THIRD DIVISION
December 28, 2018

No. 1-18-0797

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

UNITED FIRE & CASUALTY COMPANY, Plaintiff-Appellant / Counter Defendant-Appellant, v. DONALY ROOFING AND CONSTRUCTION, INC., SUMMIT DESIGN + BUILD, LLC, LAURA HERRERA, Individually and as Supervised Administrator of the Estate of FILIBERTO HERRERA, SCOTTSDALE INSURANCE COMPANY, as the liability insurer of JW PRO BUILDERS, INC., under Policy No. CPS1800777 and ESSEX INSURANCE COMPANY as the liability insurer of STEEL SOLUTIONS FIRM, INC. under policy No. 3DQ5239, Defendants, SUMMIT DESIGN + BUILD, LLC, Defendant-Appellee / Counter Plaintiff-Appellee.	)	Appeal from the Circuit Court of Cook County 17 CH 1599 Honorable Peter Flynn, Judge Presiding

JUSTICE ELLIS delivered the judgment of the court.
Justices Howse and Cobbs concurred.

ORDER

¶ 1 *Held*: Affirmed. Trial court correctly ruled that insurer had duty to defend underlying tort lawsuit.

¶ 2 After the workplace death of Filiberto Herrera (Filiberto), his widow, Laura Herrera (Laura), as administrator, filed claims against the various entities involved in the construction project where Filiberto died. The specific issue in this appeal is whether United Fire & Casualty Company (United) has a duty to defend the general contractor, Summit Design + Build, LLC (Summit) in the underlying lawsuit. Like the trial court, we hold that it does.

¶ 3 BACKGROUND

¶ 4 Summit was hired as the general contractor for a construction project at 401 N. Morgan Street in Chicago, Illinois (Project). Summit, in turn, entered into a subcontract (the Subcontract) for roofing work with Donaly Roofing and Construction, Inc. (Donaly), "an independent contractor." The Subcontract required Donaly to carry specified insurance and include Summit "as additional insured."

¶ 5 Donaly obtained the contractually-mandated insurance from United. The insurance policy between Donaly and United (the Policy) contains two endorsements which extend coverage to Summit. The first provides coverage "only with respect to your [Donaly's] liability which may be imputed to that person or organization [Summit] directly arising out of your ongoing operations performed for that person or organization." The second amends the commercial general liability coverage to include Summit, "but only with respect to your [Donaly's] liability, which may be imputed to that person or organization [Summit] directly arising out of your ongoing operations or premises owned by or rented to you."

¶ 6 In other words, the Policy did not cover Summit for Summit's own negligence, but only for the negligence of Donaly that could be imputed to Summit—that is, vicarious liability.

¶ 7 Filiberto was an employee of Donaly working on the Project. In June 2014, while working at the site, Filiberto moved an unsecured sheet of plywood that concealed a hole in the

roof. Filiberto fell through the hole; he fell "approximately thirty-one feet and seven inches" to his death. Laura filed suit against a number of parties, including Donaly and Summit, in the matter styled *Herrera v. Summit* (the *Herrera* case). Donaly, the decedent's employer, was later dismissed from the case.

¶ 8 Laura's complaint (the *Herrera* complaint) alleged, among other things, that Summit controlled the worksite and the work of Donaly and other entities. It alleged that Summit was negligent in failing to exercise proper control over Donaly and other entities, as well as failing to warn of or secure the hole in the roof. Based on those claims, the *Herrera* complaint alleged that Summit was "vicariously or directly liable" to plaintiff. (We will review these allegations in more detail later.)

¶ 9 Summit filed a third-party complaint in *Herrera* against Donaly, among others. Summit sought contribution against Donaly for its *pro rata* share of liability for the death of plaintiff's decedent. Summit also sought contractual indemnification against Donaly, alleging that, under the Subcontract between Summit and Donaly, Donaly was required to indemnify Summit for any liability to which it was exposed on the Project arising out of the work performed by Donaly—that is, it sought indemnification "in the event [Summit] is held vicariously liable for [Donaly's] negligence."

¶ 10 After the *Herrera* complaint was filed, Summit tendered the case to United. United denied the tender and filed suit, seeking a declaration that the allegations in the *Herrera* complaint did not trigger the additional endorsements of the Policy. Summit answered and counterclaimed that it was entitled to a defense and indemnification under the Policy. Summit filed a motion for judgment on the pleadings on both United's complaint and its counterclaims. The trial court granted Summit's motion based on our decision in *Pekin Ins. Co. v. Centrex*

Homes, 2017 IL App (1st) 153601. The court later entered Rule 304(a) language to allow an immediate appeal. United then timely filed this appeal.

