MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

ClearPoint Federal Bank & Trust,
Appellant / Cross-Appellee

v.

Federal Insurance Company,
Appellee / Cross-Appellant

January 15, 2025

Court of Appeals Case No.
24A-PL-132

Appeal from the Marion Superior Court

The Honorable Heather A. Welch, Judge

Trial Court Cause No.
49D01-2010-PL-36801

Memorandum Decision by Judge Bradford
Judges Bailey and Foley concur.

Bradford, Judge.

Case Summary

[1] After becoming involved in a lawsuit with its former CEO, ClearPoint Federal Bank & Trust ("ClearPoint") sought liability coverage from its insurance provider Federal Insurance Company ("Federal"). ClearPoint sought coverage under three insurance policies issued by Federal: (1) an Employment Practices Liability Insurance Policy (the "EPL Policy"), (2) a Customarq Series Financial Institutions Policy (the "CGL Policy"), and (3) a Commercial Excess and Umbrella Insurance Policy (the "Excess Policy"). ClearPoint initiated the underlying lawsuit against Federal after Federal denied coverage. The parties filed competing motions for summary judgment, with the trial court ruling in favor of ClearPoint with regard to the EPL Policy but in favor of Federal with regard to the CGL and Excess Policies. To the extent that the trial court ruled against them, both parties argue on appeal that the trial court erred in doing so. We affirm and remand to the trial court for further proceedings.

Facts and Procedural History

[2] The instant appeal involves three insurance policies.

I. The Insurance Policies

A. The CGL Policy

[3] Effective August 1, 2018, Federal issued the CGL Policy to ClearPoint. The CGL Policy had a $2,000,000.00 general aggregate limit and a $1,000,000.00

limit for each occurrence. The "Advertising Injury And Personal Injury Coverage" section of the CGL Policy provided that

> Subject to all of the terms and conditions of this Insurance, we will pay damages that the **insured** becomes legally obligated to pay by reason of liability imposed by law or assumed in an **insured contract** for **advertising injury** or **personal injury** to which this coverage applies.
>
> This coverage applies only to such **advertising injury** or **personal injury** caused by an offense that is first committed during the policy period.
>
> ****
>
> Other than as provided under the Investigation, Defense And Settlements and Supplementary Payments sections of this contract, we have no other obligation or liability to pay sums or perform acts or perform acts or services under this coverage.

Jt. App. Vol. II pp. 151–52 (emphases in original). The "Investigation, Defense And Settlements" section of the CGL Policy provided that

> Subject to all of the terms and conditions of this insurance, we will have the right and duty to defend any **insured** against a **suit**, even if such **suit** is false, fraudulent or groundless.
>
> If such a **suit** is brought, we will pay reasonable attorney fees and necessary litigation expenses to defend
>
> • the **insured**, and
>
> • if applicable, the indemnitee of the **insured**, provided the obligation to defend, or the cost of the defense of, such

> indemnitee has been assumed by such **insured** in an **insured contract**.
>
> Such attorney fees and litigation expenses will be paid as described in the Supplementary Payments section of this contract.
>
> We have no duty to defend any person or organization against any suit seeking damages to which this insurance does not apply.
>
> We may, at our discretion, investigate any **occurrence** or offense and settle any claim or **suit**.
>
> Our duty to defend any person or organization ends when we have used up the applicable Limit Of Insurance.

Jt. App. Vol. II pp. 152–53 (emphases in original). The CGL Policy indicates that employees are "**insureds**, but they are **insureds** only for acts within the scope of their employment by you or while performing duties related to the conduct of your business." Jt. App. Vol. II p. 154 (emphases in original).

[4] The CGL Policy defined "personal injury," *i.e.*, the type of injury at issue in the underlying lawsuit, as follows:

> **Personal Injury** means injury, other than **bodily injury**, **property damage** or **advertising injury**, caused by an offense of
>
> A false arrest, false detention or other false imprisonment,
>
> B malicious prosecution (unless insurance thereof is prohibited by law), except when it arises out of or is directly or indirectly related to

1 the restructure, termination, transfer or collection of any loan, lease or extension of credit, or

2 the repossession or foreclosure of property which is security for any loan, lease or extension of credit,

C wrongful entry into, wrongful eviction of a person from or other wrongful invasion of a person's right of private occupancy of a dwelling, premises or room that such person occupies, unless such person is a mortgagor of yours or of anyone for whom you are servicing mortgages, by or on behalf of you, its owner, landlord or lessor,

D electronic, oral, written or other publication of material that

1 invades a person's right of privacy, or

2 libels or slanders a person or organization (which does not include disparagement of goods, products, property or services),

except when alleged, charged or suffered by any **customer**, or

E discrimination, harassment or segregation based on a person's age, color, national origin, race, religion or sex, except when alleged, charged or suffered by any **customer**[.]

Jt. App. Vol. II pp. 178–79 (emphases in original).

