policy it issued to the Red Cross." *Id.* The *Clemmons* court recognized "the general rule of estoppel that applies when an insurance policy grants the insurer the right and duty to defend suits brought against the insured," explaining:

> "When a complaint against the insured alleges facts within or potentially within the scope of the policy coverage, the insured taking the position that the complaint is not covered by the policy must defend the suit under a reservation of rights or seek a declaratory judgment that there is no coverage. [Citation.] If the insurer does not, it is later estopped from denying coverage in a suit to collect the judgment." *Id.* at 475.

¶ 34 Our supreme court rejected Travelers' argument that it had no duty to defend because Clemmons' complaint "did not allege that Reed was driving the automobile with the permission

of the Red Cross," finding that "it [was] not necessary for a complaint to allege permission in order to trigger the duty to defend." *Id.* at 475-76. The court explained: " 'If the complaint alleges facts within the coverage of the policy or potentially within the coverage of the policy the duty to defend has been established.' [Citation.] Under the allegations of this complaint, there clearly was the *possibility* that Reed was driving his employer's automobile with permission, and whether that was a fact was a matter for later investigation by Travelers." (Emphasis added.) *Id.* at 476.

¶ 35 Travelers additionally argued that the complaint "should not have triggered the duty to defend because Reed was not the named insured in the policy." *Id.* at 476. Travelers claimed that "where the duty to defend is involved, a distinction should be made between those cases raising an issue of policy exclusion and those in which the issue is policy inclusion." *Id.* at 477. The court disagreed, finding that "An argument over exclusion from policy coverage is, for these purposes, really no different from an argument over inclusion" *Id.* (quoting *Murphy v. Urso*, 88 Ill. 2d 444, 454 (1981)). The court reasoned that since Traveler's policy extended insurance coverage to "those driving with the permission of the named insured" it was inconsistent for Travelers to argue that its duty to defend should not also extend to such drivers. *Id.* at 477.

¶ 36 The *Clemmons* court concluded:

> "Travelers had a duty to defend [Reed] in the underlying suit brought by Clemmons. If Travelers wanted to preserve its right to later contest permission, it had the choice of defending under a reservation of rights or seeking a declaratory judgment of no coverage. By doing neither, Travelers was estopped from later

> denying coverage when Clemmons, standing in Reed's shoes, asked it to pay the judgment in the underlying suit." *Id.* at 479.

Our supreme court thus affirmed summary judgment in Clemmons's favor against Travelers.

¶ 37 *Clemmons* illustrates that an initial inquiry as to the insurer's duty to defend is proper, including in cases where, as here, the underlying suit has terminated in a default judgment. Consistent with *Clemmons*, the trial court correctly began its analysis by discussing whether Country had a duty to defend Roe in the underlying lawsuit.

¶ 38 In turn, we proceed to address whether Country had a duty to defend Roe in the underlying suit. "In a declaratory judgment action *** where the issue is whether the insurer has a duty to defend, a court ordinarily looks first to the allegations in the underlying complaint and compares those allegations to the relevant provisions of the insurance policy. [Citations.] If the facts alleged in the underlying complaint fall within, or potentially within, the policy's coverage, the insurer's duty to defend arises. [Citation.]" *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010). "If any theory of recovery in the underlying complaint falls within the insurance coverage, the insurer will have a duty to defend. [Citation.] The threshold a complaint must meet to present a claim for potential coverage, and thereby raise a duty to defend, is minimal. [Citations.] Any doubts about potential coverage and the duty to defend are to be resolved in favor of the *insured*. [Citations.]" (Emphasis in original.) *Lorenzo v. Capitol Indemnity Corp.*, 401 Ill. App. 3d 616, 619 (2010).

¶ 39 "Although a court ordinarily begins its analysis by examining the underlying complaint, a court is not limited to the allegations in the complaint in determining whether an insurer has a duty to defend." *Pekin Insurance Co. v. AAA-1 Masonry & Tuckpointing, Inc.*, 2017 IL App (1st) 160200, ¶ 24. "Under certain circumstances it is proper for the court to examine evidence

beyond that contained in the underlying complaint to determine the insurer's duty to defend. [Citation.] One such circumstance is where the insurer possesses knowledge of true but unpleaded facts that, when taken together with the allegations in the complaint, indicate that the claim is within or potentially within the policy coverage." *Id.*

¶ 40 We conclude that the allegations of the underlying complaint triggered the duty to defend under the policy. We recognize that, in finding that Country had a duty to defend, the trial court relied, in part, on statements within documents outside the complaint or the policy. Country urges that the court erred in considering those statements because they cannot be considered "true" facts that were known to Country Mutual. However, we need not discuss whether those statements were properly considered by the trial court**.** Rather, we conclude that the allegations of the underlying complaint, on their face, alleged facts at least *potentially* bringing the lawsuit within the scope of coverage under the policy. Those allegations triggered Country's duty to defend.

¶ 41 Specifically, we find that the allegations of the underlying pleaded facts raising a potential of "property damage" that occurred within the policy period. The policy covered "property damage," which was defined to mean "Physical injury to tangible property including all resulting loss of use of that property." The underlying complaint alleged that Roe's negligent construction work caused Gelsomino's building to sustain "property damages, including water damage." We acknowledge that such allegations do not specify what particular property was damaged. Nonetheless, given the minimal pleading threshold to trigger a duty to defend, the allegations raised at least the *potential* that there were damages covered under the policy.

