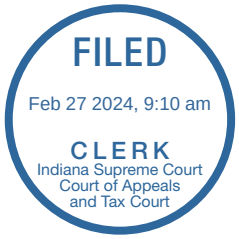
MEMORANDUM DECISION



IN THE

Court of Appeals of Indiana

Cincinnati Specialty Underwriters Insurance Company,

Appellant-Defendant,

v.

Melvin Hall,

Appellee-Plaintiff,

Bradley Shaw, Giovanni Narducci f/k/a John Roberson, and Central Indiana Protection Agency, Inc.,

Interested Parties.

February 27, 2024

Court of Appeals Case No.
23A-PL-1897

Appeal from the
Marion Superior Court

The Honorable
Katie Melnick, Magistrate

Trial Court Cause No.
49D11-1901-PL-216

Memorandum Decision by Senior Judge Robb
Judges Bailey and Kenworthy concur.

Robb, Senior Judge.

Case Synopsis

[1] Melvin Hall filed a six-count complaint against Bradley Shaw, Giovanni Narducci, and Central Indiana Protection Agency (CIPA). After this Court's decision in *Hall v. Shaw*, 147 N.E.3d 394 (Ind. Ct. App. 2020), *trans. denied*, the remaining claims alleged the torts of defamation, abuse of process, malicious prosecution, and intentional infliction of emotional distress. Since the onset of litigation in 2018, Cincinnati Specialty Underwriters Insurance Company (Cincinnati Insurance) has controlled the defense.

[2] Hall filed a complaint in the present action, seeking a declaratory judgment concluding that his complaint alleged claims covered under the policy and, thus, Cincinnati Insurance had a duty to defend under the policy. Cincinnati Insurance resisted Hall's action, claiming that it owed no duty to provide a defense, a position it took based on exclusions language in the policy. Both parties moved for summary judgment.

[3] The trial court granted Hall's motion for partial summary judgment and concluded that Cincinnati Insurance had a duty to provide a defense to Shaw, Narducci, and CIPA. Cincinnati Insurance appeals, arguing that the trial court erred. Finding no error in the trial court's decision, we affirm.

Facts and Procedural History

[4] The following facts come from Hall's underlying complaint. Shaw and Narducci supervised Hall when he worked at CIPA, a company that provides security services. After he left CIPA to operate Urban Tactical Response Agency, LLC (Urban Tactical), a competitor to CIPA, Shaw and Narducci "maliciously communicated false statements about Hall, including that Hall had impersonated a police officer, to others in the community." Appellant's App. Vol. II, p. 55. And during the relevant time period, Shaw and Narducci "encouraged others to make false allegations against Hall for impersonating a police officer." *Id.* at 57.

[5] Count I alleges that Shaw and Narducci, as CIPA agents, conspired with five others to defame Hall's reputation for the purpose of eliminating Urban Tactical's competition. Hall claims that Shaw and Narducci "maliciously made . . . false and defamatory statements concerning Hall as part of a conspiracy to damage his reputation and eliminate his competition[.]" *Id.* at 54. Count III of the complaint alleges that Shaw and Narducci, individually and as agents of CIPA, conspired with others to provide false testimony in an attempt to incriminate Hall for impersonating a public servant. The complaint further

states that Shaw and Narducci conspired to initiate Hall's prosecution to eliminate Urban Tactical as a competitor by "maliciously provid[ing] false evidence in furtherance of the conspiracy to the prosecutor[.]" *Id.* at 61. Although it is not explicitly alleged, Hall says "Count III—Malicious Prosecution," also includes a claim for false arrest. *See id.* at 60-62.

[6] Hall filed this declaratory judgment action against Cincinnati Insurance in 2019 because Cincinnati Insurance insured CIPA during the period of time in question. Cincinnati Insurance admitted that Shaw and Narducci are CIPA employees, but denied for purposes of the summary judgment motion that CIPA, Shaw, and/or Narducci committed the torts of malicious prosecution, and defamation in the underlying action.[1]

[7] The trial court entered its order which concluded:

> Bradley Shaw, Giovanni Narducci and Central Indiana Protection [A]gency, Inc. are entitled to a defense from Cincinnati Specialty Underwriter's Insurance [C]ompany under policy number CSU0025247 on the complaint of Melvin Hall, Cause number 49D11-1805-CT-019942. The Court further notes that []Melvin Hall filed his original action on May 22, 2018. Cincinnati has controlled the defense of the original action since