[5] The CGL Policy also contained the following employment-related practices exclusion ("the ERP Exclusion"):

A. This insurance does not apply to any damages sustained at any time by any person, whether or not sustained in the course of employment by any **insured**, arising out of any employment-

related act, omission, policy, practice or representation directed at such person, occurring in whole or in part at any time, including any

1 arrest, detention or imprisonment,

2 breach of any express or implied covenant,

3 coercion, criticism, humiliation, prosecution or retaliation,

4 defamation or disparagement,

5 demotion, discipline, evaluation or reassignment,

6 discrimination, harassment or segregation,

7 a eviction, or

b invasion or other violation of any right of occupancy,

8 failure or refusal to advance, compensate, employ or promote,

9 invasion or other violation of any right of privacy or publicity,

10 termination of employment, or

11 other employment-related act, omission, policy, practice, representation or relationship in connection with any **insured** at any time.

B. This insurance does not apply to any damages sustained at any time by the brother, child, parent, sister or spouse of such person at whom any employment-related act, omission, policy, practice or representation is directed, as described in paragraph A above, as a consequence thereof.

This exclusion applies

• whether the **insured** may be liable as an employer or in any other capacity, and

• to any obligation to share damages with or repay someone else who must pay damages because of any of the foregoing.

Jt. App. Vol. II pp. 164–65 (emphases in original).

B. The Excess Policy

[6] Effective August 1, 2018, Federal issued the Excess Policy to ClearPoint. The Excess Policy had a $1,000,000.00 aggregate limit, including an occurrence limit of the same. The CGL Policy was the underlying policy tied to the Excess Policy. The Excess Policy obligated Federal to cover "on behalf of the **insured**, that part of loss to which this coverage applies, which exceeds the applicable **underlying limits**" and would "follow the terms and conditions of [the] **underlying insurance**." Jt. App. Vol. III p. 13 (emphases in original).

C. The EPL Policy

[7] Effective January 1, 2019, Federal issued the EPL Policy to Oasis Outsourcing Group Holdings, L.P. ("Oasis"), which included the following limits of insurance and retention:

A. Client Company Coverage

Each **Insured Event** Sub-Limit:	$1,000,000
Client Company Policy Period Sub-Limit:	$2,000,000
Self-Insured Retention:	$50,000

B. Named Insured Coverage

Each **Insured Event** Sub-[L]imit:	$15,000,000
Self-Insured Retention:	$50,000

C. Wrongful Business Environment Coverage

Each **Insured [E]vent** [&] aggregate Sub-Limit: $1,000,000

D. Total **Policy Period** Aggregate Limit: $15,000,000

Jt. App. Vol. II p. 104 (emphases in original). Oasis was the named insured to the EPL Policy and it is undisputed that ClearPoint was covered as a "client company" under the EPL Policy.

[8] The EPL Policy provided, in relevant part, as follows:

> **A. INDEMNITY**
>
> 1. Subject to all of the terms, limitations, conditions, definitions, exclusions and other provisions of this policy, **we** will pay all **Loss Amounts** that the **Insured** is legally obligated to pay because of an **Insured Event** to which this insurance applies. The amount we will pay is limited as described in Item 3 of the Declarations and in the Sections of this policy dealing with **LIMITS OF INSURANCE, DEFENSE, SELF-INSURED RETENTION and OTHER INSURANCE**.
>
> 2. Subject to the other provisions of this policy, it is agreed that coverage only applies to **Claims** first made against any **Insured** during the **Policy Period**. Coverage is provided for a **Claim** only if:
>
> > a. The **Claim** is made by or on behalf of: (i) an **Employee**, **Worksite Employee** or an applicant for employment of the **Named Insured**, **Subsidiary Corporation** or a **Client Company**; or (ii) a former **Employee** or **Worksite Employee** of the **Named Insured**, **Subsidiary Corporation** or a **Client**

> **Company**;
>
> b. An **Insured** is named in the **Claim** and the **Claim** alleges **Wrongful Employment Acts** against the **Named Insured** or a **Subsidiary Corporation** and/or the **Client Company**, for which the **Employee** or **Worksite Employee** works or applied for employment; or the **Named Insured** or **Subsidiary Corporation** are named in a **Claim** alleging a **Wrongful Business Environment**….

Jt. App. Vol. II p. 106 (emphases in original).

[9] The EPL Policy contained the following definitions:

> C. **Client Company** means an entity that has entered into a [professional employer organization ("PEO")] or ASO Platinum **Client Services Agreement** with the **Named Insured**, thus becoming a client of the **Named Insured** or **Subsidiary Corporation**. **Client Company** shall not include any entity which contracts with the **Named Insured** for staffing services.
>
> D. **Client Services Agreement** means a contractual agreement between the **Named Insured** or a **Subsidiary Corporation** and a **Client Company** which defines the responsibilities of the **Named Insured** or a **Subsidiary Corporation** and a **Client Company** with respect to the **Named Insured's** or a **Subsidiary Corporation's** provision of [PEO] or ASO Platinum services to a **Client Company**.
>
> ****
>
> F. **Employee** means an individual who is determined to be an employee by common law and whose labor or service is engaged by and/or directed by the **Named Insured** or a **Subsidiary**

Corporation. This includes past, present, part-time, seasonal and temporary or leased **Employees** as well as any individual employed in a supervisory, managerial, or confidential position. **Employee** includes an employee of the **Named Insured** or **Subsidiary Corporation** provided under a staffing arrangement. **Employee** shall not include a **Worksite Employee(s)** or any individuals contracted under an ASO Platinum Service agreement.

G. **Insured Event** means any actual or alleged **Wrongful Employment Act** committed by an **Insured**.

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P. **Worksite Employee** means a person employed by a **Client Company**, but only to the extent covered by a **Client Services Agreement**.

