

2026 IL App (2d) 250314
No. 2-25-0314
Opinion filed June 18, 2026

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

COUNTRY MUTUAL INSURANCE COMPANY, Plaintiff-Appellant,

v.

WILLIAM WITBROD and TANYA KREULACH, Defendants-Appellees.

Appeal from the Circuit Court of Lake County.
Honorable Daniel L. Jasica, Judge, Presiding.
No. 23-CH-0129

PRESIDING JUSTICE KENNEDY delivered the judgment of the court, with opinion.
Justices McLaren and Birkett concurred in the judgment and opinion.

OPINION

¶ 1 This appeal arises from a declaratory judgment action filed by plaintiff, Country Mutual Insurance Company (Country Mutual), seeking a declaration that defendant, William Witbrod, does not qualify as an insured under the terms of its insurance policies for claims asserted by defendant, Tanya Kreulach, in the underlying lawsuit. Kreulach filed a personal injury action against Witbrod in the underlying lawsuit to recover damages she sustained in a car accident. At the time of the accident, Witbrod had delivered a pizza for his employer, Wix Pizza Inc. (Wix) d/b/a Antioch Pizza Shop, the named insured on Country Mutual's insurance policies. Country Mutual and defendants filed cross-motions for summary judgment on the issue of whether Witbrod was an insured under Country Mutual's policies and, consequently, whether Country Mutual owed Witbrod a duty to defend him in the underlying lawsuit or to indemnify Kreulach for the damages

she sustained. We reverse the trial court's decisions to (1) grant summary judgment in favor of Kreulach and Witbrod and against Country Mutual and (2) deny summary judgment in favor of Country Mutual and against Kreulach and Witbrod.

¶ 2

I. BACKGROUND

¶ 3

A. The Underlying Incident

¶ 4 On June 8, 2020, Kreulach was stopped at a traffic light in her car at an intersection in Antioch. Witbrod, driving his own car (a 2009 BMW), collided with the rear of Kreulach's vehicle, causing injury to Kreulach. At the time of the accident, Wix employed Witbrod, who was driving back to Antioch Pizza Shop after making a delivery. Witbrod had personal insurance coverage for the incident under a policy issued by State Farm Mutual Automobile Insurance Company (State Farm).

¶ 5

B. The State Farm Policy

¶ 6 State Farm issued personal auto policy No. G48282113 to Witbrod, which was in effect on the date of the accident. The insuring agreement under the State Farm policy provided:

“1. *We* will pay damages an *insured* becomes legally liable to pay because of:

a. *bodily injury* to others; and

b. damage to property caused by an accident that involves a vehicle for

which that *insured* is provided Liability Coverage by this policy.

2. *We* have the right to:

a. investigate, negotiate, and settle any claim or lawsuit;

b. defend an *insured* in any claim or lawsuit, with attorneys chosen by *us*;

and

c. appeal any award or legal decision for damages payable under this policy's Liability Coverage.”

The declarations page of the policy listed bodily injury limits of \$100,000 for each person and \$300,000 for each accident.

¶ 7 The State Farm policy defined an “insured” as “you” for “the ownership, maintenance, or use of *** your car.” An amendatory endorsement to the policy changed the definition of an “insured” in cases of vicarious liability:

“*Insured* means any other *person* or organization vicariously liable for the use of a vehicle by an *insured* as defined in 1., 2., or 3. above, but only for such vicarious liability.

This provision applies only if the vehicle is:

- a. neither *owned by*, nor hired by that other *person* or organization; and
- b. neither available for, nor being used for, carrying *persons* for a charge.”

The declarations page identified Witbrod as the named insured under the policy and “Your Car” as a 2009 BMW, the vehicle involved in the accident.

¶ 8 The State Farm policy included provisions in the event other liability coverage applies:

“2. The Liability Coverage provided by this policy applies as primary coverage for the ownership, maintenance, or use of *your car* ***.

* * *

b. If:

- (1) this is the only Car Policy issued to *you* *** by the *State Farm Companies* that provides Liability Coverage which applies to the accident as primary coverage; and

(2) liability coverage provided by one or more sources other than the *State Farm Companies* also applies as primary coverage for the same accident,

then *we* will pay the proportion of damages payable as primary that *our* applicable limit bears to the sum of *our* applicable limit and the limits of all other liability coverage that apply as primary coverage.”

¶ 9 C. The Country Mutual Policies

¶ 10 Wix obtained commercial and umbrella policies from Country Mutual that each provided automobile liability coverage for its employees. Country Mutual issued to Wix Commercial Business Policy No. AB253082011 (Business Policy), effective May 1, 2020, to May 1, 2021. The declarations under the Business Policy provided a liability coverage limit of \$1 million per occurrence and an aggregate limit of \$2 million. Pertinent here, the Business Policy included a “Business Auto Coverage Form” that described covered vehicles under the policy. Section II, subsection A, of the Business Auto Coverage Form sets forth coverage for auto liability under the policy:

“We will pay all sums an ‘insured’ legally must pay as damages because of ‘bodily injury or ‘property damage’ to which this insurance applies, caused by an ‘accident’ and resulting from the ownership, maintenance or use of a covered ‘auto.’ ”

Section IV of the Business Auto Coverage Form included an “Other Insurance” provision, which stated, in relevant part, the following regarding other insurance:

“For any covered ‘auto’ you own, this Coverage Form provides primary insurance. For any covered ‘auto’ you don’t own, the insurance provided by this Coverage Form is excess over any other collectible insurance.”

¶ 11 Country Mutual charged Wix an annual premium for “Non Owned Food Delivery” coverage. The Business Policy described “Hired ‘Autos’ ” as “[o]nly those ‘autos’ you lease, hire, rent or borrow. This does not include any ‘auto’ you lease, hire, rent or borrow from any of your ‘employees’ ***.” The policy also stated that “Non-owned ‘Autos’ ” refers to “[o]nly those ‘autos’ you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes ‘autos’ owned by your ‘employees’ *** but only while used in your business or your personal affairs.” The Business Auto Coverage Form declarations stated that vehicles are covered “autos” if they fell within the definitions of “Hired ‘Autos’ Only,” designated as symbol 8, or “Non-owned ‘Autos’ Only,” designated as symbol 9. The “Schedule of Coverages and Covered Autos” provided “Covered Auto Liability” for both “Hired ‘Autos’ ” (symbol 8) and “Non-owned ‘Autos’ ” (symbol 9), with a policy limit of \$500,000. In short, non-owned vehicles used for food delivery were considered covered “autos” under the policy.

¶ 12 The Business Policy provided coverage to individuals and entities that qualified as “insureds.” Section V of the Business Auto Coverage Form defined the term, “insured,” as:

“[A]ny person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or ‘suit’ is brought.”

¶ 13 Section II, subsection A delineated the relevant “Who Is An Insured” provision in the Business Auto Coverage Form:

“1. Who Is An Insured

The following are ‘insureds’:

- a. You for any covered ‘auto.’

b. Anyone else while using with your permission a covered 'auto' you own, hire or borrow except:

* * *

(2) Your 'employee' if the covered 'auto' is owned by that 'employee' or a member of his or her household.

* * *

c. Anyone liable for the conduct of an 'insured' described above but only to the extent of that liability."

¶ 14 Country Mutual also issued Commercial Umbrella Policy No. AU2530820 (Umbrella Policy) to Wix, the named insured, for the policy period of May 1, 2020, through May 1, 2021. The declarations under the Umbrella Policy provided a liability coverage limit of \$2 million for each occurrence and an aggregate limit, "except with respect to 'covered autos,'" of \$2 million. The Umbrella Policy's "Insuring Agreement" for bodily injury stated:

"We will pay on behalf of the insured the 'ultimate net loss' in excess of the 'retained limit' because of 'bodily injury' *** to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking damages for such 'bodily injury' *** when the 'underlying insurance' does not provide coverage or the limits of 'underlying insurance' have been exhausted. When we have no duty to defend, we will have the right to defend, or to participate in the defense of, the insured against any other 'suit' seeking damages to which this insurance may apply. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' *** to which this insurance does not apply."

The term, “Underlying Insurance” is defined as “any policies of insurance listed in the Declarations under the Schedule of ‘underlying insurance.’ ” The schedule of underlying insurance lists the other Country Mutual policies in effect during the same policy period as the Umbrella Policy, including the Business Policy.

¶ 15 The Umbrella Policy excluded coverage for “bodily injury” arising out of the “ownership, maintenance or use of any ‘auto’ which is not a ‘covered auto,’ ” meaning, the policy afforded coverage only to the ownership, maintenance, or use of a “covered auto.” The policy defined “covered auto” as “only those ‘autos’ to which ‘underlying insurance’ applies.”

¶ 16 The Umbrella Policy defined an “insured” similarly to the Business Policy and, particularly relevant here, it stated that “[a]nyone liable for the conduct of an insured described above is also an insured, but only to the extent of that liability.” Finally, the Umbrella Policy provided that it “is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis.” In addition, “[w]hen this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any ‘suit’ if any other insurer has a duty to defend the insured against that ‘suit.’ ”

¶ 17 D. The Interwoven Underlying Tort and Declaratory Judgment Proceedings

¶ 18 The litigation in the underlying personal injury lawsuit and declaratory judgment action to determine insurance coverage proceeded concurrently, but before different trial judges. The proceedings in court and otherwise unfolded as follows.

¶ 19 On April 28, 2022, Kreulach filed a personal injury action against Witbrod, styled Kreulach v. Witbrod, No. 22-LA-154 (Cir. Ct. Lake County), but not against Wix or Antioch Pizza Shop. Kreulach alleged that Witbrod’s negligence in operating his vehicle proximately caused her injuries. Kreulach’s complaint did not allege that Witbrod was acting under the scope of his

employment at the time of the accident. The complaint's prayer for relief sought judgment and damages solely from Witbrod.

¶ 20 State Farm appointed counsel to represent Witbrod in the underlying lawsuit. On October 6, 2022, Witbrod submitted his answers to Kreulach's interrogatories. Witbrod stated that, at the time of the accident, he was employed to work and make deliveries for Antioch Pizza Shop. Kreulach's interrogatory inquired about the purpose or use of the vehicle at the time of the accident and where he was traveling. Witbrod answered that he was on his way to Antioch Pizza Shop after he had made a pizza delivery. He also stated that he was the owner of his vehicle.

¶ 21 On January 3, 2023, counsel for State Farm sent Country Mutual a letter advising Country Mutual that State Farm had been retained to represent Witbrod in the underlying lawsuit. State Farm tendered defense of the case to Country Mutual, stating, "[w]e have been advised that your employee, William Witbrod, was in the course and scope of his employment with Antioch Pizza Shop at the time of the accident and was on his way returning to the Pizza Shop from a delivery when the automobile accident occurred." The letter stated that Witbrod had "advised his manager of this automobile accident on the date of the occurrence."

¶ 22 On January 14, 2023, Country Mutual received what it claimed was its first notice of the underlying lawsuit and the accident that led to Kreulach's cause of action. Also on that date, Country Mutual received notice that State Farm was defending Witbrod in the underlying lawsuit.

¶ 23 Country Mutual sent a notice of coverage denial to Witbrod on February 2, 2023. Country Mutual referenced section II, subsection A, of its Business Policy, describing "Who Is An Insured" in the Business Auto Coverage Form, and denied coverage to Witbrod because, Country Mutual asserted, he was not an insured under that provision. Specifically, Country Mutual stated that Witbrod was excluded from coverage under the policy because he was an "employee" of Wix while

using an “auto” that he owned at the time of the accident and, therefore, he did not fall within the definition of an “insured.”

¶ 24 On April 5, 2023, Witbrod testified by deposition in the underlying lawsuit that, when he began working at Antioch Pizza Shop, he was informed that he needed to obtain his own insurance coverage as a delivery driver because he would not be insured by Antioch Pizza. Witbrod paid extra money to procure insurance to cover his car for delivering pizzas. Witbrod recalled that about one month prior to his deposition, the owner of the pizza shop had approached him to ask about insurance for the underlying lawsuit. When Witbrod asked for clarification, the owner responded “[n]ever mind.” The manager of the pizza shop later approached Witbrod and explained that the owner was not sure if Witbrod knew that he had been sued following the accident.

¶ 25 On July 5, 2023, Country Mutual filed its complaint for declaratory judgment, seeking a ruling that no coverage was available under either its business or umbrella policies for the allegations asserted in the underlying lawsuit. Specifically, Country Mutual asserted that Witbrod did not qualify as an “insured” under its policies and that the policies only provided coverage to “insureds.” Witbrod was not a named insured on the declaration pages of the policies. Country Mutual alleged that, although Witbrod had been operating a covered “auto” at the time of the accident, because he was an “employee” of Wix, he was not an “insured” for the covered “auto” that he owned under the “Who Is An Insured” provision of the policies (referencing paragraph 1(b)(2) of that provision).

¶ 26 Further, Country Mutual alleged that the complaint in the underlying lawsuit neither named Wix as a defendant nor asserted that Wix was independently negligent in causing or contributing to cause Kreulach’s injuries. Country Mutual also alleged that Kreulach could not seek relief from Wix for her purported injuries because the two-year statute of limitations to file a claim against

Wix had expired. Thus, Country Mutual alleged that, because Kreulach did not seek to hold Witbrod liable for the conduct of Wix, Witbrod did not qualify as an “insured” under the “Who Is An Insured” provision that stated, “[a]nyone liable for the conduct of an ‘insured’ described above but only to the extent of that liability,” referencing paragraph 1(c) of that provision. Country Mutual sought a declaratory finding that it had no duty to defend or indemnify Witbrod under its policies.

¶ 27 Counsel for Kreulach sent both State Farm and Country Mutual a settlement demand letter on August 22, 2023. He asserted, “[i]t is undisputed that liability rests 100% with your client.” He thoroughly described Kreulach’s injuries, including displaced ribs. He stated that, “[c]ompounding this tragedy is Country Mutual’s efforts to deny coverage and make [Witbrod] personally liable for everything that has been taken from [Kreulach].” Kreulach extended a settlement offer of \$1.6 million, comprised of the \$100,000 personal State Farm coverage and \$1.5 million from the Country Mutual policies.

¶ 28 On August 31, 2023, counsel for Country Mutual sent Kreulach’s counsel a response “to your policy limits demand letter dated August 22, 2023.” Country Mutual stated that Kreulach’s demand was “based on the false premise [that] Witbrod qualifies as an insured” under the Business Policy. Country Mutual rejected Kreulach’s policy limit demand and explained why Witbrod was not an “insured” under the “Who Is An Insured” provision of the policy. Country Mutual stated:

“Plaintiff [Kreulach] does not seek relief from Mr. Witbrod for the conduct of Wix Pizza. Indeed, there are no allegations that Wix Pizza committed any act, error, or omission that caused or contributed to cause [Kreulach’s] injuries. Moreover, at the time Country Mutual received Mr. Witbrod’s tender of coverage in January 2023, [Kreulach’s] ability to seek relief from Wix Pizza was barred by the statute of limitations. Thus, even if it were legally

permissible for [Kreulach] to have asserted a claim against Mr. Witbrod for the conduct of Wix Pizza (which Country Mutual does not concede), such a claim was not possible at the time Country Mutual was first placed on notice of the claims against Mr. Witbrod.”