¶ 42 Similarly, the allegations raised a potential that at least some of the damage occurred within the policy period, that is, between April 2005 and July 25, 2006. We acknowledge that

the complaint did not specifically allege when the property damage occurred. Rather, the underlying complaint alleged that (1) Gelsomino contracted with Roe on or about August 1, 2005, —at which time the policy was in effect—and (2) that Gelsomino and Badger "learned on March 3, 2010" of "property damage sustained [that] was caused by the work performed by" Roe. We reiterate that that the "threshold for pleading a duty to defend is low, and any doubt with regard to such duty is to be resolved in favor of the insured." *Pekin Insurance Co.*, 2017 IL App (1st) 160200, ¶ 23. Although lacking specificity, the underlying allegations asserted property damage occurring sometime between August 2005 and the time the plaintiffs "learned" of the damage in March 2010. Although this is a wide time frame, it undoubtedly overlaps with the policy period, and thus alleges at least the *potential* that some of the damages were covered. Thus, the complaint triggered Country's duty to defend.

¶ 43 Having concluded that Country had a duty to defend Roe in the underlying action, the next step in the estoppel analysis is to determine whether Country breached that duty. The law is clear regarding an insurer's options once its duty to defend is triggered. If the insurer wishes to dispute coverage, it has "two options: (1) defend the suit under a reservation of rights or (2) to seek a declaratory judgment that there is no coverage. If the insurer fails to take either of these steps and is later found to have wrongfully denied coverage, the insurer is estopped from raising policy defenses to coverage." *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127 (1999); *Clemmons*, 88 Ill. 2d at 475 ("the insurer taking the position that the complaint is not covered by the policy must defend the suit under a reservation or rights or seek a declaratory judgment ***. If the insurer does not, it is later estopped from denying coverage ***.") If the insurer elects to file a declaratory judgment, it must do so *before* the underlying proceeding is resolved. *Employers Insurance of Wausau*, 186 Ill. 2d at 157 ("Where an insurer

waits to bring its declaratory judgment action until after the underlying action has been resolved by a judgment or a settlement, the insurer's declaratory judgment action is untimely as a matter of law. [Citations.]").

¶ 44 Under this precedent, Country clearly breached its duty to defend the underlying lawsuit. The record is clear, and Country does not dispute, that it received notice of the underlying action, yet failed to defend Roe under a reservation of rights. Further, it did not file its declaratory judgment complaint until several days *after* the default judgment in the underlying action.[2] In this regard, the situation is analogous to *Clemmons*, where the insurer's failure to take any action led to a default judgment. Thus, as in *Clemmons*, estoppel applies, rendering Country liable for the amount of the default judgment.

¶ 45 We acknowledge Country's arguments that estoppel should not apply to this situation, but we find them unpersuasive. First, we reject Country's suggestion that application of estoppel in this case "creates coverage" for damages occurring beyond the policy term. Country erroneously suggests that, by applying estoppel, the trial court determined when the alleged damages occurred. Country's reply brief claims that the trial court "simply accepted that all damages *** occurred prior to July 25, 2006."

¶ 46 Country's assertion that the trial court "created coverage" fundamentally misunderstands the concept of estoppel. The trial court did not make a finding that any damages were actually covered, but determined that Country's breach of its duty to defend *estopped it from denying coverage*. Country's claim ignores the equitable roots of estoppel. See *Clemmons*, 88 Ill. 2d at 479 ("The court will not enforce the insurer's protections under the policy where the insurer

[2] Its failure to do so is inexplicable, especially as the record includes a letter from Country's counsel advising Country to file a declaratory judgment action, precisely to avoid the application of estoppel.

failed to act equitably, that is, failed to defend under a reservation of rights or to bring a declaratory judgment action to determine whether there was coverage under the policy.")

¶ 47 Country suggests that it is unfair to hold it liable for property damages that may have been incurred after the policy's expiration in July 2006. However, this is the result that estoppel calls for where, as in this case, an insurer breaches its duty to defend. Country's dilemma is of its own making. It had a duty to defend the underlying lawsuit (or initiate a declaratory judgment action while the underlying suit was pending). Had it done so, it could have litigated coverage issues it now attempts to raise. However, Country inexplicably failed to do so. Country is thus estopped from now arguing that any of the alleged damages were not covered.

¶ 48 Finally, Country suggests that estoppel is limited to "policy defenses" but should not prevent Country from asserting that the damages occurred beyond the expiration of the policy. Country argues "finding coverage for damages that have taken place over subsequent years is not a policy defense."

¶ 49 We acknowledge that estoppel has been described as precluding an insurer from raising "policy defenses." See, e.g. *Employers Insurance of Wausau*, 186 Ill. 2d 127 (1999). However, Country cites no binding authority that expressly *limits* the application of estoppel in this context to "policy defenses." To the contrary, our supreme court in *Clemmons* stated:

> "When a complaint against the insured alleges facts within or potentially within the scope of the policy coverage, the insurer taking the position that the complaint is not covered by the policy must defend the suit under a reservation of right or seek a declaratory judgment that there is no coverage. [Citation.] *If the*

> *insurer does not, it is later estopped from denying coverage in a suit to collect the judgment."* (Emphasis added.) *Id.* at 475.

Thus, our supreme court broadly and explicitly held that estoppel prevents an insured from "denying coverage" once it has breached its duty to defend. That doctrine encompasses cases such as this, in which the insurer attempt to deny coverage by claiming that some or all of the alleged damages may have occurred after the policy period. We have no reason to depart from *Clemmons*'s clear directive.

¶ 50 In summary, we find: (1) the allegations of the underlying complaint triggered Country's duty to defend; (2) Country breached that duty; and (3) as a result, Country is estopped from denying coverage. Accordingly, consistent with the result in *Clemmons*, Country was liable for the amount of the resulting default judgment.

¶ 51 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 52 Affirmed.