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S. **Wrongful Employment Act** means any act, error, omission, neglect or breach of duty actually or allegedly committed or attempted by the **Named Insured**, a **Subsidiary Corporation** or a **Client Company** or by one or more **Employees** or **Worksite Employees** in their capacities as such in connection with any actual or alleged:

> 1. violation of any law or public policy concerning discrimination in employment whether based upon age, race, national origin, religion, sex, sexual preference, marital status, disability, or genetic predisposition;
>
> 2. **Wrongful Termination**, failure or refusal to hire or promote; wrongful discipline; wrongful reference, deprivation of a career opportunity, demotion or adverse change in terms, conditions or status of

> employment; wrongful failure to grant tenure; retaliation for asserting a legal right; workplace harassment; negligent hiring, retention, supervision, training or performance evaluation;
>
> Notwithstanding P.1. or P.2. above this policy *does not afford coverage for a* ***Client Company*** for breach of any express or implied employment contract, including quasi contracts and relief under "quantum meruit", defamation, invasion of privacy, misrepresentation, fraudulent inducement or infliction of emotional distress.…

Jt. App. Vol. II pp. 113–16 (bold in original, italics added). Again, ClearPoint qualifies as a "Client Company" under the EPL Policy.

[10] Furthermore, the EPL Policy did "not apply … to amounts alleged to be *owing under, or arising out of, or related to* an express or an implied contract of employment[.]" Jt. App. Vol. II p. 112 (emphasis added). The EPL Policy also contained a business-disputes exclusion, which provided as follows:

> **Business Disputes**. With respect to **Claims** against a **Client Company**, this policy *does not cover* **Loss Amounts** arising from, relating to or in any way involving *a dispute among current, former or alleged owners, shareholders, members, partners, joint-ventures, investors in or holders of any other form of equity or ownership interest in a business entity*, venture or enterprise, including agents, heirs, executors, administrators, predecessors, successors, assigns, representatives and attorneys of such parties, *in any way involving the alleged rights and/or responsibilities associated with such ownership or business interests* ("Business Disputes"), or to **Insured Events** arising from, directly or indirectly, or relating to in any way in whole or in part from such Business Disputes.

Jt. App. Vol. II p. 112 (bold in original, italics added).

II. The "deGorter Lawsuit"

[11] On August 28, 2019, David J. deGorter ("deGorter"), ClearPoint's former President and CEO, sued ClearPoint and Michael H. Devlin, II ("Devlin"), the Chair of ClearPoint's Board of Directors, in the Marion Superior Court under Cause No. 49D01-1908-PL-035770 (the "deGorter Lawsuit"). In his complaint, deGorter alleged that ClearPoint had breached his contract and that Devlin had engaged in breaches of his common-law duties. Specifically, deGorter alleged, in relevant part, the following:

> 4. In 2017, the [then-]President of ClearPoint announced his intention to retire and resign from his position at ClearPoint effective September 30, 2017.
> 5. In view of that development, [Devlin] contacted [deGorter] to inquire whether [he] would be willing to become ClearPoint's President and CEO and, if so, on what terms.
> 6. [deGorter] responded that he would be willing to become President and CEO of ClearPoint at the same level of base compensation as the outgoing President, provided that ClearPoint would agree:
>
> (a) to facilitate [deGorter's] purchasing 30% of the total equity of ClearPoint;
> (b) to adopt and implement a plan under which ClearPoint would award directors and certain managers, including [deGorter], certain equity-like benefits; and
> (c) to continue to pay [deGorter] the fees he had been receiving as a member of the Board of Directors.
>
> 7. On behalf of ClearPoint, [Devlin] agreed to [deGorter's] conditions. Accordingly, ClearPoint and [deGorter] entered into an agreement under which [deGorter] became ClearPoint's

President and CEO, and ClearPoint agreed to provide [deGorter] the compensation and benefits described in paragraph 6.
8. Because the terms under which ClearPoint agreed to employ [deGorter] as President and CEO included [his] acquiring 30% of the total equity of ClearPoint, it was necessary for [deGorter] to obtain approval from the [Office of the Comptroller of the Currency ("OCC")] to become a "Control Party" (defined as a shareholder who owns 10% or more of the equity) of ClearPoint.…
****
24. In or about mid-April 2018, [Devlin] did an about-face.…
****
29. [Devlin] called [deGorter] on April 30, 2018. [Devlin] told [deGorter] that there had been a misunderstanding concerning the sale of stock to [deGorter].…
30. [Devlin] emailed [deGorter] on May 2, 2018.… Ignoring … the commitments ClearPoint had made to [deGorter] to entice him to become President and CEO, … [Devlin] added, "I would also hope that management and the board are already focused on achieving high performance given our current culture, compensation and bonus plan."
****
32. ClearPoint's Board of Directors met again in November 2018. [Devlin] invited [Keefe, Bruyette & Woods ("KBW")] to make a presentation, the gist of which was that the time was right to sell ClearPoint.
33. ClearPoint's Board of Directors had a status call in December 2018. [Devlin] discussed the November 2018 presentation and recommended that the Board approve putting ClearPoint up for sale. The Board approved [Devlin's] recommendation.
34. [deGorter] met with the Chair on March 27, 2019.… [Devlin] told [deGorter] later that day that, until [he] agreed (a) to forego the compensation and benefits that he had bargained for and ClearPoint had agreed to provide under his employment agreement, and (b) to accept something less instead, meetings with potential acquirers of ClearPoint would be cancelled.