¶ 29 On September 14, 2023, State Farm sent counsel for Kreulach a correspondence stating that it had received the August 22, 2023, demand letter. Counsel for State Farm responded, “[b]ased on the documentation provided, State Farm is willing to settle your client’s claim for \$100,000.00. This settlement is inclusive of all damages, known and unknown, and any liens, assignments or statutory rights of recovery.”

¶ 30 On September 18, 2023, Kreulach filed an amended complaint against Witbrod in the underlying lawsuit. Kreulach alleged that on June 8, 2020, the date of the accident, Wix employed Witbrod and that, at the time Witbrod collided with Kreulach’s vehicle, “he was acting within the course and scope of his employment” with Wix. Further, Kreulach alleged that, at the time of the accident, Witbrod “was acting as the agent, servant, and/or employee” of Wix. Kreulach did not add Wix as a defendant to the amended complaint and demanded judgment and damages solely against Witbrod.

¶ 31 Kreulach answered Country Mutual’s complaint for declaratory judgment on September 8, 2023. She admitted that Wix was not a named defendant in the underlying complaint but denied that Wix was not liable for the acts of its agent, servant, or employee Witbrod in causing the accident. Kreulach also denied that Wix “does not have a right to quasi contractual implied indemnification from Witbrod.” In addition, Kreulach denied that she cannot seek relief from Wix because “[t]he statute of limitations is an affirmative matter that must be timely pled or proved or it is waived.”

¶ 32 Kreulach’s counsel responded to State Farm’s settlement offer by e-mail on September 19, 2023. Kreulach’s counsel included Country Mutual’s counsel on the e-mail correspondence. He stated that Kreulach had authorized him to extend the following settlement opportunity to Witbrod and State Farm:

“1. State Farm will pay its \$100,000.00 limit towards [Kreulach’s] damages.

2. [Kreulach] offers to have her claim against [Witbrod] decided by a binding arbitration, with no appeal rights, with the award being confirmed to judgment under the Illinois Uniform [A]rbitration Act when it is entered.

3. The Parties will choose and agree to a single arbitrator from ADR and if none are agreeable then from the Illinois Bar.

4. The arbitrator will decide liability and the amount of [Kreulach’s] damages in [her] award.

5. The parties will split the cost of the arbitrator.

6. [Kreulach] agrees not to execute against [Witbrod’s] personal assets and agrees not to execute against State Farm beyond the \$100,000.00 it has already tendered to satisfy the arbitration award/judgment. [Kreulach] will be limited to seeking satisfaction of the arbitration award/judgment from [Country Mutual’s] insurance policies and through bad-faith proceedings against [Country Mutual].

7. [Witbrod] will assign his claim for the tort of bad faith against [Country Mutual] to [Kreulach].”

¶ 33 The letter from Kreulach’s counsel also stated that,

“[a]lternatively, if State Farm does not wish to split the costs of a binding arbitration, then [Kreulach] is willing to accept State Farm’s tender of its \$100,000.00 policy limit plus

[Witbrod] agreeing to entry of a consent judgment against himself in the amount of \$1,600,000 in return for [Kreulach] agreeing to not pursue either [Witbrod] (personally) or State Farm (in excess of the \$100,000.00 already tendered), and confine her remaining recovery to the [Country Mutual] insurance policies.”

¶ 34 Witbrod filed a counter-complaint for declaratory judgment against Country Mutual on September 25, 2023. Witbrod claimed that his vehicle was a covered “auto” under Country Mutual’s Business Policy because “the vehicle is owned by [Wix’s] employee (Witbrod) [and] at the time of the accident, the vehicle was being used in [Wix’s] business.” According to Witbrod, the Business Policy provided liability coverage for Wix for damages arising out of the use of non-owned autos, as that term was defined in the policy. Witbrod next alleged that, “had [Wix] been sued for its own negligence or vicarious liability arising from Witbrod’s alleged negligence in regard to the June 8, 2020 accident in the Underlying Lawsuit, based on the terms of the Policy, Country Mutual would be obligated to defend [Wix] in the Underlying Lawsuit.” Witbrod alleged similarly regarding the duty to indemnify Wix. Witbrod also alleged “[i]t is of no consequence (windfall) to Country Mutual that [Wix] was not named as a defendant in the Underlying Lawsuit [because] Country Mutual’s coverage obligations are not contingent upon the pleadings in the Underlying Lawsuit.” He sought a declaration that Country Mutual had a duty to defend and indemnify him under the Business Policy in the underlying lawsuit.

¶ 35 Country Mutual filed an amended complaint for declaratory judgment on October 26, 2023, after Kreulach had filed her amended complaint in the underlying lawsuit. Country Mutual asserted that the complaint and amended complaint in the underlying lawsuit alleged negligence solely against Witbrod. Country Mutual alleged that “[n]either the Complaint nor the Amended Complaint in the Underlying Lawsuit names [Wix] as a defendant.” Country Mutual also alleged

that the complaint and amended complaint in the underlying lawsuit did not claim Wix was independently negligent in causing or contributing to cause Kreulach's injuries. Further, Country Mutual asserted that neither the complaint nor amended complaint in the underlying lawsuit sought to recover from Wix under a theory of vicarious liability for the negligence of Witbrod. Finally, Country Mutual alleged that Kreulach could not seek relief from Wix for her purported injuries because the two-year statute of limitations to file a claim against Wix had expired.

¶ 36 On November 27, 2023, Kreulach, Witbrod, and State Farm entered into a written agreement to arbitrate the underlying lawsuit for a binding resolution. The recitals specifically provided that "Witbrod was acting within the course and scope of his employment as a pizza delivery driver with [Wix] at the time of the June 8, 2020, crash." Thereafter, the agreement stated the following, in pertinent part:

"1. Witbrod hereby admits fault for causing the June 8, 2020 crash.

* * *

4. The parties agree that the sole matter for decision by [the arbitrator] will be Kreulach's personal injury damages owed stemming from the June 8, 2020 crash.

* * *

7. The parties agree that with respect to any award rendered by [the arbitrator] (and the resulting civil judgment obtained) that Kreulach will confine her execution and recovery against State Farm solely to its \$100,000.00 liability limit of automobile insurance coverage.

8. The parties agree that with respect to any award rendered by [the arbitrator] (and the resulting civil judgment obtained) that Kreulach will confine her execution and recovery against Witbrod to monies obtained from liability insurance companies providing

liability coverage for the June 8, 2020 crash, including [the State Farm and Country Mutual policies].

9. Kreulach agrees not to execute any arbitration award (or resulting civil judgment obtained) against Witbrod's personal assets.

10. The parties agree that State Farm cannot be held liable for Kreulach's damages suffered due to the June 8, 2020 crash in excess of the \$100,000.00 that State Farm agreed to pay by virtue of this agreement, and that State Farm is hereby relieved of any liability beyond its \$100,000.00 automobile liability insurance limit.

11. Witbrod agrees to and hereby does assign all extra-contractual claims against [Country Mutual], including his claim for the tort of bad faith in the wrongful denial of coverage, wrongful denial of a defense, amongst others, to Kreulach."

¶ 37 On December 7, 2023, counsel for Kreulach sent a one-sentence e-mail to counsel for Country Mutual, advising that Witbrod had accepted Kreulach's offer to arbitrate the underlying personal injury claim. No other information regarding the arbitration was provided in the correspondence.

¶ 38 On December 21, 2023, Kreulach, Witbrod, and State Farm appeared before a retired circuit court judge for the arbitration in the underlying lawsuit. The arbitrator found that, "based upon the medical testimony and a review of [Kreulach's] medical records said accident caused an aggravation of [Kreulach's] pre-existing condition." The arbitrator awarded Kreulach a total of \$3,205,469.19, including medical expenses, past and future pain and suffering, and disfigurement, among other damages. The arbitrator issued the arbitration award and served the parties on December 28, 2023.

¶ 39 In an affidavit executed under section 1-109 of the Code of Civil Procedure (Code) (735 ILCS 5/1-109 (West 2022)), counsel for Country Mutual stated that “[n]either Witbrod nor Kreulach, nor an attorney on either party’s behalf, provided more details about the contemplated binding arbitration before it occurred other than what is contained in [Kreulach’s counsel’s] December 7, 2023 correspondence.” The affidavit stated that Country Mutual “did not learn that the arbitration occurred or an award entered in that arbitration until February 7, 2024, when [Kreulach’s counsel] for the first time provided me with a copy of an arbitration award and advised that judgment had been entered on that award.” Further, counsel averred that Country Mutual did not learn of the existence of the November 27, 2023 agreement to arbitrate until it was attached to a motion that had been filed by Kreulach on September 25, 2024.

¶ 40 Counsel for State Farm also submitted an affidavit under section 1-109 of the Code, stating that, after Country Mutual refused to defend Witbrod in the underlying lawsuit, Witbrod, State Farm, and Kreulach agreed to resolve the underlying lawsuit through binding arbitration. She stated that Country Mutual had been notified that the underlying lawsuit was going to be resolved through binding arbitration. Counsel stated that Country Mutual never contacted her regarding the agreement to arbitrate and to her knowledge, “[Country Mutual] did nothing to object to the arbitration, stay the arbitration, stay the [underlying lawsuit], or otherwise participate in the defense of [Witbrod].” According to counsel, during the arbitration on December 21, 2023, “[e]videntiary submissions were made that included medical records, medical bills, medical literature, and sworn medical expert testimony. [Kreulach] testified and was cross-examined. The parties gave opening and closing arguments. [The arbitrator] thereafter deliberated and provided his ruling.” Finally, counsel stated that neither Witbrod, nor State Farm, nor Kreulach entered into a consent judgment.

¶ 41 In addition, Kreulach’s counsel submitted an affidavit pursuant to section 1-109 of the Code. In his affidavit, counsel stated that, after he sent the December 7, 2023, e-mail correspondence to Country Mutual’s counsel, “[a]t no point thereafter did [Country Mutual’s counsel] nor anyone affiliated with Country Mutual, inquire when the arbitration was to take place or where it was to take place.” He continued that no one affiliated with Country Mutual made “any effort to attend the arbitration, defend [Witbrod] under a reservation of rights, or stay the arbitration.” Counsel for Kreulach averred that “[t]here was no consent judgment in the [underlying lawsuit]. There was no rollover arbitration. There was no collusion.”

¶ 42 Kreulach filed a motion to confirm the arbitration award judgment in the underlying lawsuit on January 3, 2024. On January 11, 2024, the trial court in that case entered an order granting Kreulach’s motion and confirming the judgment in favor of Kreulach and against Witbrod in the amount of \$3,205,469.19.

¶ 43 On January 16, 2024, Kreulach filed a counterclaim for declaratory judgment. In her counterclaim, Kreulach alleged that the vehicle Witbrod was operating at the time of the accident was a covered “auto” under Country Mutual’s Business Policy. She alleged that Witbrod was a Wix employee, delivering Wix’s pizzas, with Wix’s permission, and in furtherance of Wix’s food delivery at the time of the accident. She claimed that “Witbrod qualifies as an insured under paragraph 1(c) of the Who Is An Insured provision” of the Business Policy, which states that “[a]nyone liable for the conduct of an ‘insured’ described above but only to the extent of that liability.” Kreulach cited *First Chicago Insurance Co. v. Molda*, 2015 IL App (1st) 140548, ¶ 50 (*Molda III*),¹ for the proposition that “[q]uestions of applicable coverage can be determined only as of the time of the accident creating potential liability.” (Internal quotation marks omitted.)

¹A discussion of the *Molda* litigation and its three appellate dispositions begins *infra* ¶ 92.

Kreulach alleged that at the time of the accident, Wix, the named insured, had “potential liability to Kreulach under the doctrine of *respondeat superior*.” She alleged that if she “obtained a judgment from Wix under the theory of *respondeat superior*, Wix would be entitled to indemnification from Witbrod under the common law theory of quasi-contractual implied indemnity.” Kreulach asserted that, “[c]onsequently, at the time of the June 8, 2020 crash, Witbrod was ‘liable for the conduct of an “insured” described above but only to the extent of that liability,’ and therefore, qualifies as an insured under the [Country Mutual] commercial auto liability policy.”

¶ 44 Kreulach sought a declaration that the car operated by Witbrod at the time of the accident was covered under the Business Policy issued by Country Mutual to Wix. She also sought a declaration that Country Mutual’s Business Policy covered Witbrod for his liability as an agent, servant, and/or employee of Wix in causing the accident. Finally, Kreulach sought a declaration that Country Mutual breached its duty to defend and indemnify Witbrod under the Business Policy.

¶ 45 On February 7, 2024, counsel for Kreulach sent an e-mail correspondence to counsel for Country Mutual offering settlement following the confirmation of the arbitration award. Counsel stated that because of Country Mutual’s “wrongful denial of coverage,” Witbrod and State Farm “did everything possible to protect him from financial ruin due to this clear liability and clear excess case.” He continued that Kreulach had accepted State Farm’s settlement offer and that Country Mutual “was kept aware of the foregoing” and took no steps to negotiate the claim, participate in the arbitration, or prevent the arbitration from proceeding. Counsel for Kreulach informed counsel for Country Mutual the amount of the arbitration award. He stated that Kreulach had instructed him “to extend a time-limited opportunity [until February 17, 2024] to resolve this claim and satisfy the judgment against its insured, Mr. Witbrod, through payment of its insurance limits of \$1.5 million ***.” Finally, counsel stated that if Country Mutual rejected the settlement

offer, Kreulach would file a summary judgment motion in the declaratory action “and pursue the full judgment amount in this clear bad-faith case.”

¶ 46 On February 20, 2024, Kreulach moved for summary judgment on her counterclaim for declaratory judgment. Similar to the allegations in her counterclaim complaint, she argued that the precedent in *Molda III* determines this litigation and, as such, Witbrod qualified as an “insured” under paragraph 1(c) of the definitions of “Who Is An Insured” under Country Mutual’s Business Policy (“Anyone liable for the conduct of an ‘insured’ described above but only to the extent of that liability”). Kreulach contended that, even if the *Molda III* decision did not exist, the subject policies were inherently ambiguous concerning Witbrod’s insured status and had to be construed in favor of coverage. Kreulach sought a summary judgment finding that Witbrod was an insured under Country Mutual’s Business Policy and that, therefore, it owed Witbrod a defense and indemnification under its policies. Witbrod moved for summary judgment on his counter-complaint for declaratory judgment on March 13, 2024, making substantially the same arguments as Kreulach.

