FOURTH DIVISION
November 6, 2014

Nos. 1-13-2351, 1-13-2352, 1-13-2485 and 1-13-2534 (Cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ERIE INSURANCE EXCHANGE, Plaintiff-Appellee, v. BNSF RAILWAY COMPANY and TTS TERMINALS, INC., Defendants-Appellants, and JOSEPH COLELLA and JAMES THOMAS, Defendants.	)	Appeal from the Circuit Court of Cook County
BNSF RAILWAY COMPANY and TTS TERMINALS, INC., Counterplaintiffs-Appellants, v. ERIE INSURANCE EXCHANGE, Counterdefendant-Appellee.	)	No. 10 CH 20232 and No. 10 CH 22539 Honorable Mary Anne Mason Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: The insurer had no duty to defend an additional insured because the underlying complaint contained no allegations against the named insured and the policy's additional insured endorsement provided coverage only for liability caused by the named insured's acts or omissions. The insurer had a duty to defend the named insured against the third-party complaint filed by the additional insured in the underlying action, and neither the contractual liability exclusion, nor the employer's liability exclusion applied where they contained an exception for an "insured contract." The indemnification agreement between the named insured and the additional insured constituted an "insured contract" within the meaning of the policy. We affirm the circuit court's grant of summary judgment in favor of the insurer and against the additional insured, we reverse the circuit court's grant of summary judgment in favor of the insurer and against the named insured, and remand this matter to the circuit court for further proceedings.

¶ 2 This consolidated appeal involves the duty to defend under the terms of a commercial general liability policy. Defendants, BNSF Railway Company (BNSF) and TTS Terminals, Inc. (TTS) (collectively, defendants) appeal the circuit court's decision on the parties' cross motions for summary judgment in declaratory judgment actions filed by plaintiff, Erie Insurance Exchange (Erie). The circuit court entered judgment in favor of Erie and ruled that Erie had no duty to defend BNSF or TTS in either of two separate underlying bodily injury actions filed by TTS's employees, Joseph Colella and James Thomas. For the reasons that follow, we affirm in part, reverse in part, and remand this matter to the circuit court for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 In the underlying personal injury actions filed by TTS's employees, Colella and Thomas, the only defendant was BNSF. Colella alleged that he slipped and fell on an accumulation of ice on a walkway in front of a building at the Corwith Intermodal Freight owned and operated by BNSF Yard (the BNSF freight yard). Thomas alleged that he slipped and fell due to a crack and liquid on the cement floor at the BNSF freight yard. Neither complaint charges TTS with

negligence or alleges that TTS contributed in any way to causing the accidents. TTS is not mentioned by name in either Colella's or Thomas's complaint.

¶ 5 At the time of the TTS employees' injuries, TTS performed yard checking and other services for BNSF pursuant to an Intermodal Facility Services Agreement (the Agreement). Pursuant to the Agreement, TTS purchased a general liability insurance policy from Erie (the Policy), which provided that BNSF was an additional insured. Although Erie also issued an umbrella policy, BNSF was entitled to coverage under the umbrella policy only if it was entitled to coverage under the primary policy. TTS was the named insured under both policies.

¶ 6 BNSF tendered its defense to TTS and Erie, requesting coverage and indemnity. Erie declined BNSF's tender of defense on the ground that the underlying complaints in Colella's and Thomas's personal injury actions did not allege sufficient facts to require Erie to defend under the policy.

¶ 7 BNSF then filed third-party complaints, subsequently amended, against TTS in the underlying personal injury lawsuits. BNSF's third-party complaints contain two counts. Count I seeks indemnification under the Agreement; Count II seeks contribution under the Illinois Joint Tortfeasor Contribution Act (740 ILCS 100/1 *et seq*. (West 2010)). BNSF alleges that any injuries to Colella and Thomas arose from, or were caused, in whole or in part, by various acts or omissions of TTS or its employees, including the underlying plaintiffs' contributory negligence.

¶ 8 TTS requested that Erie defend it in the underlying personal injury lawsuits. Erie declined to defend TTS based on the employer's liability exclusion and the contractual liability exclusion which Erie contended barred coverage for actions involving TTS's employees.

¶ 9 Erie also filed separate declaratory judgment actions, No. 10 CH 20232 and No. 10 CH 22539, seeking declarations that it did not have a duty to defend or indemnify BNSF or TTS in

the underlying personal injury actions filed by Colella and Thomas. BNSF filed counterclaims in both actions seeking a declaration that Erie was required to defend BNSF under the Policy.

¶ 10 On June 28, 2013, the circuit court considered cross-motions for summary judgment filed by Erie, BNSF, and TTS. Noting that 22 briefs had been filed in connection with the motions, and in an effort to streamline the case, the court explained that the rulings it would make in Erie's declaratory judgment action pertaining to Colella's lawsuit would apply to Erie's declaratory judgment action pertaining to Thomas's lawsuit, given the identity of issues in the two cases. The trial court determined that Erie did not have a duty to defend BNSF or TTS. In its order granting summary judgment, the trial court made a finding pursuant to Rule 304(a) (eff. Feb. 26, 2010) and stayed BNSF's alternative claim against TTS for failing to obtain adequate insurance, and TTS's bad faith claim against Erie, pending the outcome of this appeal. Both BNSF and TTS filed timely appeals in each declaratory judgment action (No. 10 CH 20232 and No. 10 CH 22539). The four appeals were subsequently consolidated by this court.