35. [Devlin] called [deGorter] on April 3, 2019, and stated that an accountant had advised that, under "the Tilford case," [deGorter] could not purchase additional ClearPoint shares. That was false. [deGorter] asked [Devlin] for specific information about "the Tilford case." [Devlin] declined to provide any.

36. On April 12, 2019, [Devlin] sent [deGorter] an email and a proposed "bonus retention agreement" that [Devlin] said had been "approved by the Compensation Committee of ClearPoint.[…]"

37. [deGorter] responded to [Devlin's] April 12 email and … said that the proposed "bonus retention agreement" "modifies the transaction that I agreed to" and "does not meet my requirements."

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43. Before [deGorter] became President and CEO, ClearPoint's net income had been flat for five years. As a result of [deGorter's] leadership, earnings have grown by roughly 50%, and assets have grown by approximately 35%.… Simply put, ClearPoint never performed better than it did under [deGorter's] leadership.

44. Even so, ClearPoint terminated [deGorter's] employment effective July 31, 2019. [Devlin] caused CleartPoint [*sic*] to do so to deprive [deGorter] of the benefits of the employment agreement that [he] had negotiated and performed, and to maximize [Devlin's] and his family's return on an eventual sale of the company.

****

47. ClearPoint has breached its contractual obligations to [deGorter].

48. [deGorter] has been damaged as a proximate result of ClearPoint's breaches.

Jt. App. Vol. III pp. 153–165.

[12] On September 3, 2019, the deGorter Lawsuit was removed to the United States District Court for the Southern District of Indiana. By order dated January 31, 2020, the district court dismissed deGorter's claim against ClearPoint. On March 18, 2020, deGorter filed an amended complaint in the U.S. District Court, naming Devlin and Curragh Capital Partners II, L.P. ("CCP"), as defendants. deGorter's amended complaint alleged counts of defamation, tortious interference with at-will employment, and breach of fiduciary duties against Devlin. Specifically, deGorter alleged that Devlin had made false statements suggesting that deGorter had engaged in fraudulent and misleading conduct. On June 9, 2020, the district court remanded the deGorter Lawsuit to the Marion Superior Court.

III. ClearPoint's Request for Liability Coverage from Federal

[13] Meanwhile, on or about August 30, 2019, Federal had been notified of the deGorter Lawsuit with a tender for coverage under the EPL Policy. By correspondence dated September 30, 2019, Federal denied coverage for the deGorter Lawsuit under the EPL Policy. In denying coverage, Federal explained,

> Since ClearPoint has a Client Service Agreement in place with Oasis, it is a Client Company under the Policy. As noted above, the Policy specifically excludes coverage for Claims against a Client Company for breach of any express or implied employment agreement. Accordingly, Mr. deGorter's claim for breach of contract against ClearPoint is excluded from coverage under the Policy.

> The allegations against [Devlin] for breach of fiduciary duty does not meet the definition of a Wrongful Employment Act, as defined above. Also, Oasis has confirmed that [Devlin] is not a Worksite Employee and therefore is not an Insured under the Policy. Accordingly, there is also no coverage for Mr. deGorter's claim for breach of fiduciary duty.

Jt. App. Vol. V p. 7.

[14] On May 14, 2020, ClearPoint tendered the amended complaint in the deGorter Lawsuit to Federal for coverage under the EPL Policy. Federal again denied coverage for the deGorter Lawsuit under the EPL Policy by correspondence dated June 17, 2020. In denying coverage, Federal stated,

> As previously noted in our September 20, 2019 letter to … [ClearPoint], Oasis … has advised that Mr. Devlin is not a Worksite Employee and therefore he is not an Insured under the Policy. This information was confirmed again following receipt of the Amended Complaint.
>
> Since the Amended Complaint is not filed against an Insured, as defined by the terms of the Policy, it does not trigger coverage under the CC Part of the Policy.
>
> Further, we also note that the allegations in the Amended Complaint do not meet the definition of a Wrongful Employment Act, which would be an additional basis to exclude coverage for this matter under the [Client Company] Part of the Policy….
>
> Accordingly, for the reasons set forth above, this matter does not trigger coverage under the [Client Company] Part of the Policy

> and Chubb will not defend or indemnify Mr. Devlin or [CCP] for this matter.

Jt. App. Vol. V. p. 121.

[15] On June 26, 2020, ClearPoint tendered the amended complaint in the deGorter Lawsuit to Federal for coverage under the CGL Policy. Federal denied coverage for the deGorter Lawsuit under the CGL Policy by correspondence dated July 30, 2020. In denying coverage, Federal stated

> It is our position that no coverage applies to [ClearPoint], [Devlin,] or [CCP], for the allegations set forth in the Amended Complaint under the Primary Policy. The allegations of breach of contract, defamation, tortious interference with at-will employment, and breach of fiduciary duties would not constitute Bodily Injury or Property Damage caused by an Occurrence, Personal Injury or Advertising Injury as these terms are defined in the Primary Policy. To the extent that [deGorter] alleges any personal injury, the exclusions for *Employment-Related Practices* would apply to preclude coverage for any defamation or wrongful termination allegations made by an employee or former employee. Further, the Policy contains the exclusions *Expected or Intended Injury, Breach of Contract, Publications with Knowledge of Falsity,* which may also apply. The Primary Policy also contains the *Securities And Trade Practices* exclusion which applies to exclude coverage for any claims alleging fraud or breach of fiduciary duty. Finally, punitive damages are not insurable as a matter of state law or public policy.