¶ 47 Also on March 13, 2024, Country Mutual moved for summary judgment, seeking a finding that it had no duty to defend or indemnify Witbrod in the underlying lawsuit. Country Mutual argued that its business and umbrella policies did not provide coverage for Witbrod in the underlying lawsuit or the “rollover judgment” from the arbitration finding. Country Mutual contended that Witbrod was not an insured under the policies’ plain and unambiguous terms. Country Mutual noted in its motion that Witbrod and State Farm had entered into an agreement with Kreulach pursuant to which Witbrod would not contest an arbitration of Kreulach’s claims in exchange for a promise that Kreulach would only seek to collect the resulting judgment from Country Mutual. Country Mutual did not dispute that Witbrod’s car qualified as a covered “auto”

under its policies or that Witbrod owned the car. Country Mutual noted that, for any covered “auto” Wix does not own, the insurance provided by the Country Mutual Business Policy “is excess over any other collectible insurance,” which, in this case, was State Farm. Country Mutual argued that because it is an excess insurer, Witbrod’s tender of the underlying lawsuit to Country Mutual should be evaluated in the context of an insurer without a duty to defend. As an excess insurer for claims involving non-owned “autos” that are covered autos under the Business Policy, Country Mutual contended that it only owed a duty to indemnify its “insureds.” According to Country Mutual, an insurer’s duty to indemnify arises only if the facts alleged actually fall within coverage. Continuing, Country Mutual argued that the question of whether the insurer has a duty to indemnify someone for a particular liability is only ripe for consideration if he, she, or it had already incurred liability in the underlying claim. Country Mutual asserted that because Kreulach did not allege or seek to impose liability on Witbrod for Wix’s conduct, Witbrod did not qualify as an insured under its policies. Finally, Country Mutual argued that *Molda III* did not apply to this case or was incorrectly decided.

¶ 48 On May 28, 2024, the trial court entered its order ruling on the parties’ cross-motions for summary judgment. Initially, the court found that the facts alleged by the parties were undisputed in light of Country Mutual’s failure to respond to Kreulach’s statement of undisputed facts. The court noted that the coverage dispute turned on whether Witbrod was properly considered an “insured” under the Country Mutual policies issued to Wix. The parties agreed that Witbrod’s car was a covered “auto” under the policies. However, the court also recognized that even if Witbrod’s car was a covered “auto,” the issue remained whether Witbrod was an “insured” entitled to coverage under the policies.

¶ 49 The trial court considered the Country Mutual policy language of paragraph 1(c) that described “Who Is An Insured.” The court substituted Wix as the named insured in that section of the policy to read, “ ‘anyone liable for the conduct of Wix Pizza but only to the extent of that liability.’ ” The court then stated that

“[a] plain reading of this text suggests that this provision was only intended to extend coverage for one who is passively liable for the negligent or tortious acts of the named insured, Wix Pizza. In such instances, that party’s liability could logically be said to ‘arise’ out of the conduct of the insured (Wix Pizza).”

The court pointed out how other jurisdictions had considered the exact same policy language to find that the language of paragraph 1(c) provided “coverage to a third party that is potentially *vicariously liable* for the acts or wrongdoing of the named insured.” (Emphasis in original.) The court also noted a case from the United States District Court for the Northern District of Illinois, *Vulcan Materials Co. v. Casualty Insurance Co.*, 723 F. Supp. 1263, 1265 (N.D. Ill. 1989), that interpreted a similar provision, finding the language as “ ‘plainly a vicarious liability provision and nothing more.’ ”

¶ 50 Nevertheless, the trial court stated that it was obligated to follow the decision in *Molda III*, which concluded that the same provision was not strictly limited to instances where a party is potentially vicariously liable for the acts or omissions of a named insured. The court found that this case was “on all fours with *Molda [III]*.” The court noted that the four corners of the complaint in the underlying lawsuit did not control whether there was a duty to indemnify. “Instead, the duty to indemnify is based on whether the adjudicated facts, as they are found to have existed at the time of the occurrence, fall within coverages provided under the policy.” The court stated that, “[b]y focusing on the facts as of the date of the accident, the *Molda [III]* court was presumably

analyzing the issue of coverage and indemnity under the policy, not the duty to defend.” In reference to Country Mutual’s argument that Kreulach had failed to file a claim against Wix before the expiration of the statute of limitations, the court stated that “whether the employer is *actually named* as a defendant in the underlying personal injury lawsuit should not be relevant to or determinative of the issue of coverage.” (Emphasis in original.) The court pointed out that the claims against the defendant in *Molda I* (*Wilson v. Molda*, 396 Ill. App. 3d 100, 111 (2009)) were found to be barred by the two-year statute of limitations.

¶ 51 The trial court concluded that, based on the holding in *Molda III*, Witbrod was an “insured” under Country Mutual’s business and umbrella policies issued to Wix. The court stated that at the time of the accident, Wix, as Witbrod’s employer, was potentially liable to Kreulach under a *respondeat superior* theory, as held in *Molda III*. “If sued, Wix Pizza would then have had a potential claim for quasi-contractual implied indemnification against its employee, Witbrod.” The court found that, under *Molda III*, “Witbrod was therefore ‘liable for the conduct of an “insured” and qualified as an insured under the Country Mutual policies.’ ” The court granted summary judgment in favor of Kreulach and Witbrod and denied Country Mutual’s motion for summary judgment.

¶ 52 On June 26, 2024, Country Mutual moved to reconsider the trial court’s May 28, 2024, summary judgment ruling, arguing that the court did not apply the Illinois duty to defend test to support the conclusion that Country Mutual owed that duty to Witbrod. Country Mutual also argued that the court incorrectly described the Illinois duty to indemnify standard because it failed to consider the insured’s actual liability in the underlying lawsuit and whether the resulting loss or damage from that actual liability fell within the policy’s coverage. In the alternative, Country Mutual moved for leave to file a second amended complaint.

¶ 53 On September 12, 2024, the trial court denied Country Mutual’s motion to reconsider but granted its motion for leave to file a second amended complaint. The following day, Country Mutual filed its second amended complaint for declaratory judgment. In count I, Country Mutual alleged that Witbrod did not qualify as an “insured” under its policies and stated that it reasserted count I from its previously dismissed amended complaint to preserve its rights on appeal. In counts II and III, Country Mutual alleged that it was not liable for the judgment in the underlying lawsuit. Country Mutual pleaded counts II and III in the alternative “to the extent Witbrod is an insured” under its policies, noting that it did not waive its right to appeal the court’s May 28, 2024, decision, “which was converted to a non-final order on Country Mutual’s Motion.” Country Mutual alleged that Witbrod assumed an obligation without Country Mutual’s consent by entering into a consent judgment with Kreulach. Country Mutual also asserted that the judgment in the underlying lawsuit was unreasonable and, therefore, not binding on it.

¶ 54 On September 19, 2024, Country Mutual filed a motion for immediate appeal of the trial court’s May 28, 2024, order pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). Country Mutual asserted that the summary judgment order resolved competing reciprocal claims asserted by the parties regarding whether Witbrod was an “insured” under the policies it issued to Wix. Country Mutual argued that a finding under Rule 304(a) was applicable because there were multiple claims asserted in its second amended complaint, for which no final judgment had been entered and that there was no just reason for delaying the appeal.

¶ 55 However, the litigation of the declaratory action continued on September 25, 2024, as Kreulach moved to dismiss counts II and III of Country Mutual’s second amended complaint for declaratory judgment. She argued that count II should be dismissed because no consent judgment was entered, binding precedent held that Witbrod did not breach Country Mutual’s policies, and

Country Mutual was estopped from taking contradictory positions concerning Witbrod's insured status. She contended that dismissal of count II was warranted because the trial court could act as an appellate court regarding the binding arbitration findings.

¶ 56 On September 30, 2024, the trial court denied Country Mutual's motion for immediate appeal of the May 28, 2024, order.

¶ 57 On October 11, 2024, Witbrod moved for summary judgment of Country Mutual's second amended complaint for declaratory judgment. Witbrod argued similarly to Kreulach's motion to dismiss counts II and III of Country Mutual's second amended complaint.

¶ 58 On January 3, 2025, the trial court denied Kreulach's motion to dismiss counts II and III and Witbrod's motion for summary judgment. The court found that Country Mutual was not precluded from challenging the reasonableness of the arbitration award. The court stated that, "where the specter of potential collusion between an insured and an injured plaintiff exists, Illinois courts have permitted an insurer to challenge the reasonableness of any settlement agreement entered by and between the injured plaintiff and the insured." To that end, the court stated as follows:

"Here, Country Mutual did not simply deny coverage. It promptly filed its declaratory judgment action in July 2023. Country Mutual was not timely notified or provided a copy of the November 27, 2023, partial settlement agreement between Kreulach, Witbrod, and State Farm. It first received a copy in September 2024, after this Court had already ruled on the cross-motions for summary judgment on Count I. Country Mutual was not notified in advance of when or where the arbitration would occur. Country Mutual was certainly not invited to participate in the arbitration. And, the Court seriously doubts counsel for Kreulach and Witbrod would have readily permitted Country Mutual—a non-party to the

underlying tort case that was to be arbitrated and a non-party to the agreement to arbitrate— to have participated. Country Mutual was not notified of the arbitrator’s award or the motion to confirm that award. By the time it had notice of the arbitrator’s award, [the arbitrator] had already entered his order confirming the award and the parties were already briefing their cross-motions for summary judgment as to Count I.”

The court held that, based on the limited record before it, it could not foreclose Country Mutual’s equitable right to contest the reasonableness of the \$3.2 million award “before it is obligated to potentially provide indemnification in that very substantial amount.”

¶ 59 Kreulach and Witbrod moved for reconsideration of the denial of their motions to dismiss count III of Country Mutual’s second amended complaint. The trial court denied the motion for reconsideration on April 5, 2025. Although not file stamped, Kreulach apparently had filed a motion to quash or be held in civil contempt following the discovery issued by Country Mutual in April 2025. Essentially, she challenged Country Mutual’s right to receive her medical records, which Country Mutual contended were needed for the reasonableness hearing on the arbitration finding ordered by the trial court. She also filed a motion for clarification on April 29, 2025, requesting clarification of a number of issues stemming from count III of Country Mutual’s second amended complaint for declaratory judgment. Country Mutual opposed Kreulach’s motion to quash as “a clear attempt to obstruct the Court’s ability to conduct the reasonableness hearing it previously ordered [to] take place.”

¶ 60 The trial court conducted a hearing on Kreulach’s motions to quash and for clarification on July 9, 2025. There, the court considered whether an interlocutory appeal was necessary to consider its prior ruling regarding insurance coverage. The court stated that it was “of the opinion that the more appropriate issue to go up is the substantive and potentially dispositive issue of

whether there is or is not coverage for Witbrod under the Country Mutual excess or umbrella policies.” The court specifically noted that *Molda III* “is at odds with several federal and *** out of state rulings interpreting the specific language at issue and also potentially at odds with the natural reading of the policy language at issue.” Accordingly, the court granted Rule 304(a) language for the threshold issue of coverage to be determined on appeal.

¶ 61 Following the hearing, the trial court entered a written order the same day, stating that, pursuant to Rule 304(a), “the Court finds that there is no just reason for delaying either enforcement or appeal of the summary judgment ruling contained in the Memorandum Opinion and Ruling on Cross-Motions for Summary Judgment dated May 28, 2024.”² The court also stayed further litigation of Country Mutual’s second amended complaint for declaratory judgment. Country Mutual filed a timely appeal following the entry of the court’s Rule 304(a) finding.

¶ 62

II. ANALYSIS

¶ 63 On appeal, Country Mutual argues that Witbrod is not an “insured” under both of its policies issued to Wix using either the duty to defend or the duty to indemnify standard. Country Mutual contends that, pursuant to the clear and unambiguous language of its policies, Witbrod did not qualify as an “insured” in the underlying lawsuit because (1) Kreulach did not allege that Witbrod was liable for Wix’s conduct and (2) the judgment Kreulach obtained against Witbrod in the underlying lawsuit was not for Wix’s conduct. Country Mutual seeks reversal of the trial court’s determination that Witbrod qualified as an “insured” under its policies.

²Rule 304(a) states that a finding under that rule “may be made at the time of the entry of the judgment or thereafter on the court’s own motion or on motion of any party.” Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016).

¶ 64 Kreulach responds that Country Mutual pleaded itself out of court and should not have been allowed to file a post-summary judgment second amended complaint for declaratory judgment.³ Essentially, Kreulach asserts that Country Mutual should not have been allowed to plead in its second amended complaint in count I that Witbrod was not an “insured” under its policies and then contradictorily plead in counts II and III that Witbrod was an “insured” under its policies.⁴ Kreulach also argues that the *Molda III* decision established that Witbrod was an “insured” under Country Mutual’s policies. In addition, she contends that, even if the *Molda III* decision did not exist, Country Mutual’s policies provide coverage or, at the very least, contain inherent ambiguities that must be construed in favor of coverage.

¶ 65 In its reply, Country Mutual argues that it is legally permissible to plead claims in the alternative. Count I of its second amended complaint for declaratory judgment asserts that Witbrod did not qualify as an “insured” under Country Mutual’s policies and the pleading expressly

³Witbrod and Kreulach are the named defendants in Country Mutual’s declaratory judgment action, however, only Kreulach filed a response brief on appeal.

⁴In her response brief, Kreulach argues before this court that Country Mutual’s second amended complaint for declaratory judgment was untimely, stating that Country Mutual

“was provided notice of [Kreulach’s] offer to arbitrate the tort case (in September of 2023)[,] that Witbrod/State Farm accepted the offer (in December of 2023)[,] and a copy of the arbitration award (in February of 2024)[,] yet it chose not even to attempt to file its second amended complaint until June of 2024 after losing summary judgment on Count 1.”

Kreulach’s argument here, however, is misleading when considering the trial court pointed to “potential collusion” in its January 3, 2025, denial of Kreulach’s motion to dismiss counts II and III of Country Mutual’s second amended complaint for declaratory judgment. See *supra* ¶ 58.

provided that count I was included to preserve Country Mutual's rights on appeal. Counts II and III were specifically pleaded in the alternative "to the extent Witbrod is an insured" under the Country Mutual policies.

¶ 66 Country Mutual contends that the Code expressly allows for alternative pleading under section 2-613(b) (735 ILCS 5/2-613(b) (West 2022)). Section 2-613 governs separate counts of complaints, and subsection (b) provides that "[w]hen a party is in doubt as to which of two or more statements of fact is true, he or she may, regardless of consistency, state them in the alternative or hypothetically in the same or different counts ***. A bad alternative does not affect a good one." *Id.* Country Mutual argues that the Code "clearly authorizes alternative pleading, regardless of the consistency of the allegations, as long as the alternative factual statements are made in good faith and with genuine doubt as to which contradictory allegation is true," citing *Bureau Service Co. v. King*, 308 Ill. App. 3d 835, 841 (1999).