¶ 11 ANALYSIS

¶ 12 On appeal, United claims that the court erred in entering judgment on the pleadings in favor of Summit, finding that United owed a duty to defend the Underlying Case. Judgment on the pleadings is like summary judgment limited to the pleadings. *Pekin Insurance Company v. Wilson*, 237 Ill. 2d 446, 455 (2010). Judgment on the pleadings will be granted only if the pleadings do not reveal a genuine issue of material fact, and the movant is entitled to judgment as a matter of law. *Id*. When determining whether an insurer has a duty to defend an insured (or additional insured) in an underlying lawsuit, generally, the court " 'must compare the allegations in the underlying complaint to the policy language.' " *Pekin Insurance Company v. Centex Homes*, 2017 IL App (1st) 153601, ¶ 34 (quoting *General Agents Insurance Co. of America, Inc. v. Midwest Sporting Goods Co.*, 215 Ill. 3d 146, 154-55); see also *Wilson*, 237 Ill. 2d at 455.

¶ 13 An insurer's duty to defend is broader than its duty to indemnify. *Wilson*, 237 Ill. 2d at 456. "If the facts alleged in the underlying complaint fall within, or potentially within, the policy's coverage, the insurer's duty to defend arises." *Id*. at 455; see *Centex*, 2017 IL App (1st) 153601, ¶ 34. The allegations in the underlying complaint must be liberally construed in favor of the insured. *Centex*, 2017 IL App (1st) 153601, ¶ 34. Where there are multiple theories, there is a duty to defend if any of them potentially falls within the policy. *Id*. It is the alleged conduct, not the label, that determines whether a duty to defend exists. *Id.*; *Pekin Insurance Co. v. Roszak/ADC, LLC*, 402 Ill. App. 3d 1055, 1059). We review the grant of judgment on the pleadings *de novo*. *Wilson*, 237 Ill. 2d at 455.

¶ 14 Again, the Policy here provided coverage to Summit not for Summit's direct negligence but exclusively for Summit's vicarious liability for the acts or omissions of Donaly. So for a duty to defend the Underlying Case to exist, the underlying complaint must potentially demonstrate both (1) Donaly's negligence and (2) Summit's vicarious liability for Donaly's negligence. *Centex*, 2017 IL App (1st) 153601, ¶ 37.

¶ 15 No one disputes that the first prong was satisfied here. Often, when the named insured (here, Donaly) is the plaintiff's employer, that party is not named in the underlying tort lawsuit because of the workers-compensation bar to suing employers, and thus a closer scrutiny of the underlying complaint is required to determine whether the relevant acts or omissions could be fairly attributed to the employer. See *id*., ¶ 36; *Pekin Insurance Co. v. CSR Roofing Contractors, Inc.*, 2015 IL App (1st) 142473, ¶ 50. We don't have that problem here; Donaly was a named defendant in the *Herrera* case initially and, even after its dismissal, there are sufficient allegations here that Donaly's negligent acts or omissions caused the decedent's death. There is no dispute on this point.

¶ 16 The dispute is whether the underlying complaint alleges Summit's vicarious liability for Donaly's negligence. We can say this much at the outset—the *Herrera* complaint claims to be doing precisely that. As we already recounted above (see *supra*, ¶ 8), the underlying complaint alleges that Summit is "vicariously or directly liable to the plaintiff."

¶ 17 Putting aside that label, the *Herrera* complaint alleges the following:

- Summit owned and controlled the worksite;
- Summit entrusted Donaly and others to perform work on the site;
- Summit "retained control of the work being performed," which included (1) "the authority to supervise, stop, change, inspect, and/or coordinate the work" of Donaly

and other contractors; (2) the authority to enforce work safety rules; and (3) controlling access to the site; and

- Summit "retained control of the means and method of the work performed" by Donaly and other contractors "to the extent that they were not free to perform their work in their own way."

¶ 18 The exercise of control over the worksite is the key allegation here. When, as here, the allegation is that a general contractor controls a worksite, the failure to exercise proper control over the work of independent contractors (such as Donaly) is, in many cases, a *direct*-liability claim. See *Carney v. Union Pacific R.R. Co.*, 2016 IL 118984, ¶¶ 36-38. Section 414 of the Restatement (Second) of Torts allows a direct negligence claim against an entity " 'who entrusts work to an independent contractor, but who retains control of any part of the work' " to the extent that they failed to exercise their retained control with reasonable care. *Id.*, ¶¶ 33, 36 (quoting Restatement (Second) of Torts § 414 (1965)). This claim is *not* a claim of vicarious liability for the negligence of the independent contractor. See *id.*, ¶ 36 ("The rule set forth in section 414, however, articulates a basis only for imposition of direct liability," as "an employer of the independent contractor is typically not answerable for the contractor's negligence.").

¶ 19 But our supreme court identified a crucial caveat:

> "if the control retained by the employer is such that it gives rise to a master-servant relationship, thus negating the person's status as an independent contractor, the employer may be liable for the negligence of the contractor's employees under the law of agency. Agency law, under which an employer may be *vicariously* liable for the torts of its employees, is distinct from the principles encompassed in section 414, under which an

employer is directly liable for its own negligence. In short, 'section 414 takes over where agency law ends.' " (Emphasis added). *Id*., ¶ 38.