Jt. App. Vol. V p. 125 (emphases in original).[1]

[16] On October 16, 2020, ClearPoint filed a complaint for declaratory judgment against Federal. On January 14, 2021, Federal filed its answer and affirmative defenses to ClearPoint's complaint. Federal filed an amended answer on August 10, 2021. On August 6, 2021, ClearPoint filed a motion for partial summary judgment on Federal's duty to defend. On February 21, 2022, Federal filed a cross-motion for summary judgment and response in opposition to ClearPoint's motion.

[17] On July 28, 2022, the trial court held a hearing on the cross-motions for summary judgment. On September 28, 2022, the trial court issued an order granting in part and denying in part ClearPoint's motion for summary judgment and granting in part and denying in part Federal's cross-motion for summary judgment. On December 15, 2023, the trial court entered partial final judgment pursuant to Indiana Trial Rule 56(C).

Discussion and Decision

[18] Each party challenges the portion of the trial court's summary-judgment order awarding summary judgment to the other on appeal.

[1] Both the trial court and the parties focus on the ERP Exclusion and neither cite nor rely on either of the other two potential exclusions listed in Federal's denial of coverage.

I. Applicable Law

A. Summary Judgment Standard of Review

[19] This Court reviews summary judgments de novo, applying the same standard as the trial court. *SCI Propane, LLC v. Frederick*, 39 N.E.3d 675, 677 (Ind. 2015). Summary judgment is appropriate only when the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C)[; *s*]*ee Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). Parties filing cross-motions for summary judgment neither alters this standard nor changes our analysis—"we consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law." *SCI Propane, LLC*, 39 N.E.3d at 677. Matters involving disputed insurance policy terms present legal questions and are particularly apt for summary judgment. *Wagner v. Yates*, 912 N.E.2d 805, 808 (Ind. 2009).

Erie Indem. Co. for Subscribers at Erie Ins. Exch. v. Est. of Harris by Harris, 99 N.E.3d 625, 629 (Ind. 2018).

B. Interpretation of an Insurance Contract

[20] The construction of a contract is particularly well-suited for de novo appellate review, because it generally presents questions purely of law. *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 667 (Ind. 1997). Insurance contracts are governed by the same rules of construction as any other contract. *Id.* Clear and unambiguous policy language is given its ordinary meaning, *id.*, in order to accomplish the primary goal of contract interpretation: "to determine the intent of the parties at the time the contract was made as disclosed by the language used to express their rights and duties," *First Fed. Sav. Bank of Ind. v. Key Markets, Inc.*, 559 N.E.2d 600, 603 (Ind. 1990).

> Where contractual language is ambiguous, we generally resolve those ambiguities in favor of the insured, *Guzorek*, 690 N.E.2d at 667, but will not do so if such an interpretation fails to harmonize the provisions of the contract as a whole, *see Key Markets*, 559 N.E.2d at 603. However, the failure to define a contractual term does not necessarily make that term ambiguous, *Guzorek*, 690 N.E.2d at 667, nor does a simple disagreement about the term's meaning. "Rather, an ambiguity exists where the provision is susceptible to more than one reasonable interpretation." *Id.*

Holiday Hosp. Franchising, Inc. v. AMCO Ins. Co., 983 N.E.2d 574, 577–78 (Ind. 2013). "When construing an insurance policy, we may not extend insurance coverage beyond that provided in the contract, nor may we rewrite the clear and unambiguous language of the insurance contract." *Sell v. United Farm Bureau Fam. Life Ins. Co.*, 647 N.E.2d 1129, 1131–32 (Ind. Ct. App. 1995), *trans. denied*.

[21] "Insurance companies are free to limit their liability in a manner not inconsistent with public policy as reflected by case or statutory law." *Allstate Ins. Co. v. Boles*, 481 N.E.2d 1096, 1098 (Ind. 1985). "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." *Keckler v. Meridian Sec. Ins. Co.*, 967 N.E.2d 18, 23 (Ind. Ct. App. 2012), *trans. denied*. "An exclusionary clause must clearly and unmistakably express the particular act or omission that will bring the exclusion into play." *Jackson v. Jones*, 804 N.E.2d 155, 158 (Ind. Ct. App. 2004). "It is well[-]settled law that a condition or exclusion in an insurance policy must clearly and

unmistakably bring within its scope the particular act or omission that will bring the condition or exclusion into play in order to be effective, and coverage will not be excluded or destroyed by an exclusion or condition unless such clarity exists." *Asbury v. Ind. Union Mut. Ins. Co.*, 441 N.E.2d 232, 242 (Ind. Ct. App. 1982). "If a plainly expressed exception, exclusion or limitation in an insurance policy is not contrary to public policy, it is entitled to construction and enforcement as expressed." *Boles*, 481 N.E.2d at 1098.