[1] During the summary judgment hearing and on appeal, Hall did not make the argument that his claim for intentional infliction of emotional distress (IIED) was covered under the insurance policy language. And whether the IIED claim was covered is of no consequence for purposes of our decision. *See Ind. Farmers Mut. Ins Co. v. N. Vernon Drop Forge, Inc.*, 917 N.E.2d 1258, 1267 (Ind. Ct. App. 2010) ("If the policy is otherwise applicable, the insurance company is required to defend even though it may not be responsible for all of the damages assessed."), *trans. denied*. Additionally, Cincinnati Insurance argues that Hall's complaint does not assert a false arrest claim. *See* Reply Br. pp. 3-5. Whether a false arrest claim was pleaded likewise does not affect our decision.

> it retained outside counsel in August 2018. This case[] was filed in January 2019. Cincinnati filed its answer to the complaint for declaratory judgment in February 2019 and filed its initial cross-claim in April 2019. Cincinnati's motion for Summary Judgment was filed in November 2022. Between 2018 and 2022, there was significant litigation in the underlying action and Cincinnati controlled the defense throughout. The Court denies Cincinnati's motion for Summary Judgment.

Id. at 14.

[8] Cincinnati Insurance appeals from the court's order, contending that the court's decision is erroneous and improper as a matter of law because the allegations in Hall's underlying complaint fall under multiple exclusions in its policy. Thus, contrary to the court's order, Cincinnati Insurance argues it is not required to provide a defense.

Discussion and Decision

I. Standard of Review

I.A. Summary Judgment

[9] Cincinnati Insurance appeals from the court's order on summary judgment. We review a trial court's summary judgment order de novo. *Kovach v. Caligor Midwest*, 913 N.E.2d 193, 196 (Ind. 2009). We apply the same standard as the trial court: whether the designated evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37, 39 (Ind. 2002). In making this determination, we construe all facts and

reasonable inferences in a light most favorable to the non-moving party, *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692, 695 (Ind. 2000), and resolve all doubts as to the existence of a factual issue against the moving party, *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996). The moving party has the initial burden to prove that there are no genuine factual issues and that judgment as a matter of law is appropriate, and only then must the non-moving party respond by setting forth specific facts in the designated evidence demonstrating the opposite is true. *Stephenson v. Ledbetter*, 596 N.E.2d 1369, 1371 (Ind. 1992).

[10] A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute, or where undisputed facts are capable of supporting conflicting inferences on such an issue. *Briggs v. Finley*, 631 N.E.2d 959, 963 (Ind. Ct. App. 1994), *trans. denied*. We may affirm a trial court's grant of summary judgment upon any theory supported by the designated materials. *Sims v. Barnes*, 689 N.E.2d 734, 735 (Ind. Ct. App.1997), *trans. denied*.

[11] The fact that the parties filed cross-motions for summary judgment does not alter our standard of review. *Pond v. McNellis*, 845 N.E.2d 1043, 1053 (Ind. Ct. App. 2006), *trans. denied*. We consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law. *Id.*

I.B. Contract Interpretation

[12] The interpretation of a contract is a matter of law, so cases involving the interpretation of insurance contracts are particularly appropriate for summary judgment. *Wright v. Am. States Ins. Co.,* 765 N.E.2d 690, 692 (Ind. Ct. App. 2002). Provisions of insurance contracts are subject to the same rules of construction as other contracts; we interpret an insurance policy with the goal of ascertaining and enforcing the parties' intent as revealed by the insurance contract. *Id.* To accomplish that goal we must construe the insurance policy as a whole, rather than considering individual words, phrases, or paragraphs. *Id.* at 692-93. If the contract language is clear and unambiguous, it should be given its plain and ordinary meaning. *Id.* An unambiguous exclusionary clause is ordinarily entitled to enforcement. *Id.* at 694.