¶ 67 In Illinois,

"[i]t is well settled that at the pleading stage of the proceedings, where the issue is solely the sufficiency of the pleadings and whether plaintiffs can conceivably prove a set of facts that would entitle them to recovery, plaintiffs may plead factual allegations and legal theories in the alternative and, at trial, choose which theories of recovery to pursue." *Id.*

Moreover, our supreme court has stated that "[t]he rules governing the preservation of dismissed claims for purposes of appellate review are clear and well settled." *Bonhomme v. St. James*, 2012 IL 112393, ¶ 17. "[A] party who files an amended pleading waives any objection to the trial court's ruling on the former complaints," and " '[w]here an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn.' " *Foxcroft Townhome Owners Ass'n v.*

Hoffman Rosner Corp., 96 Ill. 2d 150, 153-54 (1983) (quoting *Bowman v. County of Lake*, 29 Ill. 2d 268, 272 (1963)). In short, had Country Mutual failed to refer back in its second amended complaint and preserve its assertion in count I that Witbrod was not an “insured” under its policies, the claim would have been abandoned, as held in *Foxcroft*. Section 2-613(b) of the Code applies here and Country Mutual properly preserved its claim that Witbrod is not an “insured” under its policies for purposes of this appeal. 735 ILCS 5/2-613(b) (West 2022); *Foxcroft*, 96 Ill. 2d at 153-54.

¶ 68 We now turn to the merits of this appeal to address whether Witbrod was an “insured” under Country Mutual’s policies issued to Wix.

¶ 69 A. Standard of Review

¶ 70 1. Summary Judgment

¶ 71 Summary judgment is appropriate “if 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(c) (West 2022). The parties here filed cross-motions for summary judgment, which typically indicates there are no disputed material facts, though we note that the mere filing of cross-motions for summary judgment does not conclusively establish that there is no issue of material fact. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. “When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record.” *Id.* We review *de novo* the trial court’s decision on cross-motions for summary judgment. *Id.* ¶ 30.

¶ 72 2. Construing an Insurance Policy

¶ 73 An insurance policy is a contract, and the traditional rules of contract interpretation are applied to determine the scope of insurance coverage. *Illinois Insurance Guaranty Fund v. Virginia*

Surety Co., 2012 IL App (1st) 113758, ¶ 15. The construction of an insurance policy is a question of law, which we review *de novo*. *Pekin Insurance Co. v. Willett*, 301 Ill. App. 3d 1034, 1037 (1998). When construing the language of an insurance policy, courts must ascertain and give effect to the intention of the parties as expressed in their agreement. *Id.* Thus, policy terms are given their plain and ordinary meaning and are applied as written unless such application contravenes public policy. *Id.* Conversely, if the policy language is susceptible to more than one meaning, it is considered ambiguous and will be construed strictly against the insurer who drafted the policy and in favor of the insured (*American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997)); however, courts will not strain to find ambiguity in a policy where none exists. *McKinney v. Allstate Insurance Co.*, 188 Ill. 2d 493, 497 (1999). “[A]n ambiguity will be found if the language of the contract is ‘obscure in meaning through indefiniteness of expression.’ ” *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004) (quoting *Platt v. Gateway International Motorsports Corp.*, 351 Ill. App. 3d 326, 330 (2004)). However, “[a] contract is not rendered ambiguous merely because the parties disagree on its meaning.” *Id.* An undefined term in an insurance policy is given its plain, ordinary, and popular meaning, which can be obtained in a dictionary. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 366 (2006). “Basic insurance and contract law indicate insurance companies provide coverage for particular risks in exchange for premiums and do not gratuitously pay noncovered claims.” *Illinois Insurance Guaranty Fund*, 2012 IL App (1st) 113758, ¶ 15 (citing *Ryan v. State Farm Mutual Automobile Insurance Co.*, 397 Ill. App. 3d 48, 51-52 (2009) (insurance policies are contracts and the insurer’s risk corresponds with the insured’s premium)).

¶ 75 The duty to defend refers to an insurer's duty to defend its insured against pending claims. "An insurer's duty to defend an insured is triggered (1) when the insured tenders the defense of an action that is potentially within the scope of coverage [citation] or (2) when the insurer has "actual notice" of such a claim, even without a formal tender [citation]." *Crawford v. Belhaven Realty LLC*, 2018 IL App (1st) 170731, ¶ 37. "Tendering a defense, in this context, means asking the insurer for assistance in defending the suit." *Id.* In a declaratory judgment action involving the issue of 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." *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010) (citing *Koloms*, 177 Ill. 2d at 479). "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.* This principle has been referred to as the "eight corners rule." See *Farmers Automobile Insurance Ass'n v. Country Mutual Insurance Co.*, 309 Ill. App. 3d 694, 698 (2000) (the "court should compare the four corners of the underlying complaint with the four corners of the insurance contract"). The insurer's duty to defend is much broader than its duty to indemnify the insured. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 393-94 (1993).

¶ 76 "When an insurer is uncertain as to its duty to defend, it must either seek a declaratory judgment as to its obligations and rights prior to trial or settlement of the underlying action or defend under a reservation of rights or both." *RLI Insurance Co. v. Illinois National Insurance Co.*, 335 Ill. App. 3d 633, 644 (2002). "Failure to take one of these courses of action and refusal to defend an insured who ultimately incurs an adverse judgment estops the insurer from raising policy exclusions or noncoverage as a defense in any subsequent action brought to recover policy

proceeds.” *Id.* at 644-45. In this case, Country Mutual filed a declaratory judgment action prior to trial or settlement of the underlying lawsuit, asserting that Witbrod was not an “insured” under its policies.

¶ 77

4. Duty to Indemnify

¶ 78 The duty to indemnify relates to an insurer’s duty to satisfy a judgment entered against the insured. *Northern Illinois Gas Co. v. Home Insurance Co.*, 334 Ill. App. 3d 38, 55 (2002). “The duty to indemnify arises only if the facts alleged actually fall within coverage.” (Emphasis omitted.) *Crum & Forster*, 156 Ill. 2d at 398. “The duty to indemnify ‘will not be defined until the adjudication of the very action which [the insurer] should have defended.’ ” (Internal quotation marks omitted.) *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 127 (1992) (quoting *Maryland Casualty Co. v. Chicago & North Western Transportation Co.*, 126 Ill. App. 3d 150, 156 (1984)). “In other words, the question of whether the insurer has a duty to indemnify the insured for a particular liability is only ripe for consideration if the insured has already incurred liability in the underlying claim against it.” *Id.* “If so, the duty to indemnify arises if the insured’s activity and the resulting loss or damage *actually* fall within the *** policy’s coverage.” (Emphasis in original.) *Id.* at 128. In cases where no duty to defend exists and the facts alleged do not even potentially fall within the insurance coverage, “such facts alleged could obviously never actually fall within the scope of coverage.” (Emphasis omitted.) *Crum & Forster*, 156 Ill. 2d at 398. Thus, a duty to indemnify does not arise. *Id.*

¶ 79

B. Country Mutual’s Policy Language Frames the Coverage Analysis

¶ 80 Country Mutual argues that its business and umbrella policies are excess with respect to matters involving Witbrod’s vehicle—meaning that Country Mutual did not owe an “insured” a duty to defend relating to the underlying lawsuit. Country Mutual contends that State Farm was

the primary insurer in this case and, as such, State Farm owed Witbrod, its insured, a duty to defend. “Primary insurance coverage is coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of an event that gives rise to liability.” *Certain Underwriters at Lloyd’s, London v. Central Mutual Insurance Co.*, 2014 IL App (1st) 133145, ¶ 2. “A primary insurer provides ‘ “first dollar” ’ coverage up to the limits of its policy.” *Id.* (citing Scott M. Seaman & Charlene Kittredge, *Excess Liability Insurance: Law and Litigation*, 32 Tort & Ins. L.J. 653, 655 (1997)). “In contrast with primary insurance, excess insurance coverage is a secondary layer which protects an insured when a judgment or settlement exceeds the primary policy’s limits of liability.” *Id.*

¶ 81 According to Country Mutual, the trial court incorrectly analyzed whether Witbrod was an “insured” under its policies using the duty to defend standard, which led to the court improperly finding that Country Mutual owed Witbrod a duty to defend in the underlying lawsuit. Country Mutual contends Witbrod was not an “insured” under the language of its policies. Accordingly, Country Mutual argues the court utilized an improper framework to conclude that Witbrod was an “insured” under its policies.

¶ 82 1. The Policies’ Competing “Other Insurance” Clauses

¶ 83 Commercial general liability (CGL) policies typically contain “other insurance” clauses, which are meant to shift the duty of defense to another insurer when more than one is available. See *John Burns Construction Co. v. Indiana Insurance Co.*, 189 Ill. 2d 570, 576 (2000) (“the purpose of an ‘other insurance’ clause is not to trigger coverage but to provide a method of apportioning coverage that would be triggered otherwise”). The priority of coverage between insurance policies is dictated by the terms of the “other insurance” clauses in the policies. *Putnam v. New Amsterdam Casualty Co.*, 48 Ill. 2d 71, 76-77 (1970). When the targeted policies both

contain “other insurance” clauses, courts will look to the wording of the clauses to determine the priority of coverage. See *id.* (finding that, whenever possible, “other insurance” clauses in competing policies should be reconciled to effectuate the intent of the parties).

¶ 84 How the “other insurance” clauses in the Country Mutual and State Farm policies are characterized—as either primary or excess—determines the framework of our analysis in this case. When one insurance policy contains a primary “other insurance” clause and the second insurance policy contains an excess “other insurance” clause, the insurance company with the excess “other insurance” clause is treated as providing excess coverage. *River Village I, LLC v. Central Insurance Cos.*, 396 Ill. App. 3d 480, 483, 487 (2009); *United States Fire Insurance Co. v. Aetna Life & Casualty*, 291 Ill. App. 3d 991, 1002 (1997). In such an instance, the insurance company providing excess coverage is held liable only after the insurance company with the primary “other insurance” clause has exhausted its policy limits. See *Central Illinois Public Service Co. v. Agricultural Insurance Co.*, 378 Ill. App. 3d 728, 731 (2008) (“primary insurers have a duty to defend the insured because liability for a primary insurer attaches immediately upon the occurrence creating the liability for the insured, whereas liability for an excess insurer occurs only after a predetermined amount of primary insurance has been exhausted”); *American States Insurance Co. v. Liberty Mutual Insurance Co.*, 291 Ill. App. 3d 336, 339 (1997) (primary insurers have a duty to pay defense costs, and excess insurers are not liable to pay defense costs before the conclusion of the underlying suit). Illinois courts are encouraged to reconcile “other insurance” provisions “whenever possible in order to effectuate the intent of the parties”; however, courts should not “arbitrarily pick one policy to be read first and undermine the intention of the insurer whose policy is read second.” *Certain Underwriters at Lloyd’s, London*, 2014 IL App (1st) 133145, ¶ 17. If the two “other insurance” clauses from the competing insurance policies are deemed to be

irreconcilable, then the two insurers should share in the cost of defending and indemnifying the underlying lawsuit. *Ohio Casualty Insurance Co. v. Oak Builders, Inc.*, 373 Ill. App. 3d 997, 1004 (2007).

¶ 85 In this case, the “other insurance” clauses in the Country Mutual and State Farm policies are unambiguous and not subject to more than one reasonable interpretation. *Country Mutual Insurance Co. v. Teachers Insurance Co.*, 324 Ill. App. 3d 246, 249 (2001). The State Farm policy specifically provided that “[t]he Liability Coverage provided by this policy applies as primary coverage for the *** use of” the 2009 BMW and was the only policy issued to Witbrod by State Farm that applied to the accident as primary coverage. The State Farm policy states that, even if a competing policy also provided primary coverage, State Farm would “pay the proportion of damages payable as primary” under the limits of its policy “and the limits of all other liability coverage that apply as primary coverage.” The Country Mutual Business Policy states that “[f]or any covered ‘auto’ you don’t own,” such as Witbrod’s 2009 BMW, “the insurance provided by the Coverage Form is excess over any other collectible insurance.” The Country Mutual Umbrella Policy provides that “[t]his insurance is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis.”

¶ 86 In *Teachers Insurance*, the court reviewed the same policy language as in this case to determine whether Country Mutual or Teachers Insurance was the primary insurer. *Id.* at 247. There, a teacher at a school was involved in a car accident with a student, driving a vehicle that she owned while she was in the course of her employment. *Id.* As in this case, the Country Mutual policy in *Teachers Insurance* provided, “[f]or any covered auto you don’t own, the insurance provided by this policy is excess over any other collectible insurance.” (Emphasis and internal quotation marks omitted.) *Id.* The court enforced the Country Mutual policy as written, taking into

account the type of policy and its overall purpose, finding that it provided only excess coverage over any other collectible insurance that applied. *Id.* at 249; see *Vedder v. Continental Western Insurance Co.*, 2012 IL App (5th) 110583, ¶¶ 18-19 (holding same after construing similar policy language).

¶ 87 We likewise enforce the Country Mutual policies as written, finding that they provide only excess coverage over the State Farm primary insurance for the underlying lawsuit. *Teachers Insurance*, 324 Ill. App. 3d at 249; *Vedder*, 2012 IL App (5th) 110583, ¶¶ 18-19. Here, the State Farm policy is “other collectible insurance” for the 2009 BMW. Our supreme court held that, pursuant to custom in the insurance industry, primary liability is generally placed on the insurer of the owner of the car. See *State Farm Mutual Automobile Insurance Co. v. Universal Underwriters Group*, 182 Ill. 2d 240, 246 (1998).

¶ 88 2. The Summary Judgment Finding Under a Duty to Defend Standard

¶ 89 In this case, when the trial court made its summary judgment ruling, it also recognized that State Farm’s policy served as the primary policy and that Country Mutual’s policies, if applicable, were secondary or excess to State Farm’s coverage. Country Mutual argues that the trial court nevertheless incorrectly analyzed whether Witbrod was an “insured” under its policies using a duty to defend test, thereby requiring reversal of summary judgment. Country Mutual contests the trial court’s framing of its analysis because the excess insurer’s duty to defend does not arise until the limits in the primary policy are exhausted.⁵ See *Kajima Construction Services, Inc. v. St. Paul Fire*

⁵The appellate record does not make clear whether State Farm has actually paid \$100,000 to Kreulach as part of the November 27, 2023, agreement. However, if State Farm submitted \$100,000 to Kreulach, the payment of that amount would have exhausted State Farm’s policy limit for the accident and, thus, it would no longer have coverage obligations to Witbrod, its insured. Further, the trial court’s

& Marine Insurance Co., 227 Ill. 2d 102, 115, 117 (2007) (holding that an insured must exhaust all of its primary insurance before invoking excess coverage). Country Mutual contends that even if its policies were primary with defense obligations for covered accidents, which it did not concede, the underlying lawsuit failed to allege facts that would render Witbrod an “insured” under its policies. Comparing the language of the insurance policy to the allegations in the underlying complaint is required when determining whether there is a duty to defend. *Outboard Marine*, 154 Ill. 2d at 107-08 (“To determine whether the insurer has a duty to defend the insured, the court must look to the allegations in the underlying complaint and compare these allegations to the relevant provisions of the insurance policy.”). Country Mutual asserted that the court did not compare the underlying lawsuit’s allegations to the terms of its policies and that, when the duty to defend is correctly applied, the allegations against Witbrod did not trigger that duty.