II. Whether Federal Owed ClearPoint a Duty to Defend[2]

[22] The parties agree that this case turns on the question of whether Federal owed a duty to defend ClearPoint. "An insurer's duty to defend its insureds is broader than its coverage liability or duty to indemnify." *Jim Barna Log. Sys. Midwest, Inc. v. Gen. Cas. Ins. Co. of Wis.*, 791 N.E.2d 816, 823 (Ind. Ct. App. 2003), *trans. denied*. This principle, however, "only applies when the risk is insured against." *Liberty Mut. Ins. Co. v. Mich. Mut. Ins. Co.*, 891 N.E.2d 99, 102 (Ind. Ct. App. 2008). For instance, "'[w]here an insurer's independent investigation of the facts underlying a complaint against its insured reveals a claim is patently outside of the risk covered by the policy, the insurer may properly refuse to defend." *Id.* at 102–03 (quoting *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37, 42 n.6 (Ind. 2002)).

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[2] ClearPoint asserts that "[t]he most important thing for this Court to understand … is that ClearPoint is not seeking double recovery. This case concerns coverage under two different insurance policies for two different sets of defense costs." Appellant's Reply Br. p. 9.

[23] [A]n insurer may go beyond the face of the complaint and refuse to defend based upon the factual underpinnings of the claims contained within the complaint. *Cincinnati Ins. Co. v. Mallon*, 409 N.E.2d 1100, 1105 (Ind. Ct. App. 1980). "Where the insurer is aware of facts, not in the pleadings, which clearly disclose an absence of coverage, it can refuse to defend or clarify its obligation by means of a declaratory judgment action." *Id.* at 1105. For example, "when the underlying factual basis of the complaint, even if proved true, would not result in liability under the insurance policy, the insurance company can properly refuse to defend." *Id.* Accordingly, it is the nature of the claim, not its merits, that determines the insurer's duty to defend. *Id.*

Jim Barna, 791 N.E.2d at 823. Further, "[i]f 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." *Ind. Farmers Mut. Ins. Co. v. N. Vernon Drop Forge, Inc.*, 917 N.E.2d 1258, 1267 (Ind. Ct. App. 2009), *trans. denied*.

A. Direct Appeal Challenge: The CGL Policy

[24] ClearPoint contends that the trial court erred in granting summary judgment to Federal on the question of duty to defend under the CGL Policy. ClearPoint claims that the trial court erred in concluding that the ERP Exclusion applied. In support, ClearPoint argues that the trial court erred in relying on our prior opinions in *Peerless Indemnity Insurance Co. v. Moshe & Stimson LLP*, 22 N.E.3d 882 (Ind. Ct. App. 2014), *trans. denied*, and *Global Caravan Technologies, Inc. v. Cincinnati Insurance Company*, 135 N.E.3d 584 (Ind. Ct. App. 2019), *trans. denied*, claiming that these opinions provided limited guidance. Instead, ClearPoint

points to caselaw from other jurisdictions to support its assertion that the ERP Exclusion does not apply. For its part, Federal argues that our opinions in *Peerless* and *Global Caravan* apply and, as such, the trial court did not err in relying on them.

[25] The facts of *Peerless* are as follows: Justin Stimson and Sarah Moshe were siblings and law partners. 22 N.E.3d at 883. After Sarah informed Justin that she intended to leave their law firm, Justin made accusations about Sarah's personal integrity and professional competence. *Id.* Sarah eventually filed suit against Justin, alleging defamation and seeking a formal dissolution of their partnership. *Id.* Justin filed a claim under the law firm's insurance policy with Peerless, seeking defense and indemnification. *Id.* Peerless argued that it had no duty to defend because Sarah's allegations were excluded from coverage pursuant to the policy's employment-related practices exclusion. *Id.* Like the ERP Exclusion at issue in this case, the exclusion in the Peerless policy indicated that the insurance did not apply to employment-related practices or acts, including defamation. *Id.* at 884. Peerless appealed after the trial court ordered it to defend and indemnify Justin, determining that the employment-related practices exclusion did not apply. *Id.* at 885.

[26] On appeal, we noted that the issue was whether Justin's alleged actions, particularly his alleged defamation of Sarah, were "employment-related." *Id.* at 886. In finding that they were, we defined "employment-related" as follows: "Black's Law Dictionary defines 'employment' in many ways, including 'the quality, state, or condition of being employed; the condition of having a paying

job.' Black's Law Dictionary 641 (10th ed. 2014). 'Related,' in turn, means 'connected in some way; having relationship to or with something else....' *Id.* at 1479." *Id.* at 886. Applying these definitions, we concluded that Justin's alleged actions and statement were employment-related, and, as such, Peerless did not have a duty to defend the law firm. *Id.*

[27] In *Global Caravan*, Global Caravan founder Charles Hoefer, Jr., filed a lawsuit in which he alleged that company investors Husheng Ding, Christopher Douglas, and Kyle Fang ("the Hoefer defendants") had "made defamatory statements about him which injured his professional reputation while he was still employed with [Global] and serving as its CEO and a director on the Board." 135 N.E.3d at 595 (brackets in original). He further alleged that his professional reputation had been "injured by a public statement issued by [the Hoefer defendants], ostensibly through Global while under illegitimate control, in RV industry media outlets. In the public statement, Ding states that Hoefer's Underlying Lawsuit 'demonstrates the same emotional, *irrational* and *dangerous behavior* that led to his necessary separation from the company.'" *Id.* (emphases in original, brackets added). Global Caravan's insurance provider, Cincinnati Insurance Company ("Cincinnati"), initially agreed to defend the Hoefer defendants, but subsequently filed a complaint seeking a declaratory judgment that it had no duty to defend or indemnify them because the claims raised by Hoefer were excluded from coverage under the policy's employment-related practices exclusion. *Id.* at 587.