¶ 20 In other words, whether a failure-to-control allegation is a claim of direct liability against the employer, or a claim that the employer is vicariously liable for the negligence of the independent contractor, depends on the extent of the general contractor's control. The more intimately the employer controlled the work, the more likely a master-servant relationship existed, and thus the more likely the claim is one of vicarious liability.

¶ 21 To put a finer point on it, if the employer "retain[s] only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous," the control is not of such a minute and intimate nature to suggest a master-servant relationship, and the claim is one of direct liability. *Id*., ¶ 37 (quoting Restatement (Second) of Torts § 414, cmt. a, at 387 (1965)). On the other hand, "[i]f the employer of an independent contractor retains control over the operative detail of doing any part of the work," the employer is more a master to the independent contractor's servant, and thus the claim is one of vicarious liability. *Id*. (quoting Restatement (Second) of Torts § 414, cmt. a, at 387 (1965)); see *Centex*, 2017 IL App (1st) 153601, ¶ 54 (describing it as "a continuum" whereby the "greater control over the 'operative detail' could properly result in vicarious liability").

¶ 22 Keeping in mind the test for a duty to defend, the question here is thus whether the *Herrera* complaint could *potentially* give rise to a finding of vicarious liability against Summit for the negligence of Donaly. See *Wilson*, 237 Ill. 2d at 456. We agree with the trial court that it could.

¶ 23 The *Herrera* complaint alleges that Summit exercised far more control than merely directing the order of the work or that it be done safely. As we cited above, the *Herrera*

complaint alleges that Summit had the authority to "supervise, stop, change, inspect, and/or coordinate the work" and "*retained control of the means and method of the work performed*" by Donaly and other contractors "*to the extent that they were not free to perform their work in their own way*." (Emphasis added.) That's not merely telling Donaly and the other contractors to do this part of the work first, that part second, or ordering them to work in a safe manner. It is stopping them, inspecting them, coordinating them, telling them *how* to do the work.

¶ 24 Thus, the *Herrera* complaint more than adequately alleges the potential for vicarious liability against Summit for the negligence of Donaly. See *Centex*, 2017 IL App (1st) 153601, ¶¶ 9, 55 (insurer had duty to defend general contractor for vicarious liability claims based on allegations that defendant "participated in coordinating the work," "designated various work methods, maintained and checked work progress and participated in scheduling of the work and the inspection of the work" and "had the authority to stop the work, refuse the work and materials and order changes in the work.").

¶ 25 We emphasize that our question here involves the duty to defend, not the narrower duty to indemnify. It may ultimately prove to be the case that Herrera's claims lead to a finding of direct liability against Summit. By no means are we suggesting that this could not happen. Our holding is simply that the allegations could *potentially* give rise to vicarious liability, and thus United owes Summit a duty to defend the *Herrera* lawsuit.

¶ 26 United asks us to consider the third-party complaint that Summit filed against Donaly seeking contribution. A claim for contribution, United says, is a claim involving allegations of direct liability and thus is inconsistent with the notion of vicarious liability.

¶ 27 Summit says our review should be limited to the "eight-corners" rule, under which we may only consider the four corners of the relevant insurance policy and the four corners of the

underlying complaint in determining the duty-to-defend question. See, *e.g.*, *Pekin Insurance Co. v. St. Paul Lutheran Church*, 2016 IL App (4th) 150966, ¶ 63. That's not a rule without exceptions. Regardless, even if we considered the third-party complaint Summit filed against Donaly, our decision would be the same.

¶ 28 United is correct that a contribution suit involves claims of direct, not vicarious liability; indeed, a vicarious-liability claim cannot sound in contribution. See *Allison v. Shell Oil Co.*, 113 Ill. 2d 26, 34-35 (1986). But Summit also filed a third-party claim for indemnification against Donaly "[i]n the event [Summit] is held vicariously liable for [Donaly's] negligence." And even United agrees that an indemnification claim is proper to seek redress for vicarious liability. See, *e.g.*, *Travelers Casualty & Surety Co. v. Bowman*, 229 Ill. 2d 461, 472–73 (2008).

¶ 29 Summit was covering its bases, in other words, pleading in the alternative in that third-party complaint to account for the possibility that it might be found directly liable—in which case it could seek contribution from Donaly, a joint tortfeasor—or vicariously liable—in which case it could seek contractual indemnification from Donaly. The third-party complaint does not "admit" anything by including a contribution claim; it was merely an alternative claim that a responsible defendant would file to protect itself against different, potential theories of liability in the complaint.

¶ 30 The allegations in the *Herrera* complaint could potentially impose vicarious liability on Summit for the negligence of Donaly. United thus owes Summit a duty to defend that lawsuit.

¶ 31 CONCLUSION

¶ 32 We affirm the judgment of the circuit court.

¶ 33 Affirmed.