¶ 90 The initial complaint filed in the underlying lawsuit only sought relief from Witbrod for his negligent operation of the 2009 BMW, a vehicle he owned. Although the amended complaint, which was filed after Country Mutual had filed its declaratory judgment action, stated that Witbrod

confirmation of the arbitration award on January 11, 2024, served to end the underlying lawsuit as well. The electronic docket of the Circuit Court of the Nineteenth Judicial Circuit reflects that on January 11, 2024, judgment was entered in favor of Kreulach and against Witbrod in the amount of \$3,205,469.19, and that the case was closed. See *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, ¶ 24 n.4 (taking notice of court clerk’s on-line docket entries). As there is no longer any underlying lawsuit based on the settlement, there is no longer a duty to defend. And, if there is no duty to defend, there is no duty to indemnify. See *American Family Mutual Insurance Co. v. Enright*, 334 Ill. App. 3d 1026, 1029 (2002) (“If the insurer owes no duty to defend, then it owes no duty to indemnify because the duty to defend is broader than the duty to indemnify.”).

was acting within the course and scope of his employment with Wix, the amended complaint neither named Wix as a party nor sought relief from Wix for Witbrod’s alleged negligent conduct. Country Mutual argues that, as such, only the claim against Witbrod for negligent driving is relevant to Country Mutual’s coverage determination.

¶ 91 The Country Mutual policies extended “insured” status to “[a]nyone liable for the conduct” of Wix, “but only to the extent of that liability.” Accordingly, Witbrod’s “insured” status under Country Mutual’s policies depends upon whether the pleadings in the underlying lawsuit potentially sought to hold Witbrod liable for Wix’s conduct. Country Mutual argues that the underlying lawsuit did not allege or seek to impose liability on Witbrod for Wix’s conduct. Country Mutual points out that the underlying lawsuit was devoid of allegations that Wix engaged in any conduct, negligent or otherwise, relating to the accident. Considering that, under its policies, “insured” status applies “only to the extent of that liability,” Country Mutual asserts that Witbrod cannot qualify as an insured if there was no actual or alleged liability for the conduct of another insured: in this case, Wix. In short, Country Mutual argues that Witbrod does not qualify as an insured because he was not sued for vicarious liability for Wix’s alleged misconduct. This brings us to a discussion of *Molda III* and whether it applies here.

¶ 92 C. The *Molda* Litigation

¶ 93 1. *Molda I*

¶ 94 The genesis of the *Molda* litigation occurred on August 17, 2005, when the defendant, Michael Molda, driving his mother’s car, collided with the underlying plaintiff, Nola Wilson. *Wilson v. Molda*, 396 Ill. App. 3d 100, 101 (2009) (*Molda I*). Wilson filed a personal injury action against Molda a few days before the two-year statute of limitations expired. *Id.* at 102. Months after the statute of limitation expired, Wilson learned that Molda had been working for the

defendant, Metrolift, Inc. (Metrolift), when the accident occurred. *Id.* Wilson filed an amended complaint on April 23, 2008, adding Metrolift as a defendant and adding a second count alleging that Metrolift was liable for Molda's negligence under a theory of *respondeat superior*. *Id.* at 103. Metrolift moved to dismiss count II of Wilson's complaint, asserting the statute of limitations as a bar. *Id.* In her opposition motion, Wilson argued that, because Metrolift and Molda were jointly and severally liable under the theory of *respondeat superior*, the timely filing against Molda preserved her claim against Metrolift under the relation-back provision of section 2-616(b) of the Code (735 ILCS 5/2-616(b) (West 2006)). *Molda I*, 396 Ill. App. 3d at 103-04. The trial court granted Metrolift's motion to dismiss, finding that Wilson's claim against Metrolift was not saved by section 2-616(b) and that the claim was barred by the two-year statute of limitations. *Id.* at 104.

¶ 95 On appeal, the *Molda I* court solely addressed whether Wilson's timely complaint filed against Molda preserved her claims against Metrolift. *Id.* at 106. Wilson suggested that the filing of a complaint against one defendant should preserve a claim against another defendant, essentially asking the court to be the first to find that "the filing of a claim against an employee automatically preserves any claims against his or her employer, so long as the claims arose out of the same transaction and occurrence alleged against the employee and so long as they arose out of his or her employment." *Id.*

¶ 96 The reviewing court declined Wilson's invitation "to rewrite the existing statute of limitations, as we believe that is the job of the legislature." *Id.* at 106-07. In its reasoning for not applying section 2-616(b) to Wilson's case, the court explained that subsection (b) "does not speak of adding defendants, but only of adding claims." *Id.* at 108-09 ("subsection (b), by its terms, applies only to the addition of 'causes of action, cross claim[s] or defense[s]' " (quoting 735 ILCS 5/2-616(b) (West 2006))). The *Molda I* court also pointed out that Code section 2-401 states that a

complaint must provide “ ‘the names of all parties for and against whom relief is sought.’ ” *Id.* at 110 (quoting 735 ILCS 5/2-401(c) (West 2006)). Wilson failed to cite a case where a court permitted a plaintiff to use section 2-616(b) to add a new defendant. *Id.* Ultimately, the *Molda I* court held that Wilson’s cause of action against Metrolift was barred by the statute of limitation and that section 2-616(b) did not save it. *Id.* at 111. The last sentence of the opinion states, “[w]e express no opinion concerning any indemnification claim that defendant Molda may have against Metrolift, since the trial court made no ruling concerning indemnification.” *Id.*

¶ 97

2. *Molda II*

¶ 98 The next iteration of *Molda* involved the declaratory judgment action filed by First Chicago Insurance Company (First Chicago), which sought a declaration that it had no duty to defend or indemnify the defendant, Molda, or his employer, Metrolift, for the underlying lawsuit. See *First Chicago Insurance Co. v. Molda*, 408 Ill. App. 3d 839, 839-40 (2011) (*Molda II*). There, the trial court granted First Chicago’s motion for summary judgment, finding that it had not received timely notice of the accident as required by Metrolift’s insurance policy. *Id.* at 840. The *Molda II* court stated that the automobile Molda had been driving at the time of the accident “had only \$20,000 in liability coverage.” *Id.* First Chicago “had issued a policy including liability coverage for automobiles ‘owned by [Metrolift’s] employees or members of their house-holds [*sic*].’ ” *Id.* The disposition did not specify whether First Chicago’s policy was a primary or excess policy and set forth only the notice provisions of the policy that were at issue in the appeal. *Id.* at 840-41. Two Metrolift executives became aware of the accident within two days of its occurrence but decided to wait and see whether Metrolift would be named in a lawsuit and whether Molda’s personal insurance policy would provide sufficient coverage. *Id.* at 842. Metrolift filed its declaratory judgment complaint on April 24, 2008, alleging that it first received notice of the occurrence on

March 26, 2008. *Id.* at 843. Molda filed a counterclaim and third-party complaint against Metrolift and First Chicago, seeking indemnification from First Chicago based on Metrolift’s insurance policy for “ ‘any judgment rendered’ ” against Molda in the underlying lawsuit involving Wilson. *Id.* at 844.

¶ 99 On appeal, Molda and Wilson argued that First Chicago was estopped from denying that it received timely notice of the accident because First Chicago’s insurance broker had received timely notice and notice to an agent is imputed to the principal. *Id.* at 844-45. Molda and Wilson also contended that, as to Molda, notice to First Chicago was timely and public policy concerns required the reviewing court to construe the insurance contract in favor of coverage. *Id.* at 845. The *Molda II* court reversed summary judgment, finding that there were issues of fact remaining as to whether the insurance broker was acting as an agent of First Chicago for purposes of receiving notice from Metrolift. *Id.* at 852-53. In addition, the court found that, as a matter of law, the March 2009 notice received by First Chicago was unreasonable.⁶ *Id.* at 853.

¶ 100

3. *Molda III*

¶ 101 The declaratory judgment action proceeded to a bench trial, in which the trial court determined that First Chicago owed a duty to defend Molda in the underlying personal injury lawsuit involving Wilson. *Molda III*, 2015 IL App (1st) 140548, ¶ 1. *Molda III* discussed the contents of the First Chicago policy in slightly greater detail. Similar to the instant case, the insured

⁶The disposition earlier had stated that Metrolift alleged in its declaratory judgment complaint that it first received notice on March 26, 2008. *Molda II*, 408 Ill. App. 3d at 843. First Chicago had sent a reservation of rights letter to Metrolift on April 2, 2008. *Id.* Thus, it appears that the holding that “the March 2009 notice received by First Chicago was unreasonable,” is a typographical error and refers to the March 2008 notice. *Id.* at 853.

employer, Metrolift, had purchased liability coverage for certain categories of covered “autos.” *Id.* ¶ 6. As here, category 9 referred to non-owned autos as “[o]nly those autos you do not own, lease, hire or borrow which are used in connection with your business. This includes autos owned by your employees or members of their house-holds but only while used in your business or your personal affairs.” (Internal quotation marks omitted.) *Id.* The policy stated that the terms “ ‘you’ ” and “ ‘your’ ” referred to Metrolift, the named insured. (Internal quotation marks omitted.) *Id.* Also similar to this case, the policy listed “[t]he following are ‘insureds’ ” under the policy:

“a. You for any covered ‘auto’.

b. Anyone else while using with your permission a covered ‘auto’ you own, hire or borrow except:

(2) Your employee if the covered ‘auto’ is owned by that employee or a member of his or her household.

* * *

c. Anyone liable for the conduct of an ‘insured’ described above but only to the extent of that liability.” (Internal quotation marks omitted.) *Id.* ¶ 7.

¶ 102 On the first day of trial, First Chicago amended its complaint for declaratory judgment to add a claim in addition to the late notice of loss and late notice of lawsuit. *Id.* ¶ 12. First Chicago added a third count alleging that “ ‘Molda is not an Insured as Defined by the [First Chicago] Policy of Insurance.’ ” *Id.* First Chicago alleged that Molda was not operating a covered “auto” under the policy and was only an insured to the extent of Metrolift’s liability and, because there could be no liability against Metrolift (as Wilson had failed to file a complaint against Metrolift within the two-year statute of limitations), Molda was not an insured under the policy. *Id.*

¶ 103 Molda testified at the bench trial that, at the time of the accident, he was driving to a construction site and was performing his job duties for Metrolift. *Id.* ¶ 22. The car he was driving was owned by his mother, and he had not been offered a company car. *Id.* Metrolift expected Molda to use his own vehicle as part of his job duties as a salesman. *Id.* Molda testified that he had insurance on the vehicle through State Farm, which had a \$20,000 policy limit. *Id.* He stated that he had notified both State Farm and Metrolift after the accident but never had any communications with First Chicago. *Id.* He had first learned of the existence of First Chicago and Metrolift's insurance coverage in 2008. *Id.*

¶ 104 The trial court entered judgment in favor of the defendants, Molda and Wilson, and against the plaintiff, First Chicago. *Id.* ¶ 26. The court further declared that “the applicable [First Chicago] policy of insurance entitles Molda to defense and indemnification relative to any and all claims of Wilson.” (Internal quotation marks omitted.) *Id.* The court found, among other things, that Molda's vehicle “was a non-owned auto as defined by category 9 of the insurance policy.” *Id.* In addition, the court stated that “ ‘[t]he complaint filed by Wilson contained allegations which would trigger coverage of Molda, if said complaint was timely filed within the statute of limitations,’ ” and, thus, it found that Molda was an insured under the First Chicago policy. *Id.*

¶ 105 On appeal, First Chicago argued that the trial court erred when it found that Molda was an insured under its policy because (1) Molda's vehicle was not a covered auto under the policy and (2) Molda was not an insured as defined by the policy. *Id.* ¶ 33. The *Molda III* court first noted that “First Chicago agreed to ‘pay all sums an “insured” legally must pay as damages because of “bodily injury” or “property damage” to which this insurance applies, caused by an “accident” and resulting from the ownership, maintenance or use of a covered “auto,” ’ ” and also “owed the ‘right and duty to defend any “insured” against a “suit” asking for such damages.’ ” *Id.* ¶ 35. The court

analyzed the language of the policy and concluded that Molda's vehicle was not owned, leased, hired, or borrowed by Metrolift and, therefore, "if it was used in connection with Metrolift's business, then it would be a covered auto under category 9." *Id.* ¶ 44. Considering the trial evidence, the *Molda III* court found that "Molda's vehicle was properly considered to be a 'nonowned auto' under the First Chicago policy." *Id.* ¶ 45. The *Molda III* court specifically noted that "the trial court was not asked to determine whether Metrolift would be vicariously liable for Molda's actions" and instead, the policy "merely required Molda to be operating the vehicle 'in connection with' Metrolift's business." *Id.* ¶ 47.

¶ 106 The *Molda III* court next considered whether Molda was an insured under the First Chicago policy language. *Id.* ¶ 49. Initially, the court again provided the pertinent policy language describing who was an insured under the policy and stated that "Molda does not qualify as an insured under either paragraph (a) or (b), since he was not the named insured and the vehicle he was driving was not owned, hired or borrowed by Metrolift." *Id.* Accordingly, the only way that Molda could be covered by the policy was if paragraph (c) applied. *Id.* Pertinent to this case, *Molda III* affirmed the trial court, holding as follows:

"We agree with the trial court that Molda qualifies as an insured under paragraph (c). Under that paragraph, Molda would be considered an insured if he was liable for the conduct of Metrolift, but only to the extent of that liability. First Chicago argues that since all of the claims against Metrolift were dismissed, Metrolift has no liability for the accident and, consequently, Molda cannot be considered an insured since he would be an insured 'only to the extent of [Metrolift's] liability.' However, First Chicago's argument overlooks the fact that ' "[q]uestions of applicable coverage can be determined only as of the time of the accident creating potential liability." ' [Citations.] At the time of the accident, Metrolift

had potential liability under the doctrine of *respondeat superior*, and, in fact, was included as a defendant in Wilson’s case on that basis. If Wilson obtained a judgment against Metrolift under the theory of *respondeat superior*, Metrolift would be entitled to indemnification from Molda under the common law theory of quasi-contractual implied indemnity. [Citations.] Consequently, at the time of the accident, Molda was ‘liable for the conduct of an “insured” described above but only to the extent of that liability,’ and, therefore, qualified as an insured under the First Chicago policy.” *Id.* ¶¶ 50, 74.