[28] Similar to the exclusions in *Peerless* and the instant case, the employment-related exclusion at issue in *Global Caravan* excluded coverage for "[o]ther employment-related practices, policies, acts or omissions including … defamation." *Id.* at 593. Citing *Peerless*, we concluded that

> [a]ll of the findings indicate actions that occurred while Hoefer was employed by [Global] and were allegedly perpetrated by [the Hoefer defendants], all employees of [Global]. The statements were made regarding Hoefer's performance as related to his employment with [Global]. Therefore, the allegations in the Hoefer Litigation fall squarely within that category of actions. The trial court did not err when it granted summary judgment in favor of [Cincinnati] in this matter.

Id. at 598 (second set of brackets added, all other brackets in original). We therefore further concluded that the exclusion "precluded coverage by Cincinnati for [the Hoefer defendants]." *Id.* (brackets added).

[29] Again, the CGL Policy contained in the ERP Exclusion states that the CGL Policy did not apply to any damages sustained in the course of employment, arising out of any employment-related act, including "defamation or disparagement." Jt. App. Vol. II p. 164. The ERP Exclusion applies "whether the insured may be liable as an employer or in any other capacity[.]" Jt. App. Vol. II p. 165 (emphasis omitted). The trial court found that the ERP Exclusion

> would serve to bar coverage of deGorter's defamation claims against ClearPoint. The Court finds that the alleged defamatory comments made by Devlin concerning deGorter's professional judgment and credibility are sufficiently related to deGorter's role as President and CEO of ClearPoint since deGorter's candor

> with the regulators that would oversee ClearPoint's operations is among his employee responsibilities and thus construes the defamation claim raised in the deGorter Complaint to concern comments that are "employment-related" for the purposes of applying the ERP Exclusion. Devlin's alleged comments over deGorter's overall fitness to lead also relate to deGorter's employment on the face of the deGorter Complaint since the[y] concern deGorter's effectiveness to act as the chief executive and leader of ClearPoint.

Jt. App. Vol. II pp. 67–68. In granting Federal's request for summary judgment, the trial court concluded that "[b]ecause Federal has no duty to defend the deGorter Lawsuit under the CGL Policy, it can have no duty to indemnify…. Accordingly, Federal is entitled to judgment as a matter of law that there is no coverage for the deGorter Lawsuit under the CGL Policy." Jt. App. Vol. II p. 68. We agree.

[30] While ClearPoint acknowledges that some of the claims at issue may be excluded under the ERP Exclusion consistent with our opinions in *Peerless* and *Global Caravan*, it asserts that others, particularly those for which it has the responsibility to indemnify Devlin, fall outside of the ERP Exclusion. We disagree, concluding that all of the claims, even those involving Devlin, are employment-related. At all relevant times, Devlin was serving as a member of ClearPoint's Board of Directors and the actions taken by Devlin for which deGorter complained about in both the original and amended lawsuits were at least tangentially related to deGorter's employment relationship with ClearPoint. As such, the trial court did not err in finding that Federal did not

owe ClearPoint a duty to defend or in granting summary judgment to Federal as it relates to the CGL Policy.[3]

B. The Excess Policy

[31] Again, the CGL Policy is the underlying policy for the Excess Policy, which follows the terms and conditions of the underlying policy. As the trial court concluded, pursuant to the terms and conditions of the Excess Policy, there can only be coverage under the Excess Policy if there is coverage under the CGL Policy. Given our conclusion that Federal did not owe a duty to defend ClearPoint under the CGL Policy, we likewise conclude that the trial court did not err in granting summary judgment to Federal of the question of duty to defend under the Excess Policy.

C. Cross-Appeal Challenge: The EPL Policy

[32] On cross-appeal, Federal contends that the trial court erred in granting summary judgment in favor of ClearPoint on the question of duty to defend under the EPL Policy. The trial court found that the coverage question under the EPL Policy essentially came down to whether the deGorter Lawsuit involved a breach-of-contract claim or a violation of the Wrongful Employment Act. As the trial court noted, Federal did not dispute that deGorter's allegations met the definition of a Wrongful Employment Act but argued that

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[3] Having concluded that the trial court did not err in considering our prior decisions in *Peerless* and *Global Caravan* in determining that the ERP Exclusion applies deGorter's claims in full, we need not discuss the numerous foreign cases mentioned by ClearPoint in support of their argument that the ERP Exclusion did not apply to deGorter's claims in full.

because deGorter's initial allegations involved an alleged breach of contract, the breach-of-contract exclusion applies.