¶ 11 II. ANALYSIS

¶ 12 A. Standard of Review

¶ 13 We review *de novo* the trial court's decision on a motion for summary judgment. *Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co.*, 215 Ill. 2d 121, 128 (2005). " 'The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court [to decide and] are appropriate subjects for disposition by way of summary judgment.' " *Illinois Emcasco Insurance Co. v. Waukegan Steel Sales Inc.*, 2013 IL App (1st) 120735, ¶ 11 (quoting *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993)). "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter

of law. [Citations.]" (Internal quotation marks omitted.) *Pekin Insurance Co. v. Equilon Enterprises LLC*, 2012 IL App (1st) 111529, ¶ 12. This same standard applies in a case involving a duty to defend claim. *Id.*

¶ 14 B. Construction of Insurance Policy

¶ 15 The principles involved in the interpretation and construction of insurance contracts are the same as those applicable to other types of contracts. *Carey v. American Family Brokerage, Inc.*, 391 Ill. App. 3d 273, 278 (2009). When construing an insurance policy, a court is to ascertain and give effect to the intentions of the parties as expressed by the policy language. *West American Insurance Co. v. Yorkville National Bank*, 238 Ill. 2d 177, 184 (2010). "[T]erms of an insurance policy are to be accorded their plain and ordinary meaning." *National Union Fire Insurance Co. of Pittsburgh, Pennsylvania v. Glenview Park Dist.*, 158 Ill. 2d 116, 122 (1994). However, where the terms are specifically defined in the policy, they will be given the meaning as defined in the policy. *American National Fire Insurance Co. v. National Union Fire Insurance Co. of Pittsburgh, Pennsylvania*, 343 Ill. App. 3d 93, 103 (2003). "Because the court must assume that every provision was intended to serve a purpose, an insurance policy is to be construed as a whole, giving effect to every provision [citation], and taking into account the type of insurance provided, the nature of the risks involved, and the overall purpose of the contract. [Citations.]" *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 371 (2007). " 'All the provisions of the insurance contract, rather than an isolated part, should be read together to interpret it and to determine whether an ambiguity exists.' " *Id.* (quoting *U. S. Fire Insurance Co. v. Schnackenberg*, 88 Ill. 2d 1, 5 (1981)). "The rule that policy provisions limiting an insurer's liability will be construed liberally in favor of coverage only applies where the provision is ambiguous." *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010).

¶ 16 C. Duty to Defend

¶ 17 "In the field of insurance law, it is well settled that the duty to defend is broader than the duty to indemnify." *American Country Insurance Co. v. Cline*, 309 Ill. App. 3d 501, 512 (1999). "[E]ven if an insurer ultimately may not be obligated to indemnify, if the allegations in a complaint state a cause of action that gives rise to the possibility of recovery under the policy, the insurer's duty to defend is called into play." *Id*. An insurer has the burden of establishing that the facts alleged in the complaint do not trigger a duty to defend. *Pekin Insurance Co. v. Roszak/ADC, LLC*, 402 Ill. App. 3d 1055, 1059 (2010). This burden includes affirmatively demonstrating the applicability of an exclusion. *American Zurich Insurance Co. v. Wilcox & Christopoulos, L.L.C.*, 2013 IL App (1st) 120402, ¶ 34.

¶ 18 To determine whether an insurer has a duty to defend an action against an insured, a court ordinarily looks first to the allegations of the underlying complaint and compares them to the relevant portions of the insurance policy. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010); *Pekin Insurance Co. v. Equilon Enterprises LLC*, 2012 IL App (1st) 111529, ¶ 14. This process 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) (explaining that "the court should compare the four corners of the underlying complaint with the four corners of the insurance contract"). If the underlying complaint alleges facts that fall within or potentially within the coverage of the policy, the insurer is obligated to defend its insured even if the allegations are groundless, false, or fraudulent. *Northbrook Property & Casualty Co. v. Transportation Joint Agreement*, 194 Ill. 2d 96, 98 (2000). The potentiality of liability is what gives rise to the duty to defend, even though there may not be a high probability of recovery under the terms of the contract. *Hertz Corp. v. Garrott*, 207 Ill. App. 3d 644, 648 (1990).