[13] We must accept an interpretation of the contract language that harmonizes the provisions rather than one that supports a conflicting version of the provisions. *Id.* at 693. "Policy terms are interpreted from the perspective of an ordinary policyholder of average intelligence." *Id.* "If reasonably intelligent persons honestly may differ as to the meaning of the policy language, the policy is ambiguous." *Id.* "One way of determining whether reasonable persons might differ is to see if the policy language is susceptible to more than one interpretation." *Meridian Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 698 N.E.2d 770, 773 (Ind. 1998).

[14] "Terms in a contract are given their usual and common meaning unless, from the contract, it can be determined that some other meaning was intended." *Am.*

Family Ins. Group v. Houin, 777 N.E.2d 757, 761 (Ind. Ct. App. 2002), *trans. dismissed*. Unless the contract provides otherwise, all applicable law in force at the time the agreement is made impliedly forms a part of the agreement without any statement to that effect. *Miller v. Geels*, 643 N.E.2d 922, 928 (Ind. Ct. App. 1994), *trans. denied*.

[15] When the insured and the insurer dispute whether an ambiguity in the insurance contract exists, we generally construe the language strictly against the insurer and in favor of coverage. *Burkett v. American Family Ins. Group*, 737 N.E.2d 447, 452 (Ind. Ct. App. 2000). "However, when a case involves a dispute between a third party and an insurer, we determine the general intent of the contract from a neutral stance." *Id.* Here, the latter is true, and we determine the general intent of the contract for insurance from a neutral stance.

II. Analysis

II.A. Indiana Insurance Law

[16] Before we turn to the parties' contentions, we first discuss basic principles of Indiana insurance law. "In Indiana, the duty to defend is broader than coverage liability." *Trisler v. Indiana Ins. Co.*, 575 N.E.2d 1021, 1023 (Ind. Ct. App. 1991). "It is the nature of the claim, not its merit, which establishes the insurer's duty to defend." *Id.* "Consequently, if it is determined that an insurer has a contractual duty to defend a suit based upon risks it has insured, the insurer will not be relieved of that obligation, regardless of the merits of the claim." *Id.*

[17] "The insurer's duty to defend is determined from the allegations of the complaint coupled with those facts known to or ascertainable by the insurer after reasonable investigation." *Id.* "Accordingly, in evaluating the factual basis of a claim and the insurer's concomitant duty to defend, this court may properly consider the evidentiary materials offered by the parties to show coverage or exclusion." *Id.* "If the pleadings fail to disclose a claim within the coverage limits or one clearly excluded under the policy, and investigation also reveals the claim is outside the coverage of the policy, no defense will be required." *Id.*

II.B. The Duty to Defend

[18] The narrow issue we are asked to resolve is that of Cincinnati Insurance's duty to defend. Cincinnati Insurance's position is that under the plain language of the policies,[2] coverage is not provided for the kinds of claims alleged against Shaw, Narducci, and CIPA. Appellant's Br. pp. 7-8. Under the policy, where there is no coverage, there is no duty to defend. Again, the remaining counts of Hall's complaint alleged the torts of defamation, abuse of process, malicious prosecution and intentional infliction of emotional distress.

[2] Insurance coverage during the time period alleged in the underlying action was provided in separate policies, each containing the same if not similar language: 2013-2014 (Appellant's App. Vol. II, pp. 92-166); 2014-2015 (Appellant's App. Vol. II, pp. 212-250 and Appellant's App. Vol. III pp. 2-49); 2015-2016 (Appellant's App. Vol. III, pp. 50-138); 2016-2017 (Appellant's App. Vol. III, pp. 139-226); 2017-2018 (Appellant's App. Vol. III, pp. 227-248 and Appellant's App. Vol. IV, pp. 2-66); 2018-2019 (Appellant's App. Vol. IV, pp. 67-160).

[19] We turn now to the pertinent policy language, which the parties refer to as Coverage B.[3]

> Throughout this policy the words "you" and "your" refer to [CIPA] shown in the Declarations . . . .
>
> * * * *
>
> We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply.
>
> * * * *
>
> This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

Appellant's App. Vol. II, pp. 103, 108.

[20] "Personal and advertising injury" is defined by the policies in pertinent part as follows:

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[3] The parties agree that there is no coverage issue under Coverage A of the policies. And because there is no dispute that the offenses occurred during the policy periods of 2014 to 2019, and the language of the policies is the same or substantively similar, we cite to only one of the policies for the pertinent policy language.