[33] In awarding summary judgment to ClearPoint, the trial court determined that "[f]rom the face of deGorter's Complaint, therefore, it does not appear that the breach of contract alleged by deGorter necessarily concerns an 'employment contract' and thus is not necessarily subject to the Breach of Contract Exclusion in the EPL Policy." Jt. App. Vol. II p. 60. The trial court concluded that

> Because the deGorter Complaint has been amended and ClearPoint dismissed from the underlying matter, it is impossible to determine whether the alleged breach concerning the 30% equity share that related to the Stock Sale plan would ultimately be considered a covered Wrongful Employment Act [or an] excluded breach of an employment contract. In cases like this, however, the Court finds that the broad application of an insurer's duty to defend means that the correct result is to find that Federal did owe ClearPoint such a duty in the underlying suit up until ClearPoint was dismissed in this case. Here, there was a possibility that deGorter's allegations constituted a covered Wrongful Employment Act under the EPL Policy while also raising the possibility that the claim would be an excluded breach of an employment contract under the EPL Policy's Breach of Contract Exclusion. Rather than denying coverage based on the face of the deGorter Complaint at the outset, Federal should have defended ClearPoint under the EPL Policy until it became unmistakably clear that deGorter's claims would ultimately be tied [to] breach of his employment contract with ClearPoint, at which point Federal could have denied further defense coverage and all indemnity. The Court finds as a matter of law that a proper application of the full Wrongful Employment Act coverage under the EPL Policy to the facts alleged in the

> deGorter Complaint obligated Federal to defend ClearPoint in the underlying suit.

Jt. App. Vol. II p. 61.

[34] Again, the EPL Policy contained a general exclusion which indicated that it would "not apply … to amounts alleged to be owing under, or arising out of, or related to an express or an implied contract of employment[.]" Jt. App. Vol. II p. 112. With regard to the Wrongful Employment Act, the EPL Policy further provided that it "does not afford coverage for a **Client Company** for breach of any express or implied employment contract, including quasi contracts and relief under 'quantum meruit', defamation, invasion of privacy, misrepresentation, fraudulent inducement or infliction of emotional distress." Jt. App. Vol. II p. 116 (emphasis in original). Given this policy language, the question is whether deGorter's claims levied against ClearPoint raised colorable employment claims beyond a claim of breach of employment contract.

[35] As it related to ClearPoint,[4] deGorter alleged that "ClearPoint has breached its contractual obligations to [deGorter]" and he had "been damaged as a proximate result of ClearPoint's breaches." Jt. App. Vol. III p. 165. Federal points to the language used by deGorter in his complaint as support for its assertion that it did not have a duty to defend ClearPoint pursuant to the breach-of-contract exclusion. For its part, ClearPoint argues that "deGorter's

[4] The parties seem to agree that coverage under the EPL Policy is limited to actions attributed to ClearPoint.

framing of the claim [against ClearPoint] as one for breach of contract is not outcome-determinative." Appellant's Reply Br. p. 48. The trial court found the same, stating,

> The Court notes that deGorter alleging a breach of contract claim against ClearPoint is not outcome-determinative of Federal's duty to defend as noted by both Parties. The Court looks instead to the factual allegations of the Complaint to determine whether coverage would be excluded, and Federal's burden is to show that the damages complained of would necessarily be excluded by the Breach of Contract Exclusion. The Court finds that Federal did not meet this burden.

Jt. App. Vol. II p. 59. The trial court explained that "there are genuine questions of whether the breach complained of by deGorter that included the equity purchase plan was necessarily part of his alleged employment agreement with ClearPoint." Jt. App. Vol. II p. 59. Specifically, the trial court found,

> Based on a sum total of the allegations, these damages indicate that ClearPoint's alleged breach was not directly tied to deGorter's employment relationship with ClearPoint since he began to work prior to the finalized deal had been agreed and continued to work even after it became apparent that ClearPoint, as allegedly acting through Devlin, would no longer entertain a 30% equity share with deGorter. Instead, it was the alleged interference by ClearPoint of this Stock Plan that appears to have been entered into independent from deGorter's specific employment contract that led to deGorter filing a claim for breach of contract against ClearPoint. From the face of deGorter's Complaint, therefore, it does not appear that the breach of contract alleged by deGorter necessarily concerns an "employment contract" and thus is not necessarily subject to the Breach of Contract Exclusion in the EPL Policy.

> The Court further finds that deGorter's allegations could present a potential Wrongful Employment Act that would be covered under the EPL Policy. A covered Wrongful Employment Act claim under the EPL Policy includes to [*sic*] changes in employment status. Even if the alleged Stock Sale Plan was necessarily part of deGorter's employment as compensation, the allegations reflect that his employment status did change through the alleged reneging of the deal among other negative changes allegedly experienced by deGorter.

Jt. App. Vol. II pp. 60–61. Basically, the trial court determined that deGorter's original complaint contained colorable claims that could potentially trigger Federal's duty to defend and Federal, therefore, "should have defended ClearPoint under the EPL Policy until it became unmistakably clear that deGorter's claims would ultimately be tied [*sic*] breach of his employment contract with ClearPoint, at which point Federal could have denied further defense coverage and all indemnity." Jt. App. Vol. II p. 61.

[36] Given our review of the designated evidence, we reach the same conclusion as the trial court, which is that deGorter's original complaint alleged colorable claims that could have potentially extended beyond the realm of a breach-of-contract claim. As such, we cannot say that the trial court erred in denying Federal's request for summary judgment as it relates to the EPL Policy or in finding, as a matter of law, that Federal, at least initially, had a duty to defend ClearPoint under the EPL Policy.

[37] The judgment of the trial court is affirmed and the matter remanded to the trial court for further proceedings.

Bailey, J., and Foley, J., concur.

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