¶ 19 "Where the insurer rejects a tender of defense based on a provision that it contends excludes coverage, we review the applicability of that provision to ensure it is clear and free from doubt that the policy's exclusion prevents coverage." (Internal quotation marks omitted.) *Id*. (quoting *Atlantic Mutual Insurance Co. v. American Academy of Orthopaedic Surgeons*, 315 Ill. App. 3d 552, 560 (2000)). The threshold for pleading duty to defend is low, and when there is a doubt about such duty, it is to be resolved in favor of the insured. *Management Support Associates v. Union Indemnity Insurance Co.*, 129 Ill. App. 3d 1089, 1096 (1984). "Although low, this threshold is not nonexistent: an insurer may justifiably refuse to defend against the underlying action if the complaint clearly does not allege facts potentially within coverage." *L.J. Dodd Construction, Inc. v. Federated Mutual Insurance Co.*, 365 Ill. App. 3d 260, 262 (2006).

¶ 20 1. Erie Had No Duty to Defend BNSF

¶ 21 Applying these principles, we conclude that Erie had no duty to defend BNSF from the claims of TTS's employees. A comparison of the Policy with the underlying complaints shows that there is no potential for coverage.

¶ 22 We begin with the language of the Policy, specifically the additional insured endorsement which states in relevant part:

"**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

> **Name of Additional Insured Person(s) or Organization(s)**
>
> ***
>
> Information required to complete this Schedule, if not shown above, will be shown in the Declarations.
>
> **A. Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for 'bodily injury', 'property damage' or 'personal and advertising injury' caused, in whole or in part, by:
>
> 1. Your acts or omissions; or
>
> 2. The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above." (Emphasis in original.)

The Declarations in the Policy designates BNSF as an additional insured.

¶ 23 The trial court concluded that the additional insured endorsement was unambiguous and did not trigger coverage for BNSF. The court additionally concluded that, even if it considered pleadings beyond the four corners of the underlying complaint, Erie had no duty to defend BNSF in the underlying actions.

¶ 24 *a. The Underlying Complaints Do Not Trigger a Duty to Defend BNSF*

¶ 25 On appeal, BNSF first contends that Erie has a duty to defend BNSF based solely on the allegations in the underlying complaints in Thomas's and Colella's personal injury actions

because they allege facts that fall within, or potentially within, the coverage of the policy. We disagree.

¶ 26 We agree with BNSF that the language of the additional insured endorsement does not require that BNSF's coverage under the policy be predicated s*olely* on the acts or omissions of TTS. Nonetheless, the language, "caused, in whole or in part," requires that BNSF's liability must be based on *some* act or omission of TTS. BNSF also argues that the "acts or omissions" of TTS that bring on the duty to defend do not have to be "negligent" nor alleged to be "negligent." Relying primarily on *U.S. Fire Insurance Co. v. Aetna Life and Casualty*, 291 Ill. App. 3d 991 (1997), BNSF asserts that it is entitled to a defense because both Colella and Thomas, at the time of their alleged injuries, were employees of the named insured [TTS], were performing work in connection with TTS's ongoing operations, and were performing services under the Agreement.

¶ 27 In *U.S. Fire*, a subcontractor's employee sued, among others, the general contractor on a construction project alleging he was injured "when he tripped on a conduit protruding from a concrete slab while removing rebars." *Id*. at 994. The employee alleged actions under the Structural Work Act (740 ILCS 150/1 *et seq*. (West 1992)) and in negligence. *Id*. The subcontractor's insurer filed a declaratory judgment action contending, among other things, it did not have a duty to defend the contractor because the complaint did not allege "any acts or omissions" on the part of the subcontractor regarding the accident involving the employee. *Id*. Even though the subcontractor was not named as a defendant, and may not have been negligent, the *U.S. Fire* court decided that the subcontractor's liability insurer had a duty to defend the contractor because the employee's complaint alleged that he was employed by the subcontractor, that he was performing tasks required of him, and that he was working at the site. *Id*. at 1000.

The court determined that the employee's injuries potentially arose out of acts or omissions of the subcontractor in connection with the subcontractor's operations at the site. *Id*.

¶ 28 *U.S. Fire* is distinguishable. As Erie notes, "*U.S. Fire* involved a typical construction case in which the named insured was on site and arguably contributed to the accident unlike TTS which had no connection to [the BNSF freight yard]." Also, contrary to BNSF's assertions, the additional insured endorsement in *U.S. Fire* was not "[v]irtually the same" as the one in this case. The *U.S. Fire* court construed an additional insured endorsement entirely distinct from, and much broader than, the one at issue here. The additional insured endorsement in *U.S. Fire* provided coverage "only with respect to acts or omissions of the named insured *in connection with* the named insured's operations at the applicable location designated." (Emphasis added.) *Id*. at 994. Here, the additional insured endorsement provides coverage "only with respect to liability for 'bodily injury' *** *caused, in whole or in part*, by [TTS's] acts or omissions." (Emphasis added.) Even if an injury can be caused by an act or omission without that act or omission being "negligent," causation is still required. Nothing in the underlying complaints alleges that any act or omission of TTS caused either Thomas's or Colella's injuries. The complaints do not allege any facts showing that TTS played any part in causing the accidents on the premises over which BNSF exercised exclusive control.