¶ 107 D. Whether *Molda III* Applies in This Case

¶ 108 Country Mutual argues that *Molda III* was incorrectly decided and should not apply to this case because (1) it did not apply the Illinois duty to defend standard in its analysis of whether Molda was an insured; (2) it substituted Metrolift’s conduct requirement for an analysis of whether its employee, Molda, could theoretically be liable to Metrolift under a quasi-contractual implied indemnity, a conclusion not supported by the policy language in this case or by Illinois law; and (3) Witbrod is not an insured under the Country Mutual policies when using the duty to indemnify standard, an issue not considered by the *Molda III* court.

¶ 109 Kreulach responds that *Molda III* conclusively shows Witbrod was an insured under Country Mutual’s policies. She argues that *Molda III* is factually identical precedent, considering the same policy language relating to “Who Is An Insured.” Kreulach points out that the *Molda III* court’s analysis concerning First Chicago’s duties did not focus on excess versus primary coverage or the duty to defend versus the duty to indemnify and, instead, simply answered the question of whether Molda, the at-fault-driver, was an insured under the policy. Kreulach asserts that, even under the duty to defend analysis, Witbrod is considered to be an insured under the language of the Country Mutual policies. However, Kreulach did not apply the Illinois duty to defend standard

in her response brief. In fact, she made no mention of the allegations in her underlying complaint and failed to add Wix as a defendant to claim negligence on the theory of *respondeat superior*. Instead, she contends that Country Mutual “confusingly” spent “multiple pages arguing that application of the Illinois ‘duty to defend test’ (which it said not to apply) proves Witbrod is not an insured.” Finally, she argues that if this court departs from *Molda III*, the decision should only prospectively invalidate coverage under similar insurance policies.

¶ 110

1. *Molda III* and the Duty to Defend

¶ 111 “An insurer’s duty to defend arises when (1) the complaint is brought against an insured and (2) the facts as alleged in the complaint fall, or potentially fall, within the policy’s coverage.” *State Farm Mutual Automobile Insurance Co. v. Murphy*, 2019 IL App (2d) 180154, ¶ 23 (citing *Wilson*, 237 Ill. 2d at 455). “ ‘[I]t is the actual complaint, not some hypothetical version, that must be considered.’ ” *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill. App. 3d 749, 761 (2005) (quoting *Connecticut Indemnity Co. v. DER Travel Service, Inc.*, 328 F.3d 347, 350-51 (7th Cir. 2003)). The insured bears the initial burden of showing that a claim falls or potentially falls within the coverage of an insurance policy, and the burden shifts to the insurer to demonstrate whether coverage is precluded by a policy limitation or exclusion. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453-54 (2009).

¶ 112 The court in *Molda III* did not apply this analysis when it found that Molda was an insured under the First Chicago policy. Metrolift was neither a defendant to the underlying complaint nor could have been added, despite Wilson’s efforts, due to the expiration of the statute of limitations, a decision that was affirmed in *Molda I*, 396 Ill. App. 3d at 111. Instead of relying on the underlying complaint as is required under Illinois law, the *Molda III* court stated that “[q]uestions of applicable coverage can be determined only as of the time of the accident creating potential liability.” (Internal

quotation marks omitted.) 2015 IL App (1st) 140548, ¶ 50. The *Molda III* court applied this rule to find that, at the time of the accident, Metrolift had potential liability under the doctrine of *respondeat superior*. *Id.* Although the *Molda III* court cited to a number of cases with the temporal proposition of looking to applicable coverage at the time of the accident, all the cases it cited in support of that proposition involved the issue of whether the alleged insured qualified under a particular descriptor at the time of the accident for insurance coverage purposes. See, e.g., *Gaudina v. State Farm Mutual Automobile Insurance Co.*, 2014 IL App (1st) 131264, ¶¶ 19-27 (alleged insurer challenged the policy definition of “spouse”); *Coley v. State Farm Mutual Automobile Insurance Co.*, 178 Ill. App. 3d 1077, 1081 (1989) (contesting the policy definition of “relative”); *Hawkeye Security Insurance Co. v. Sanchez*, 122 Ill. App. 3d 183, 186 (1984) (determining whether the alleged insured was a “resident” of the household and a “relative of one of the named insureds”).

¶ 113 Indeed, the very first Illinois case to state the proposition that “questions of the applicable coverage provided by the *** policy can be determined only as of the time of the accident,” sought to clarify an ambiguity in the policy as to whether the putative insured was the “spouse” of the plaintiff. See *Sypien v. State Farm Mutual Automobile Insurance Co.*, 111 Ill. App. 3d 19, 20-21 (1982). The *Sypien* court cited *Allstate Insurance Co. v. Wallace*, 435 S.W.2d 537, 538 (Tex. Civ. App. 1968), a Texas case in which the court examined the terms and provisions of the applicable policy to determine whether the appellee, Maggie Wallace, was an insured under the policy at the time of the collision. When Wallace purchased the Allstate policy, she was married to her husband. *Id.* However, when the accident at issue occurred, she was no longer married, and her husband was the only named insured on the policy. *Id.* She argued that because the Allstate policy had been purchased with community funds from the marriage, the court should consider her an insured based

on the date of the issuance of the policy. *Id.* The *Wallace* court found that the source of the money with which the policy was purchased was not material and did not control coverage. *Id.* at 539. The court stated that the question of insurance coverage “can be determined only by the provisions of the policy as of the time of the accident because of which a claim is made.” *Id.* The *Wallace* court held that she was no longer an insured under the policy at the time of the accident because she was no longer married to the named insured. *Id.*

¶ 114 Applying that line of reasoning from those cases to this case, Witbrod’s status as an employee of Wix is determined as of the date of the accident. It is the descriptor and whether the putative insured fits into the definition of that descriptor at the time of the accident which controlled in that line of cases. In this case, “employee” is the comparable temporal descriptor here under the line of cases cited by *Molda III*.

¶ 115 But the parties here do not contest whether Witbrod was an employee of Wix on the date of the accident. Simply put, whether a putative insured is married to a policyholder, is a relative of a policyholder, or is employed by a policyholder are facts that can be ascertained in the absence of a claim without regard to liability, fault, or the nature of the cause of action. In short, the policy descriptor of the putative insured has no bearing on liability or fault. Illinois law provides that the duty to defend is triggered only when a complaint is filed against an insured. See *Wilson*, 237 Ill. 2d at 455; *Murphy*, 2019 IL App (2d) 180154, ¶ 23.

¶ 116 In this case, Kreulach never filed a complaint against Wix alleging it acted negligently in connection to the accident. If we followed *Molda III* and held that, at the time of the accident, Wix had potential liability under the doctrine of *respondeat superior*, we would completely circumvent the duty to defend requirements that are well-settled under Illinois law. See *id.*; *Koloms*, 177 Ill. 2d at 479. Without an underlying complaint alleging negligence against a putative insured, there

indemnity.” 2015 IL App (1st) 140548, ¶ 50. “Consequently, at the time of the accident, Molda was ‘liable for the conduct of an “insured” described above but only to the extent of that liability,’ and, therefore, qualified as an insured under the First Chicago policy.” *Id.* Although we already declined to follow *Molda III* because it did not follow the requirements of Illinois duty to defend precedent, we will address the next logical leap the *Molda III* court took when it applied the theory of quasi-contractual implied indemnity.

¶ 120 “The right to indemnification may arise from contract [citation], or from situations in which a promise to indemnify can be implied from the relationship among the tortfeasors.” *Frazer v. A.F. Munsterman, Inc.*, 123 Ill. 2d 245, 255 (1988) (citing Nina S. Appel & Richard A. Michael, *Contribution Among Joint Tortfeasors in Illinois: An Opportunity for Legislative & Judicial Cooperation*, 10 Loy. Univ. Chi. L. J. 169, 171 & n.8 (1979), and Michael J. Polelle & Bruce L. Ottley, *Illinois Tort Law* 674-75 (1985)). “ ‘Implied indemnity’ is based on principles of restitution: ‘a contract implied in law arising from the legal obligation of an indemnitee to satisfy liability caused by actions of his indemnitor.’ ” *Id.* (quoting *Allison v. Shell Oil Co.*, 113 Ill. 2d 26, 28 (1986)). “The fundamental premise for the cause of action is that the indemnitee, although without fault in fact, has been subjected to liability solely because of the legal relationship with the plaintiff for a nondelegable duty arising out of common or statutory law.” *Id.* (citing 1 James A. Dooley, *Modern Tort Law* § 26.07, at 651 (1982)).

¶ 121 The doctrine of implied indemnity applies in the context of quasi-contractual relationships involving vicarious liability. *American National Bank & Trust Co. v. Columbus-Cuneo-Cabrini Medical Center*, 154 Ill. 2d 347, 350 (1992); *Zielinski v. Miller*, 277 Ill. App. 3d 735, 739 (1995). Our supreme court explained that “[t]he right to common law implied indemnity is available to ‘a tortfeasor whose liability is vicariously imposed by policy of law rather than culpability of

conduct.’ ” *Travelers Casualty & Surety Co. v. Bowman*, 229 Ill. 2d 461, 472 (2008) (quoting *Allison*, 113 Ill. 2d at 35). “For example, if ‘an injured party could hold an employer or property owner vicariously liable for the negligence of an employee or other person, a right of indemnity would be implied in favor of the party liable in law who had not contributed to the injury.’ ” *Id.* at 472-73 (quoting *Allison*, 113 Ill. 2d at 29). “In cases of vicarious liability in a quasi-contractual context, liability is imposed upon a blameless principal derivatively through an agent’s conduct.” *Sperl v. Henry*, 2018 IL 123132, ¶ 26. “The agent is at fault in fact for the plaintiff’s injuries, and the principal is considered blameless.” *Id.*

¶ 122 The *Molda III* court cited *Gibbs v. Top Gun Delivery & Moving Services, Inc.*, 399 Ill. App. 3d 765, 772 (2010), in support of its finding that if Wilson had obtained a judgment against Metrolift under the theory of *respondeat superior*, Metrolift would be entitled to indemnification from Molda under the common law theory of quasi-contractual implied indemnity. *Molda III*, 2015 IL App (1st) 140548, ¶ 50. This finding presupposed two things: (1) Molda qualified as an insured because Metrolift was potentially vicariously liable for Molda’s conduct at the time of the accident (which we already discussed and departed from above); and (2) Wilson pleaded a viable negligence claim against Metrolift in the underlying complaint. However, the *Molda III* decision instead specifically qualified its holding with, “[i]f Wilson obtained a judgment.” (Emphasis added.) *Id.*; see *Steadfast Insurance Co.*, 359 Ill. App. 3d at 761 (when applying the duty to defend, “[i]t is the actual complaint, not some hypothetical version, that must be considered” (internal quotation marks omitted)). In fact, Wilson not only never obtained a judgment against Metrolift, but her claim against Metrolift was dismissed for failure to file her claim within the two-year statute of limitations, which was upheld in *Molda I*.

¶ 123 The holding in *Gibbs* does not support the reasoning of *Molda III*. In *Gibbs*, the plaintiff, Bertram Gibbs, filed a negligence action against the defendants—Kevin Dunigan, Top Gun Delivery and Moving Services, Inc. (Top Gun), and Harlem Furniture, Inc. (Harlem)—asserting they were liable for injuries Gibbs suffered when a truck Dunigan was driving collided with Gibbs’s vehicle. 399 Ill. App. 3d at 766. Gibbs alleged that Dunigan was acting in his capacity as an agent of Top Gun while operating his truck. *Id.* He later alleged in an amended complaint that Harlem was vicariously liable for Dunigan’s actions because Dunigan, as an employee of Top Gun, was delivering furniture for Harlem pursuant to a contract between Top Gun and Harlem at the time of the accident. *Id.* After Gibbs had entered into a covenant with Safeco, Top Gun’s and Dunigan’s primary insurer, not to enforce a judgment against either Top Gun or Dunigan, the trial court granted Harlem’s motion to dismiss the entire action on the basis that “ ‘any settlement between the agent and the plaintiff must also extinguish the principal’s vicarious liability.’ ” *Id.* (quoting *American National Bank & Trust*, 154 Ill. 2d at 355).

¶ 124 On appeal, the court considered whether the covenant agreement constituted a settlement sufficient to release Harlem—the alleged principal of Top Gun and Dunigan—from vicarious liability. *Id.* at 771. The covenant stated, among other things, that “[n]othing [in] *** this agreement is intended to preclude Bertram Gibbs, his heirs or assigns, from executing against Defendant Harlem Furniture and/or its Insurer, Citizens Insurance on any judgment in excess of the [\$735,000] paid as consideration for this agreement.” (Internal quotation marks omitted.) *Id.* Gibbs contended that the terms of the covenant agreement indicated there was never an intention to “release” or “dismiss” Dunigan and Top Gun from liability, nor was the covenant intended to shield Dunigan and Top Gun from any subsequent indemnification claim by Harlem. *Id.* Instead, Gibbs contended that Dunigan and Top Gun “entered into the covenant agreement to ensure they

received the full benefit of the contested Safeco insurance policy, which in effect greatly reduced both their potential liability to [Gibbs] in the underlying action and in any possible implied indemnity action by Harlem.” *Id.* Gibbs asserted that the covenant not to enforce judgment did not constitute a “settlement” under Illinois law because it did not “release” the defendant from liability. *Id.*

¶ 125 The reviewing court disagreed with Gibbs’s argument, stating that Illinois courts have recognized covenants not to enforce judgments as “settlements” under section 2 of the Joint Tortfeasor Contribution Act (Contribution Act). *Id.*; see 740 ILCS 100/2(c) (West 2000) (“[w]hen a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury *** it does not discharge any of the other tortfeasors from liability for the injury *** unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant”); see *Thompson v. Centegra Management Services, Inc.*, 2026 IL App (2d) 240667, ¶ 40. The *Gibbs* court recognized that the covenant did not use the term “settlement” but noted that both Gibbs and Dunigan specifically referred to the covenant not to enforce as a “partial settlement” of the underlying action in pleadings they had filed under the Contribution Act. *Gibbs*, 399 Ill. App. 3d at 772. Pertinent here, the court explained that “[i]f [Gibbs] obtained a judgment against Harlem under the theory of *respondeat superior* in this case, Harlem would be entitled to indemnification from Dunigan and Top Gun under the common law theory of quasi-contractual implied indemnity.” *Id.* (citing *American National Bank & Trust*, 154 Ill. 2d at 353-54).