> "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
> a. False arrest, detention or imprisonment;
> b. Malicious prosecution;
> * * * *
> d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
> e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
> * * * *

Id. at 116.

[21] The applicable exclusions to Coverage B, which Cincinnati Insurance claims eliminate its duty to defend and indemnify, are in pertinent part as follows:

> **2. Exclusions**
> This insurance does not apply to:
> **a. Knowing Violation of Rights of Another**
> "Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".
> **b. Material Published With Knowledge Of Falsity**
> "Personal and advertising injury" arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.
> * * * *
> **d. Criminal Acts**
> "Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

Id. at 108.

[22] Looking at the policy language from a neutral stance, Hall's claims of malicious prosecution, and defamation are clearly covered under Coverage B. *See id.* at 108, 118. After all, it is "the nature of the claim, not its merit, which establishes the insurer's duty to defend." *Trisler*, 575 N.E.2d at 1023. Although "offense" is not defined in the policy, Merriam-Webster defines "offense" as "something that outrages the moral or physical senses" and "an infraction of law." Offense, Merriam-Webster, https://www.merriam-webster.com/dictionary/offense [https://perma.cc/NM53-BJRH] (last accessed February 19, 2024). Hall's allegations satisfy the common definition of "offense."

[23] We next turn to the exclusion language. "Generally, when an insurer wishes to rely upon an exclusionary clause in its policy, it is raising an affirmative defense to coverage and it bears the burden of proving its applicability." *FLM, LLC v. Cincinnati Ins. Co.*, 27 N.E.3d 1141, 1143 (Ind Ct. App. 2015), *trans. denied*. And here, for Cincinnati Insurance to resist Hall's partial motion for summary judgment and support its own motion, Cincinnati Insurance was required to designate evidence that the exclusions applied. To generalize, the exclusions become applicable upon a showing that the insured engaged in knowing or intentional conduct as set out in the policy language. The evidence Cincinnati Insurance designated was its denial that the defendants engaged in the conduct alleged in Hall's underlying complaint. Thus, there was no designated evidence that the exclusions were applicable. To the contrary, Cincinnati Insurance designated evidence which did not contradict that the claims, as alleged, fell within the provisions of Coverage B.

[24] Next, Cincinnati Insurance argues that "[t]o find that an insurance company is obligated to provide coverage and defense unless it first affirmatively proves the allegations against its own insured would be a completely illogical result and is clearly not an obligation required by Indiana law." Appellant's Br. p. 15. "Cincinnati [Insurance] is not and cannot reasonably be obligated to then affirmatively prove the truth of those allegations against its insureds before it can be found to have no duty to defend." *Id.* at 16.

[25] Cincinnati Insurance's arguments here highlight the potentially illusory nature of the Coverage B provisions when paired with the exclusions. However, we offer no opinion about whether the exclusion language is illusory because that question is not before us. The illusory nature of the coverage, if any, pertains to indemnification, not the duty to defend. There is no judgment yet in the underlying action. Therefore, any decision on the issue of coverage on the merits and Cincinnati Insurance's potential duty to indemnify would be premature.

[26] Cincinnati Insurance, as the drafter of the policy, chose the policy language in the sections at issue here. Consequently, to defeat the motion for partial summary judgment on the narrow issue of the duty to defend, Cincinnati Insurance, by its own policy language, must designate some evidence to demonstrate that the claims are clearly excluded. Here, the exclusions require that the excluded conduct be done "with the knowledge," "with knowledge," or be a "criminal act." *See* Appellant's App. Vol. II, p. 108. Those terms require an examination of the conduct's mens rea, knowingly or intentionally.

[27] Therefore, Cincinnati Insurance as the drafter of the policy has placed itself in this position and is required by the terms of its own policy to acknowledge that the conduct occurred in order to defeat the motion for partial summary judgment and to support its own motion by way of the exclusions. Concluding that it has not done so, we find no error here in the trial court's decision.[4]

Conclusion

[28] In light of the foregoing, we affirm the trial court's decision.

[29] Affirmed.

Bailey, J., and Kenworthy, J., concur.

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[4] We do not find the laches argument persuasive under the facts herein. While the issue is briefly raised, it appears Cincinnati Insurance did not delay in questioning whether it had a duty to defend and Hall has not designated evidence showing harm.