¶ 29 TTS also contends that BNSF is entitled to a defense from Erie. TTS asserts that both Colella's and Thomas's underlying complaints show that their alleged injuries may have been caused by the acts or omissions of BNSF "through its agents, employees, [and] servants." TTS contends that "[p]ursuant to TTS's work at the Property for BNSF and under the terms of the [Agreement], TTS and its employees and representatives are possibly 'agents, representatives, employees and servants' of BNSF that may have allegedly caused Colella['s] and Thomas's

alleged bodily injury [which could be imputed to BNSF]." As Erie notes, both BNSF and TTS speculate that the conclusory allegations of agency in the complaints create the theoretical possibility that TTS could be BNSF's agent for purposes of controlling the property. This argument is similar to the dissenting opinion in *Pekin Insurance Co. v. United Parcel Service, Inc.*, 381 Ill. App. 3d 98 (2008). There, the majority held that the contractor's insurer had no duty to defend an additional insured in a negligence action filed against it by the contractor's employee for injuries he sustained while working on the additional insured's premises. *Id.* The dissent, however, noted that the complaint against the additional insured included allegations it acted "by and through" its agents and concluded that "[n]othing in the complaint preclude[d] the possibility that [the contractor] may qualify as an agent for whose fault [the underlying plaintiff] seeks to hold [the additional insured] liable" and "the complaint [left] open the possibility that a court might find [the additional insured] liable solely based on [the contractor's] negligent act of providing its employee, [the underlying plaintiff], with an unstable ladder from which to work." *Id.* at 109 (McNulty, J., dissenting). Thus, the dissent concluded that "[t]he complaint's failure to specifically name [the contractor] as the negligent agent of [the additional insured] should not excuse [the contractor's insurer] from providing a defense to the complaint. *Id.*

¶ 30 First, we note that the facts in this case are different from those in *Pekin Insurance Co. v. United Parcel Service, Inc.* in that the complaint there involved allegations of a defective product and plaintiff alleged he fell from an unsafe and unstable ladder. *Id.* at 98. The allegations in the underlying complaints here involve slip and fall accidents on property owned and maintained by BNSF over which TTS had no control. As one court has stated: "[W]e will not cobble together a more compelling or comprehensive complaint than what is written or what can be inferred." *Northfield Insurance Co. v. City of Waukegan*, 701 F.3d 1124, 1130 (7th Cir. 2012). "After all,

we are charged with comparing the underlying complaint, inferences, and other known facts to the insurance policy, not some hypothetical or hoped-for version." *Id.*; accord *Amerisure Mutual Insurance Co. v. Microplastics, Inc.*, 622 F.3d 806, 812 (7th Cir. 2010) ("The duty to defend applies only to facts that are explicitly alleged; 'it is the actual complaint, not some hypothetical version, that must be considered.'[Citation.]"); *Pekin Insurance Co. v. Precision Dose, Inc.*, 2012 IL App (2d) 110195, ¶ 60.

¶ 31 *b. BNSF'S Own Third-Party Complaints Do Not Trigger a Duty to Defend BNSF*

¶ 32 Defendants also argue that Erie has a duty to defend BNSF based on the allegations in the third-party complaints that BNSF filed against TTS in the underlying actions, in which BNSF alleges that any injuries to Colella and Thomas arose from, or were caused, in whole or in part, by various acts or omissions of TTS or its employees, including the underlying plaintiffs' contributory negligence. BNSF then alleges seventeen separate actions or omissions sounding in the employees' own negligence (*e.g.*, failing "to keep a safe and proper lookout for conditions on the pavement") or TTS's negligence (*e.g.*, failing "to provide sufficient training to Plaintiff[s] on safety procedures, including walking within the rail yard"). Defendants contend that BNSF's third-party complaints allege facts that fall within, or potentially within, the coverage of the policy.

¶ 33 Erie counters that this court should "not look beyond the eight corners of the complaints and the policies to determine whether Erie has a duty to defend BNSF." Erie asserts that if this court were to consider allegations outside Colella's and Thomas's underlying complaints, "it would encourage gamesmanship and manipulation of insurance coverage." Erie also argues that, "[i]n the third-party complaints, BNSF's theories of failure to train and failure to supervise have barely marginal relevance to the slip and fall alleged in the Complaints."

¶ 34 We recognize that the Illinois Supreme Court has clarified that it did not intend "to limit the source of an insurer's duty to defend 'solely' to the content of the underlying complaint in *all* cases." (Emphasis added.) *Pekin v. Wilson*, 237 Ill. 2d at 458. Rather, "a circuit court may, *under certain circumstances*, look beyond the underlying complaint in order to determine an insurer's duty to defend." (Emphasis added.) *Id.*

¶ 35 In *Pekin v. Wilson*, the underlying lawsuit (filed by Terry Johnson) against the insured (Jack O. Wilson) alleged causes of action for assault, battery, intentional infliction of emotional distress, and negligence stemming from two incidents. *Id.* at 449-50. As a part of his answer, Wilson filed a counterclaim against Johnson, alleging, among other things, that Johnson was the aggressor, Wilson was defending himself, and Johnson was guilty of assault, battery, and intentional infliction of emotional distress. *Id.* at 451. The insurance policy at issue contained an exclusion to its coverage for bodily injury "expected or intended from the standpoint of the insured (the intentional-act exclusion)." (Internal quotation marks omitted.) *Id.* However, the intentional-exclusion contained an exception for bodily injury 'resulting from the use of reasonable force to protect persons or property' (the self-defense exception)." *Id.*