¶ 126 The *Gibbs* court continued its analysis, finding that nothing in the language of the covenant not to enforce suggested that Top Gun and Dunigan intended or agreed to remain liable to Harlem in an implied indemnity action following the conclusion of the underlying case. *Id.* The court

concluded that “[a]llowing Top Gun and Dunigan to remain liable to Harlem in an implied indemnity action after [Gibbs] reached a settlement with the agent-defendants in the underlying case is the exact type of ‘catch-22’ situation *Gilbert* intended to prevent.” *Id.* at 772-73 (citing *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 528 (1993)). “Because ‘any settlement between the agent and the plaintiff must also extinguish the principal’s vicarious liability,’ we find the trial court did not err in granting Harlem’s motion to dismiss.” (Emphasis in original and internal quotation marks omitted.) *Id.* at 773 (quoting *Gilbert*, 156 Ill. 2d at 527).

¶ 127 *Gibbs* is distinguishable from *Molda III* because, in *Gibbs*, the plaintiff actually filed an action for vicarious liability against the principal. *Id.* at 766. When the *Molda III* court invoked the potential application of the common law theory of quasi-contractual implied indemnity, it did so in a hypothetical fashion, as Wilson was unable to sustain a claim alleging vicarious liability against Metrolift. See *Molda II*, 408 Ill. App. 3d at 852-53.

¶ 128 In this case, Kreulach never filed a negligence claim against Wix. Similar to *Gibbs* and unlike *Molda III*, plaintiff Kreulach and agent Witbrod entered into an agreement, albeit a different agreement than a covenant not to enforce a judgment, as that in *Gibbs*. Kreulach and Witbrod, along with Witbrod’s primary insurer, State Farm, entered into the November 27, 2023, agreement to arbitrate the underlying lawsuit, specifically stating that “Witbrod and State Farm want to protect themselves from an excess verdict and any extra-contractual claims and preserve Witbrod’s personal assets from exposure to excess verdict.” Indeed, Kreulach agreed not to execute any arbitration award or resulting civil judgment obtained against Witbrod’s personal assets. Finally, Witbrod agreed to assign all extra-contractual claims against Country Mutual to Kreulach, including his claim for the tort of bad faith, among others.

¶ 129 In *Gilbert*, our supreme court held that “ ‘any settlement between the agent and the plaintiff must also extinguish the principal’s vicarious liability’ ” and “stands regardless of whether the plaintiff’s covenant not to sue the agent expressly reserves the plaintiff’s right to seek recovery from the principal.” 156 Ill. 2d at 527, 528-29 (quoting *American National Bank & Trust*, 154 Ill. 2d at 355). Country Mutual did not argue either below or in this court whether the November 27, 2023, arbitration agreement between Kreulach (underlying plaintiff), Witbrod (agent), and Witbrod’s insurer, State Farm, served to extinguish Wix’s purported vicarious liability, per *Gilbert*. However, the November 27, 2023, agreement to arbitrate the underlying lawsuit contained a promise that Kreulach would not execute any arbitration award against Witbrod’s personal assets in exchange for the \$100,000 policy limits from State Farm. Similar to *Gibbs*, allowing Witbrod to remain liable to Wix in an implied indemnity action after Kreulach reached, in effect, a settlement in the underlying case, perhaps “is the exact type of ‘catch-22’ situation *Gilbert* intended to prevent,” given that “ ‘any settlement between the agent and the plaintiff must also extinguish the principal’s vicarious liability.’ ” (Emphasis in original and internal quotation marks omitted.) *Gibbs*, 399 Ill. App. 3d at 772-73 (quoting *Gilbert*, 156 Ill. 2d at 527); see *Thompson*, 2026 IL App (2d) 240667, ¶¶ 40, 44 (finding that high-low agreements are a form of a covenant not to enforce judgment, and “are simply a form of a settlement agreement” in that “a plaintiff promises a defendant that it will not enforce a judgment beyond the high amount in exchange for a promise by the defendant to pay at least the low amount regardless of the outcome at trial”). *Molda III* did not involve any type of agreement between the plaintiff and the agent. Further, in this case, there is no hypothetical indemnification of Wix by Witbrod under the common law theory of quasi-contractual implied indemnity, as Kreulach never sued Wix, the alleged principal. Thus, this case is distinguishable from *Molda III* on that basis as well.

¶ 130

3. The Duty to Indemnify as Applied in This Case

¶ 131 An insurer's duty to indemnify arises only if the facts alleged actually fall within coverage. *Crum & Forster*, 156 Ill. 2d at 398. Our supreme court in *Outboard Marine* stated that "the question of whether the insurer has a duty to indemnify the insured for a particular liability is only ripe for consideration if the insured has already incurred liability in the underlying claim against it." 154 Ill. 2d at 127. "If so, the duty to indemnify arises if the insured's activity and the resulting loss or damage *actually* fall within the CGL policy's coverage." (Emphasis in original.) *Id.* at 128. In cases where no duty to defend exists and the facts alleged do not even fall potentially within the insurance coverage, "such facts alleged could obviously never actually fall within the scope of coverage" and, thus, a duty to indemnify does not arise. (Emphasis omitted.) *Crum & Forster*, 156 Ill. 2d at 398.

¶ 132 In this case, the underlying lawsuit was resolved through binding arbitration between Kreulach, Witbrod, and State Farm and did not involve Wix or Country Mutual, neither of which were parties in the underlying litigation. The arbitration was confirmed by the trial court and granted relief to Kreulach against Witbrod on the single, direct negligence claim asserted in her amended complaint in the underlying lawsuit. Again, nothing in the underlying lawsuit imposed liability against Witbrod for Wix's conduct. Thus, Witbrod cannot show that any part of the judgment in the underlying lawsuit was "to the extent of that liability" for Wix's conduct, as provided in the Country Mutual policies.

¶ 133 The trial court stated in its disposition granting summary judgment in favor of Kreulach and Witbrod that "the duty to indemnify is based on whether the adjudicated facts, as they are found to have existed at the time of the occurrence, fall within coverage provided by the policy." However, the question of whether the insurer has a duty to indemnify the insured for a particular

liability is only ripe for consideration if the insured has already incurred liability in the underlying claim. *Outboard Marine*, 154 Ill. 2d at 127-28. If so, the duty to indemnify arises only when the insured's activity and the resulting loss or damage actually fall within the CGL policy's coverage. *Id.* at 128.

¶ 134 Notably, the duty to indemnify under the facts of this case could arise only after Witbrod was found liable for the conduct of Wix, which never occurred in the underlying litigation. In short, Witbrod cannot qualify as an “insured” under the policies if there was no actual or alleged liability for the conduct of another insured (Wix). There is simply no judgment (or potential judgment) against Witbrod for the conduct of Wix in this case. Neither Kreulach nor Witbrod presented any evidence or allegation that Wix committed any act that may have caused or contributed to cause Kreulach's injuries. In sum, Country Mutual owed no duty to indemnify because there was no finding of actual liability against Wix directly or against Witbrod for Wix's conduct.

¶ 135 Further, *Molda III* is not applicable here for purposes of determining whether Witbrod was an “insured” under the duty to indemnify standard. The *Molda III* decision involved whether the trial court correctly found that First Chicago owed a duty to defend Molda in the underlying lawsuit. *Molda III* did not include an examination of the duty to *indemnify*—the court considered neither Metrolift's nor Molda's actual liability. We have already determined that the Country Mutual policies in this case are excess and, thus, afford only a duty to indemnify “insureds” for covered liability. Neither the underlying complaint nor the underlying judgment against Witbrod asserted a claim against Wix or against Witbrod for Wix's conduct. Therefore, as a matter of law, Country Mutual did not owe a duty to indemnify Witbrod in the underlying lawsuit.

¶ 136 E. Illinois and Extrajurisdictional Authority Support a Finding of No Coverage

¶ 137 When the trial court granted summary judgment in favor of Kreulach and Witbrod and against Country Mutual and denied Country Mutual's summary judgment motion, it based its holding on the *Molda III* decision, which it stated it was "obligated" to follow as precedent. The court, however, specifically noted and discussed other federal cases that did not follow the same conclusion as *Molda III*. The court found that Witbrod was an "insured" under Country Mutual's policies because, at the time of the accident, Wix, as Witbrod's employer, was potentially liable to Kreulach under a *respondeat superior* theory. However, as we have departed from *Molda III*, both Illinois and federal cases inform our decision that Witbrod was not an "insured" under Country Mutual's policies.

¶ 138 In *Federal Insurance Co. v. Economy Fire & Casualty Co.*, 189 Ill. App. 3d 732, 734 (1989), Jay Michel was involved in an accident while driving a car owned by Michel Masonry Company, his employer. A passenger in the car, Marirose Johnson, filed a personal injury complaint against Jay, Michel Masonry Company, and the drivers of two other vehicles involved in the accident. Jay's father, Elwood Michel, had a "personal estate protector" umbrella policy with Economy Fire and Casualty Company (Economy) for excess coverage. *Id.* Economy denied coverage to Jay. *Id.* National Grange Insurance Company and Federal Insurance Company (Federal) defended the claim against Jay and Michel Masonry Company and settled for the limits of their policies. *Id.* Under that settlement, Jay obtained a full release from Johnson and assigned to her any rights he may have had against Economy for its failure to defend. *Id.* Thereafter, Johnson and Federal filed a declaratory judgment action against Economy, alleging that it had breached a duty to defend and indemnify Jay pursuant to the insurance policy, claiming that the original underlying complaint triggered Economy's duty to defend Jay and Michel Masonry Company. *Id.*

The parties filed cross-motions for summary judgment. Economy argued that it had no duty to defend Jay because he was not an insured under the policy. *Id.* The trial court granted summary judgment in favor of Economy and against Johnson and Federal. *Id.*

¶ 139 On appeal, Johnson and Federal argued, among other things, that Economy was estopped from denying coverage because it had failed to defend under a reservation of rights or to file a declaratory action. *Id.* at 735. They contended that Jay was potentially insured under Economy’s policy as “(1) any person using an automobile owned by, loaned to or hired for use [on] behalf of the named insured *** or (2) with respect to a nonowned automobile, any relative, provided the actual use thereof is with the permission of the owner.” *Id.* at 735-36.

¶ 140 However, the *Federal Insurance* court stated that, “[w]hen an insurer contracts to defend its insured, it must do so unless it is clear from the face of the complaint that the allegations fail to state facts which bring the case within, or potentially within, the policy’s coverage.” *Id.* at 735. Accordingly, before an insurer’s duty to defend arises: “(1) the action must be brought against an insured, and (2) the allegations of the complaint must disclose the potential of policy coverage.” *Id.* “If the allegations of the complaint reveal that the action was not brought against an insured and that there was no potential for coverage under the policy, there is no duty to defend the underlying action [citation], and the insurer can justifiably refuse to defend.” *Id.*

¶ 141 The *Federal Insurance* court affirmed the trial court’s summary judgment finding, stating that there was no genuine issue of material fact presented because the underlying complaint failed to allege negligence against an insured or any other potential for coverage. *Id.* at 737-38. The court found that no person or entity insured by Economy was named as a defendant in the underlying complaint. *Id.* at 736. Johnson had sued Jay and the other defendants individually. *Id.* She sued Michel Masonry under its corporate name. *Id.* Elwood Michel, the named insured under

Economy's policy, was never named as a defendant in the underlying action, and no third-party action was ever filed against Elwood Michel. *Id.* Further, the allegations in the underlying action were directed against Jay as the driver of the car involved in an accident, which was owned by Michel Masonry. *Id.* The complaint alleged that Jay was acting as an agent and authorized employee of Michel Masonry at the time of the accident. *Id.* The complaint, however, did not allege that the car had been loaned to or hired for the father's use. *Id.* Indeed, Johnson had failed to allege in her complaint that Jay was in any manner connected with or acting on behalf of his father, Elwood Michel. *Id.* Therefore, the allegations of Johnson's complaint revealed that the action was not brought against the insured, Elwood Michel, and that there was no potential for coverage pursuant to the relevant provision of Economy's policy. *Id.* Moreover, the underlying complaint did not allege that Jay was a relative of Elwood Michel or that the car in question was a non-owned automobile, as defined in Economy's policy. *Id.* "Consequently, there was similarly no potential for coverage under this provision of the insuring agreement," and, under those circumstances, "the potential for 'coverage cannot be inferred merely because the son of the insured is named in a lawsuit.'" *Id.* (quoting *Murphy v. Peterson*, 129 Ill. App. 3d 952, 958 (1984)).

¶ 142 Similarly, in this case, Kreulach never added the named insured, Wix, as a defendant in her underlying lawsuit. Kreulach alleged negligence solely against Witbrod in the underlying lawsuit. In her amended complaint, she alleged that, at the time of the accident, Witbrod was employed by Wix and acting within the scope of his employment as an agent for Wix. Nevertheless, the allegations of Kreulach's complaint show that the personal injury action was not brought against the insured, Wix; thus, there was no potential for coverage pursuant to paragraph 1(c) of the "Who Is An Insured" provision of Country Mutual's policies. That provision states that "[a]nyone liable for the conduct of an 'insured' described above but only to the extent of that liability." Paragraph

1(a) of that provision refers to “[y]ou for any covered ‘auto,’ ” in this case, the named insured, Wix. Paragraph 1(b) provides coverage for “[a]nyone else while using with your permission a covered ‘auto’ you own, hire or borrow except *** [y]our ‘employee’ if the covered ‘auto’ is owned by that ‘employee’ or a member of his or her household.” The Country Mutual policies except Witbrod from coverage under that provision since he was an “employee.” Paragraph 1(c) provides coverage for “[a]nyone liable for the conduct of an ‘insured’ described above [in paragraphs 1(a) and 1(b)] but only to the extent of that liability.” Witbrod does not fall into coverage for either paragraphs 1(a) or 1(b), which means that the “ ‘insured’ described above” clause in paragraph 1(c) can only refer to Wix. As we have already discussed, Kreulach never alleged negligence for the conduct of Wix in the underlying complaint. Therefore, there is no potential for coverage pursuant to paragraph 1(c) of the “Who Is An Insured” provisions in the Country Mutual policies. *Federal Insurance Co.*, 189 Ill. App. 3d at 736. Simply put, Witbrod does not fit the definition of an “insured” under the Country Mutual policies’ definitions of “Who Is An Insured.”

¶ 143 Under the circumstances of this case, the potential for coverage cannot be *inferred* under a theory of *respondeat superior* because Witbrod—the driver, employee, and alleged agent of Wix—was solely named in the underlying lawsuit. *Id.* That is not how insurance coverage is determined under Illinois law. Yet, that is precisely what the *Molda III* court held and why we choose not to follow it here.