¶ 36 The issue in *Pekin v. Wilson* was "whether the duty to defend the insured may be triggered by allegations of self-defense in the insured's counterclaim filed in response to an underlying lawsuit alleging the insured's intentional acts, where the policy contains both an exclusion for intentional acts and a self-defense exception to that exclusion." *Pekin v. Wilson*, 237 Ill. 2d at 449. The court ultimately concluded that the case involved" 'unusual or compelling circumstances' requiring the trial court to go beyond the sole allegations of the underlying complaint to determine the insured's duty to defend." *Id.* In so doing, the *Pekin v. Wilson* court distinguished the cases of *National Union Fire Insurance Co. of Pittsburgh v. R. Olson*

Construction Contractors, Inc., 329 Ill. App. 3d 228 (2002) and *L.J. Dodd Construction, Inc. v. Federated Mutual Insurance Co.*, 365 Ill. App. 3d 260 (2006) in which the appellate court had declined to consider third-party complaints where there were no such "unusual or compelling circumstances." *Id*. at 459. As the *Pekin v. Wilson* court concluded: "here, unlike *National Union Fire Insurance Co*. and *L.J. Dodd Construction, Inc*., *there were 'unusual or compelling circumstances'* requiring the trial court to go beyond the sole allegations of the underlying complaint to determine the insured's duty to defend." (Emphasis added.) *Id.* at 465. The instant case does not involve any unusual or compelling circumstances that would require this court to consider the allegations in BNSF's own third-party complaint to determine Erie's duty to defend BNSF. As will be explained below, however, we come to a different conclusion with respect to Erie's duty to defend TTS.

¶ 37 BNSF asserts that "consideration of third party pleadings from the underlying matter in order to establish a duty to defend is well established under Illinois law." BNSF notes that in, *American Economy Insurance Co. v. Holabird & Root*, 382 Ill. App. 3d 1017 (2008), this court rejected the insurer's attempt to limit its consideration to matters outside of the complaint. There, we stated that "[t]he trial court should be able to consider all the relevant facts contained in the pleadings, including a third-party complaint, to determine whether there is a duty to defend." *Holabird & Root*, 382 Ill. App. 3d at 1031-32. We note that *Holabird & Root* was cited with approval by the *Pekin v.Wilson* court. However, *Holabird & Root* is distinguishable.

¶ 38 In a later (related) appeal, *American Economy Insurance Co. v. DePaul University*, 383 Ill. App. 3d 172 (2008), this court discussed its earlier decision in *Holabird & Root*, noting that we had "engaged in a lengthy analysis of the Illinois cases in which evidence beyond the

underlying complaint was admitted in determining the duty to defend." *Id*. at 179.[1] However, we also noted "one important factual distinction" between the *DePaul University* case and the related [*Holabird & Root*] decision." *Id*. at 180. The distinction was that, in *DePaul University*, the party that had prepared and filed the third-party complaint was the same party that was using the complaint to seek coverage as an additional insured. *Id*. Here, also, it is the putative insured who drafted and filed the third-party complaint in the underlying action, and who now relies on the allegations in its own third-party complaint to seek coverage as an additional insured. Neither *Holabird & Root* nor *DePaul University* is directly on point with the instant case because, *in addition to the third-party complaint*, the record showed "true but unpleaded facts" that were not provided by the insured and that should have alerted the insurer to the possibility that the underlying complaint was within the coverage of the policy. *DePaul University*, 383 Ill. App. 3d at 181-82. As the *DePaul University* court clarified, "*even if* we decline to consider DePaul's third-party complaint, other true but unpleaded facts are present in the case that were not provided by the insured." (Emphasis added.) *Id*. at 181.

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[1] We summarized those previously analyzed cases. *Id*. ("*Associated Indemnity Co. v. Insurance Co. of North America*, 68 Ill. App. 3d 807, 816 (1979) (holding that 'the insurer is obligated to conduct the putative insured's defense if the insurer has knowledge of true but unpleaded facts, which, when taken together with the complaint's allegations, indicate that the claim is within or potentially within the policy's coverage'); *Fidelity & Casualty Co. of New York v. Envirodyne Engineers, Inc*., 122 Ill. App. 3d 301, 304-05 (1983) (allowing evidence beyond the underlying complaint to be admitted except 'when it tends to determine an issue crucial to the determination of the underlying lawsuit'); *Safeco Insurance Co. v. Brimie*, 163 Ill. App. 3d 200 (1987) (applying the decision in *Envirodyne* to allow the admission of evidence beyond the complaint at the summary judgment stage); *Millers Mutual Insurance Ass'n of Illinois v. Ainsworth Seed Co*., 194 Ill. App. 3d 888, 891-92 (1989) (finding the decision in *Envirodyne* to be 'persuasive' and permitting an affidavit to be considered in determining coverage*); Fremont Compensation Insurance Co. v. Ace–Chicago Great Dane Corp*., 304 Ill. App. 3d 734, 743 (1999) (relying on *Ainsworth Seed Co*. and *Envirodyne* to consider extrinsic evidence on the question of coverage); *West Bend Mutual Insurance Co. v. Sundance Homes, Inc.*, 238 Ill. App. 3d 335, 337-38 (1992) (allowing the review of a third-party complaint to develop implications made in the underlying complaint when determining coverage).")

¶ 39 "Although some courts have recognized that a trial court can properly review a third-party complaint as extrinsic evidence in a declaratory relief action, pursuant to the authority discussed in [*Pekin v.*]*Wilson*, 237 Ill. 2d at 458-62, there are limitations on whether the trial court must necessarily consider a third-party complaint prepared by the additional insured seeking coverage." *Pekin Insurance Co. v. United Contractors Midwest, Inc.*, 2013 IL App (3d) 120803, ¶ 29. As we stated in *National Fire Insurance of Hartford v. Walsh Construction Co.*, 392 Ill. App. 3d 312 (2009):

> "A court's consideration of a third-party complaint is limited, however. *** [W]e fail to see what a party claiming to be an additional insured could state in its third-party complaint that it could not otherwise present in the declaratory judgment action. In that context, a third-party complaint cannot bolster a third-party plaintiff's claim, as a putative additional insured, that the facts in the underlying construction negligence complaint potentially fall within the policy's coverage." *Id*. at 322.

Applying these principles here, we conclude that Erie had no duty to defend BNSF based on the allegations in BNSF's third-party complaints against TTS.

¶ 40 *c. The Agreement Does Not Trigger a Duty to Defend BNSF*

¶ 41 BNSF raises an additional argument that it is entitled to a defense from Erie pursuant to section 6 of the Agreement (the Indemnification Agreement) and that the Indemnification Agreement requires that Erie defend it in the underlying plaintiffs' actions "regardless of the alleged negligence of BNSF." We agree with Erie that the Agreement does not control the interpretation of the additional insured endorsement. Erie was not a party to the Agreement. The

unambiguous language of the Additional Insured endorsement does not provide coverage for BNSF's own negligence.

¶ 42 So far as Erie's duty to defend BNSF, this court has noted that it should not consider extrinsic evidence to enforce an unambiguous additional insured endorsement. See *Westfield Insurance Co. v. FCL Builders, Inc.*, 407 Ill. App. 3d 730, 736 (2011). In *Westfield*, the court determined that a contractor was not an additional insured under a policy procured by a sub-subcontractor. The court noted that the additional insured provision unambiguously limited the insurer's obligations. *Id*. at 736. Thus, as the court explained, any extrinsic evidence pertaining to the intent of the subcontractor and the sub-subcontractor that the contractor *would* be an additional insured under the policy had no relevance to what the insurer and the policyholder intended for their respective obligations to be under the insurance contract. *Id*.

¶ 43 In the instant case, BNSF's third-party complaints allege, in part, that *"TTS* is required to defend and provide complete and full indemnity to BNSF for any and all claims arising under work performed under the Agreement, including for the accident alleged in Plaintiff's Complaint, regardless of the alleged negligence of BNSF" and that, despite its contractual obligation, *TTS* "has failed to honor its commitment to defend and indemnify BNSF in the action subject of [*sic*] Plaintiff's Complaint." (Emphasis added.) These allegations are directed at TTS. To the extent BNSF contends that *BNSF and TTS* agreed that TTS would indemnify BNSF for its own negligence, we note that BNSF's claim against TTS for failing to procure adequate insurance remains pending in the trial court.

¶ 44 2. Erie Had A Duty to Defend TTS

¶ 45 *a. BNSF's Third-Party Complaint Triggered Erie's Duty to Defend TTS*

¶ 46 Regarding the third-party complaint, which was drafted by BNSF *against* TTS, the concerns identified by the court in *National Fire Insurance of Hartford v. Walsh Construction Co*., 392 Ill App. 3d 312 (2009), and discussed above, regarding pleadings *prepared by* the putative insured seeking coverage do not apply to TTS. Thus, our analysis regarding the effect of the third-party complaint on Erie's duty to defend BNSF does not apply to the issue of Erie's duty to defend TTS against BNSF. See, *e.g., Illinois Emcasco v Waukegan Steel Sales Inc*, 2013 IL App (1st) 120735, ¶ 19 (distinguishing *National Fire Insurance of Hartford v.Walsh Construction Co*., by noting that party seeking coverage was not relying on self-serving statements in a third-party complaint which was written by it and used to bolster its position but, instead, was relying on complaints fashioned by other parties). Section I(1)(a) of the Policy requires Erie to defend TTS and to pay for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' *** to which this insurance applies." The insurance applies to "bodily injury" if it: (1) is caused by an "occurrence" that takes place in the "coverage territory"; (2) occurs during the Policy period; and (3) no insured or employee (authorized to give or receive notice of a claim) knew of the bodily injury prior to the Policy period. We agree with TTS that all of the conditions to coverage in favor of TTS have been satisfied here. Colella's and Thomas's "bodily injury" was the alleged result of an "occurrence" (slip and fall) that took place in the "coverage territory" (United States) within the "policy period" (December 10, 2007 to December 10, 2008) and without prior notice of TTS or any TTS employee authorized to give or receive notice of the claim. We conclude that BNSF's third-party complaint triggered Erie's duty to defend TTS, absent an applicable policy exclusion.