¶ 144 Our decision in *Murphy* also supports departure from *Molda III* for similar reasons. There, Murphy served as the executor of the estate of James Hollander, deceased. *Murphy*, 2019 IL App (2d) 180154, ¶ 1. Hollander was driving a vehicle that collided with a semi-tractor trailer, which then collided with a third vehicle. *Id.* ¶ 3. Hollander was driving a vehicle owned by Sandra Wendland, in which Wendland and Alyssa Guarino were passengers. *Id.* Keith Keigher was driving

the semi-tractor in the scope of his employment with J-M Transport, Inc. (J-M), and the third car was driven by Cheyenne Flowers. *Id.* Wendland, Pamela Sheppard (guardian of the estate and person of Guarino), and Flowers each filed negligence actions against Hollander’s estate, seeking to recover damages for injuries sustained in the accident. *Id.* ¶ 5. Flowers also named as defendants Keigher and J-M. *Id.* “All of the underlying complaints alleged that the collision was caused by Hollander’s negligent acts or omissions. None of the underlying complaints alleged that Hollander was vicariously liable for any acts or omissions by Wendland.” *Id.* Further, none of the underlying complaints alleged that Wendland was liable in any manner. *Id.*

¶ 145 State Farm filed a declaratory judgment action, stating that it was defending Hollander’s estate in the underlying lawsuits under Wendland’s primary automobile insurance policy. *Id.* ¶ 7. State Farm acknowledged that Hollander was a “permissive user” of Wendland’s car, but sought a declaration that it did not owe an obligation to defend or indemnify the estate under a \$1 million umbrella policy it had issued to Wendland that was in effect at the time of the accident. *Id.* In particular, State Farm argued that it had no duty to defend or indemnify Hollander’s estate under the umbrella policy because Hollander did not qualify as an insured under the umbrella policy. *Id.* ¶ 8. The trial court entered summary judgment in favor of State Farm, finding that, under the language of State Farm’s policy, Hollander did not qualify as an insured, nor did State Farm have a duty to defend or indemnify the estate. *Id.* ¶ 16.

¶ 146 On appeal, the defendants—Murphy (on behalf of Hollander’s estate), Wendland, Flowers, Sheppard, Keigher, and J-M—argued that the trial court erred when it determined that Hollander was not an “insured” under State Farm’s umbrella policy issued to Wendland. *Id.* ¶ 20. The State Farm umbrella policy provided that “ ‘[i]f a claim is made or a suit is brought against an *insured* for damages because of a loss for which the *insured* is legally *liable* and to which this policy

applies, we will pay on behalf of the *insured*, the damages that exceed the retained limit.’ ” (Emphasis omitted.) *Id.* ¶ 28. “Insured” under the policy meant Wendland (under paragraph 6(a) of the policy) and “ ‘any other person *** to the extent they are *liable* for the use of an automobile *** by a person included in 6.a. ***.’ ” (Emphases in original.) *Id.*

¶ 147 The *Murphy* court found this policy language was clear and unambiguous. *Id.* ¶ 29. The court explained that the defendants did not present a theory of liability stemming from Wendland and that Hollander was not an insured under State Farm’s policy:

“For coverage to exist, a claim must be brought against an ‘insured’ for damages for which the insured is ‘liable.’ Although Hollander’s estate was named as a defendant in the underlying complaints, Hollander was not an insured under the policy. Further, none of the underlying complaints alleged that Hollander was liable for *Wendland’s* use of the Nissan. The underlying complaints alleged that Hollander was negligent in *his* use and operation of the Nissan. To be clear, no party alleged that Wendland, the named insured, was negligent or liable in any manner. Therefore, Hollander was not an insured under the policy and, thus, plaintiff had no duty to defend or indemnify Hollander’s estate.” (Emphases in original.) *Id.*

The *Murphy* court concluded that the trial court properly granted summary judgment in State Farm’s favor. *Id.* ¶ 36.

¶ 148 The holding in *Murphy* applies to this case as well. Kreulach’s underlying complaint alleged that Witbrod was negligent in *his* use and operation of the vehicle he was driving at the time of the accident. As in *Murphy*, the underlying plaintiff failed to allege that Wix, the named insured, was liable or negligent in any manner. *Id.* ¶ 29. Therefore, Witbrod was not an insured

under the policy and, thus, Country Mutual had no duty to defend or indemnify Witbrod in the underlying lawsuit. *Id.*

¶ 149 The *Murphy* defendants also argued that State Farm’s policy only required Wendland to be ‘using’ the car at the time of the occurrence. The *Murphy* court stated that the defendants’ interpretation of the policy “ignores and eliminates the connection between ‘liable for the use of an automobile’ and ‘by [Wendland]’ from the definition” of “insured” in the policy. *Id.* ¶ 30. “If a named insured’s use of the vehicle is all that is necessary to trigger a duty to indemnify under paragraph 6.c., then the phrase ‘to the extent they are *liable* for’ is mere surplusage.” (Emphasis in original.) *Id.* The *Murphy* court concluded that Wendland’s use of the vehicle, without more, was not sufficient to trigger coverage for Hollander. *Id.*

¶ 150 Applying that reasoning here, the parties do not dispute that Witbrod was driving his own vehicle under the scope of his employment for Wix at the time of the accident. The parties also agree that Witbrod was driving a covered “auto” under category 9 for “Non-owned ‘Autos,’ ” pursuant to Country Mutual’s Business Policy. However, as in *Murphy*, Kreulach’s interpretation of Country Mutual’s policy ignores who fits into the definition of an “insured” under the policy and how that is applied to paragraph 1(c)’s “[a]nyone liable for the conduct of an ‘insured’ described above but only to the extent of that liability.” Kreulach’s failure to name Wix as a defendant in the underlying claim would similarly render the phrase “but only to the extent of that liability” as mere surplusage without any claim whatsoever that Wix’s negligent conduct was a contributing factor under the theory of *respondeat superior*. *Id.* In this case, Kreulach’s underlying complaint needed to allege that Wix was vicariously liable for Witbrod’s negligent conduct. Because the underlying complaints did not contain any such allegations, Witbrod is not an insured. *Id.*

¶ 151 Our finding also comports with federal cases that have analyzed comparable insurance policy language and underlying lawsuits and have reached conclusions similar to ours. For example, in *Vulcan Materials Co.*, 723 F. Supp. 1263, Michael Giguere, an employee of a trucking company, was killed while delivering a load of scrap metal to Vulcan Materials when he was struck by a magnet that fell from Vulcan’s crane. *Id.* at 1263-64. The trucking company was insured by Casualty Insurance Company (Casualty). Giguere’s ex-wife and administrator of his estate sued Vulcan, and Vulcan tendered its defense to Casualty. *Id.* at 1264. Casualty denied that it was required to defend Vulcan. *Id.* Vulcan sued Casualty, seeking declaratory relief, arguing that Vulcan was an “insured” under Casualty’s automobile liability policy issued to the trucking company. *Id.* The policy defined “insured” as (a) the trucking company and, in pertinent part, “(d) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a).” (Emphasis and internal quotation marks omitted.) *Id.* Vulcan argued that the trucking company, the “named insured,” negligently failed to train Giguere and, thus, the trucking company’s liability arose “because of acts or omissions of an insured under (a).” (Internal quotation marks omitted.) *Id.* The court rejected Vulcan’s interpretation. Instead, the court stated, “[p]aragraph (d) is plainly a vicarious liability provision and nothing more: It insures all those who may be vicariously liable for acts or omissions of the named insured ***.” *Id.* at 1265. Because there was no basis for finding Vulcan vicariously liable for the trucking company’s acts, the court ruled that Casualty had no duty to defend Vulcan. *Id.* at 1265-66.

¶ 152 Further, the policy language in *Nationwide Mutual Insurance Co. v. Zurich American Insurance Co.*, 748 F. Supp. 3d 939 (E.D. Cal. 2024), mirrors the exact policy language in this case. There, Nationwide Mutual Insurance Company (Nationwide) and AMCO Insurance Company (collectively, the plaintiffs) filed a declaratory judgment action against Zurich American

Insurance Company (Zurich) and American Guarantee and Liability Insurance Company (American Guarantee) (collectively, the defendants) regarding the defendants' duty to defend and indemnify Motor Parts Distributors, Inc. (Motor Parts) in the underlying personal injury action. *Id.* at 941-42. The underlying plaintiff, Edward Laverone, filed a personal injury action against Motor Parts and the defendants' insured, Express Services, Inc. (Express), for injuries sustained in a car accident caused by Edward Gonzalez Jr.⁷ *Id.* at 941. At the time of the accident, Gonzalez was a delivery driver who was staffed by Express to work for Motor Parts. *Id.* After Gonzalez had completed his deliveries, he informed his supervisor at Motor Parts that he was clocking out for the day due to mechanical problems with his car. *Id.* at 941-42. On his way home, Gonzalez crashed into Laverone's car, which killed Gonzalez and injured Laverone. *Id.* at 942. The parties to the underlying action entered into a settlement agreement and release under which Laverone received \$8.85 million. *Id.* Of that amount, the plaintiffs paid \$6 million on behalf of Motor Parts, and the defendants paid the remaining \$2.85 million on behalf of Express. *Id.*

¶ 153 Express was a named insured on the Zurich policy, but Motor Parts was not. *Id.* The Zurich policy included "Hired And/Or Non-Owned Auto Coverage" and provided coverage for "damages awarded against an insured because of bodily injury caused by an accident and resulting from the ownership, maintenance, or use of a covered auto, subject to various policy terms, conditions, and exclusions." *Id.* American Guarantee issued an umbrella policy to Express and Express was a named insured on that policy, but Motor Parts was not. *Id.*

¶ 154 In the insurance coverage dispute, the plaintiffs and the defendants agreed that for the plaintiffs to make a *prima facie* showing of a potential for coverage for Motor Parts under the

⁷ The United States District Court for the Eastern District of California used the name Gonzalez and Gonzales interchangeably.

Zurich policy, the plaintiffs needed to establish that Gonzalez qualified as an additional insured under the Zurich policy. *Id.* at 944. The Zurich policy included an endorsement added to the “Who Is An Insured” provision of its policy that stated “[t]he following are also ‘insureds’: a. Any ‘employee of [Express] is an ‘insured’ while using a covered ‘auto’ you don’t own, hire, or borrow for acts performed within the scope of employment by ‘Express.’ ” *Id.* Plaintiffs argued that Gonzalez qualified as an insured under that endorsement because, at the time of the accident, he was an Express employee using a covered “auto” to perform acts within the scope of his employment with Express. *Id.* Plaintiffs argued that Motor Parts qualified as an additional insured because the endorsement added four additional categories of insureds to Zurich’s “Who Is An Insured” provision. *Id.* Pertinent here, the Zurich policy’s “Who Is An Insured” provision included the same language as the “Who Is An Insured” provision in Country Mutual’s policies, including paragraph 1(c), which provides “[a]nyone liable for the conduct of an insured described above but only to the extent of that liability.” (Emphases omitted.) *Id.* at 945. The plaintiffs argued that because Motor Parts was liable for the conduct of Gonzalez, paragraph 1(c) of the Who Is An Insured provision conferred insured status for Motor Parts. *Id.*

¶ 155 The *Nationwide Mutual Insurance* court agreed with the defendants. *Id.* at 947. The court explained that “the text of subparagraph c. limits coverage to ‘anyone liable for the conduct of an “insured” *described above.*’ ” (Emphasis in original.) *Id.*

“Having reviewed this text in the context of the entire Zurich Policy, the Court finds a plain reading of subparagraph c. of the Who Is An Insured provision is only susceptible to one reasonable interpretation which is that [the] provision applies only to those insureds described above in subparagraphs a. and b.” *Id.* at 948.

Further, it was unclear to the court how the endorsement could be interpreted to expand the list of insureds “ ‘described above’ ” to subparagraph c. *Id.* Identifying subparagraph c. as an “omnibus clause,” the court stated, “like most other omnibus clauses, subparagraph c. defines an ‘insured’ as one who is vicariously liable for conduct of another named insured.” *Id.* The court further explained:

“However, there is nothing in the language of the Zurich Policy, which suggests Zurich intended for the omnibus clause in subparagraph c. to be a general, collective, or catchall provision of the policy that applies to all insureds. [Citation.] Indeed, the language used by Zurich in subparagraph c. suggests the insureds described in subparagraph c. are a distinct and independent group of insureds defined by the Who Is An Insured provision. *** Even if Gonzalez qualifies as an insured by virtue of the Employee Clause within the [Zurich endorsement], it is undisputed Gonzalez does not qualify as an insured under either subparagraphs a. or b.” *Id.* at 948-49.

¶ 156 The *Nationwide Mutual Insurance* court found that the only reasonable interpretation of subparagraph c. was that it conferred insured status on those who are “ ‘liable for the conduct of an ‘insured’ described above’ ” in subparagraphs a. and b. *Id.* at 950. “While Motor Parts may be liable for Gonzalez’s conduct, Gonzalez does not qualify as an insured under subparagraphs a. or b. of the Who Is An Insured provision.” *Id.* The court held that, because Motor Parts did not qualify as an additional insured under the Zurich Policy, the defendants did not have a duty to defend Motor Parts in the underlying action, and the plaintiffs had no right to reimbursement. *Id.*

¶ 157 These federal cases bolster our conclusion that, because Kreulach in this case did not present a theory of liability in her underlying lawsuit stemming from Wix’s conduct, Witbrod is not an insured. Kreulach did not trigger the duty to defend or indemnify in this case because she

failed to allege negligence against the named insured, Wix. Further, a plain reading of the unambiguous language of the Country Mutual policies shows that Witbrod was not an “insured” under the “Who Is An Insured” provisions of those policies. We will not strain to find an ambiguity in the Country Mutual policies where none exists. *Central Illinois Light*, 213 Ill. 2d at 153; *McKinney*, 188 Ill. 2d at 497.

¶ 158 Accordingly, we reverse the trial court’s decisions to (1) grant summary judgment in favor of Kreulach and Witbrod and against Country Mutual and (2) deny summary judgment in favor of Country Mutual and against Kreulach and Witbrod. Pursuant to our authority under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994) (appellate court may, in its discretion, enter summary judgment and make any order that ought to have been made), we grant summary judgment in favor of plaintiff Country Mutual and against defendants Kreulach and Witbrod. See *Bremer v. City of Rockford*, 2016 IL 119889, ¶¶ 35, 38.

¶ 159

III. CONCLUSION

¶ 160 Based on the foregoing, we reverse the judgment of the circuit court of Lake County and grant summary judgment in favor of plaintiff.

¶ 161 Reversed.

Country Mutual Insurance Co. v. Witbrod, 2026 IL App (2d) 250314

Decision Under Review: Appeal from the Circuit Court of Lake County, No. 23-CH-129; the Hon. Daniel L. Jasica, Judge, presiding.

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