¶ 47 *b. Policy Exclusions Do Not Apply Due to Insured Contract Exception*

¶ 48 The trial court concluded, however, that Erie had no duty to defend TTS, based upon the language of the Policy that states the insurance does not apply to "contractual liability" or "employer's liability." These exclusions contained in the Policy[2] state, in pertinent part:

¶ 49 "b. Contractual Liability

'Bodily injury' *** for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement."

* * *

e. Employer's Liability

Bodily injury' to:

1) An 'employee' of the insured arising out of and in the course of:

a) Employment by the insured; or

b) Performing duties related to the conduct of the insured's business;

***

This exclusion applies:

1) Whether the insured may be liable as an employer or in any other capacity; and

2) To any obligation to share damages with or repay someone else who must pay damages because of the injury."

¶ 50 Both the contractual liability exclusion and the employer's liability exclusion, however, contain a notable exception which provides that the exclusions do not apply to liability for damages assumed by the insured under an "insured contract." The trial court further reasoned that this "insured contract" exception was inapplicable. We disagree.

[2] Both the primary policy and the umbrella policy contain these exclusions.

¶ 51 The Policy defines "insured contract" and, in fact, contains several definitions including the following, which is pertinent here:

> "f. That part of any other contract or agreement pertaining to your business *** under which you assume the tort liability of another part[y] to pay for 'bodily injury' or 'property damage' to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement."

Section 6(a) of the Agreement satisfies this definition of "insured contract."

¶ 52 Section 6(a) provides, in pertinent part, that TTS:

> "**SHALL RELEASE, INDEMNIFY, DEFEND AND HOLD HARMLESS [BNSF] *** FOR, FROM AND AGAINST ANY AND ALL CLAIMS, LIABILITIES, *** COSTS, DAMAGES, LOSSES, LIENS, CAUSE[S] OF ACTION, SUITS, DEMANDS, JUDGMENTS AND EXPENSES *** OF ANY NATURE, KIND, OR DESCRIPTION OF ANY PERSON OR ENTITY DIRECTLY OR INDIRECTLY ARISING OUT OF, RESULTING FROM OR RELATED TO (IN WHOLE OR IN PART):**
>
> ***
>
> (v) Injury to *** any person, including employees of either [TTS] or [BNSF] *** arising directly or indirectly, in whole or in part, from the actions or omissions of [TTS] or its employees
>
> ***

EVEN IF SUCH LIBILITIES [*sic*] ARISE FROM OR ARE ATTRIBUTED TO, IN WHOLE OR IN PART, ANY NEGLIGENCE OF ANY INDEMNIFIED PARTY." (Emphasis in original.)

This language, particularly the last section, clearly provides indemnification for the indemnitee's own negligence. Thus, section 6(a) of the Agreement satisfies the definition of "insured contract" because it requires TTS to indemnify BNSF from liability for bodily injury to Colella, and Thomas, that was caused by, or attributable to, BNSF's own negligence.

¶ 53 Unlike some of the cases cited by the parties, the instant case does not involve a construction contract. The distinction between cases involving a construction contract and those cases that do not is relevant because, as the Illinois Supreme Court noted, "the Construction Contract Indemnification for Negligence Act currently voids any agreement *in a construction contract* to indemnify or hold harmless a person from that person's own negligence." (Emphasis added.) *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 311, n. 1 (2008) (citing 740 ILCS 35/0.01 *et seq*. (West 2006)). As the *Buenz* court explained, "barring a statutory provision to the contrary, contracts that clearly and explicitly provide indemnity against one's own negligence are valid and enforceable." *Id.* Contrary to Erie's contentions, TTS did indeed agree to indemnify BNSF for its *own* negligence.

¶ 54 Nonetheless, the trial court ruled that the "insured contract" exception did not apply here. The trial court reasoned that section 6(a) was not an insured contract within the meaning of the Erie policy because, even if TTS assumed BNSF's liability for injury to a "third person," this did not encompass BNSF's liability for the injuries to Colella and Thomas. As the trial court stated: "TTS's employees, while acting within the scope of their employment by TTS, are insureds under the Erie policy. It would be an anomaly to hold that a person can both be an insured and a

third party [*i.e.*, third person][3] under the same contract." The trial court found "as a matter of law, that TTS's own employees cannot be third [persons] for purposes of the definition of an insured contract under Erie's policy." The court further stated that comprehensive general liability carriers "do not insure their policyholder's voluntary undertaking to indemnify an additional insured for injuries to the insured's own employee sustained in whole or in part as the result of an additional insured's negligence." The trial court determined that TTS's interpretation − that third persons in an insured contract include the employees of the name insured – "would eviscerate entirely the employer's liability exclusion."

¶ 55 "[W]hen an insurer seeks to avoid coverage under a policy exclusion, 'the applicability of the exclusionary clause must be clear and free from doubt.' [Citation.]" *Empire Indemnity Insurance Co. v. Chicago Province of Society of Jesus*, 2013 IL App (1st) 112346, ¶ 39. This court has noted that an employer's liability exclusion (also called the "employee exclusion") in a general liability policy, such as the one here, is "designed to preclude coverage in those areas normally covered by Worker's Compensation insurance." *Aetna Casualty & Surety Co. v. Beautiful Signs, Inc*., 146 Ill. App. 3d 434, 436 (1986); see also *Archer Daniels Midland Co. v. Burlington Insurance Co. Group*, Inc., 785 F. Supp. 2d 722, 730 (N.D. Ill. 2011) (explaining that the purpose of the employer's liability serves "to prevent an employee who is covered by a worker's compensation program from recovering in a private suit against his employer). However, we have also noted that where the employer's liability exclusion in a commercial general liability policy contains the "insured contract" exception, "the policy contemplates that some losses arising from an injury to an employee of the insured will be covered." *West Bend Mutual Insurance Co. v. Mulligan Masonry Co*., 337 Ill. App. 3d 698, 707 (2003), overruled on

[3] Although the trial court and Erie use the term "third party," we shall use the term "third person" as contained in the Policy.

other grounds in *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550 (2007).

¶ 56 Erie's position is that the employer's liability exclusion would be rendered a nullity if the exception for an "insured contract" is interpreted as encompassing an indemnification agreement that includes employees within the rubric of third persons. Erie asserts that "[i]f an employee is a third party from its own employer [*i.e.*, considered a "third person" under the exception], the employer's liability exclusion would literally never apply." However, as one authority on insurance law has stated: "[A] third-party claim against the insured employer for indemnification in accordance with an 'insured contract' entered into between the parties will not be precluded from coverage under the employer's policy." 9A Steven Plitt, Daniel Maldonado & Joshua D. Rogers, Couch on Insurance § 129:11 (3d ed. 2014); see also *CM, Inc. v. Canadian Indemnity Co.*, 635 F.2d 703, 707 (8th Cir. 1980) (concluding that the exclusion was intended to apply only to direct actions brought by employees against their employer and not to any obligation assumed under contract owed by the employer to a third-party).

¶ 57 TTS argues that the Policy unambiguously covers the alleged injuries at issue under the "insured contract" exception even though the injuries are to employees of TTS. According to TTS, "that appears to be the point of the exception: to cover injuries to employees when the insured assumes another party's tort liability, but to otherwise allow the insured's worker's compensation carrier and the Worker's Compensation Act to cover the loss in the absence of an insured contract." We believe this is a reasonable interpretation. Assuming *arguendo* that Erie's interpretation is also reasonable, "third person" in the "insured contract" exception would be ambiguous, and must be read in favor of coverage for TTS. See *Pekin v. Wilson*, 237 Ill. 2d at 456 ("if the terms of the policy are susceptible to more than one meaning, they are considered

ambiguous and will be construed strictly against the insurer who drafted the policy"); *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 396 (2005) ("Where competing reasonable interpretations of a policy exist, a court is not permitted to choose which interpretation it will follow. * * * Rather, in such circumstances, the court must construe the policy in favor of the insured and against the insurer that drafted the policy.").

¶ 58 We conclude that section 6(a) of the Agreement is an "insured contract" because TTS agreed to assume the tort liability of "another party" (BNSF) to pay for "bodily injury" to a third person. Under the plain and ordinary meaning of the insured contract exception, Colella and Thomas are "third person[s]." We agree with TTS that, as a named insured, it is entitled to a defense from the claims in BNSF's third-party complaints absent an applicable exclusion in the policy. Neither the contractual liability exclusion nor the employer's liability exclusion precludes coverage for TTS because section 6(a) of the Agreement is an "insured contract" within the meaning of the Policy and the "insured exception" to the exclusions applies. Accordingly, applying the eight corners rule, the four corners of BNSF's third-party complaint and its allegations fit well within the four corners of the Policy. Thus, Erie had a duty to defend TTS in connection with BNSF's third-party complaint against TTS.

¶ 59 III. CONCLUSION

¶ 60 For the foregoing reasons, we affirm the order of the circuit court of Cook County granting summary judgment to Erie and against BNSF, and reverse the order of the circuit court of Cook County granting summary judgment to Erie and against TTS. We remand this matter to the circuit court for further proceedings.

¶ 61 Affirmed in part; reversed in part; and remanded.