MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

XL Insurance America, Inc., f/k/a Winterthur International America Insurance Company,

Appellant/Cross-Appellee-Defendant

v.

Technicolor USA, Inc., Technicolor S.A., Thomson Consumer Electronics Television Taiwan, Limited, and Thomson Consumer Electronics Bermuda, Limited,

Appellees/Cross-Appellants-Plaintiffs

July 2, 2024

Court of Appeals Case No.
23A-PL-1686

Appeal from the Marion Superior Court

The Honorable Heather A. Welch, Judge

Trial Court Cause No.
49D01-1810-PL-40578

Memorandum Decision by Judge Mathias
Chief Judge Altice and Judge Bailey concur.

Mathias, Judge.

[1] XL Insurance America, Inc. ("XL") appeals the trial court's judgment on damages following an evidentiary hearing. Technicolor USA, Inc. ("Technicolor USA"), Thomson Consumer Electronics Television Taiwan, Ltd. ("Thomson Taiwan"), Thomson Consumer Electronics Bermuda, Ltd. ("Thomson Bermuda"), and Technicolor S.A. cross-appeal and challenge the trial court's earlier denial of their motion for partial summary judgment (we refer to the cross-appellants collectively as the "Technicolor Entities").

[2] Between them, the parties raise five issues for our review, but we address only the following two issues:

> 1. Whether the trial court erred when it declined to apply the holding from another panel of this Court that Thomson Taiwan is an insured under XL's umbrella policies with Technicolor USA.
>
> 2. Whether, on remand, the trial court should "stack" the deductibles and self-insured retention costs from XL's policies with Technicolor USA and subtract that sum total from the Technicolor Entities' costs of defense.

[3] We reverse the trial court's judgment and remand for a new damages hearing.

Facts and Procedural History

[4] We previously summarized the parties' relationships as follows:[1]

> In 2004, a group of former factory workers and their heirs filed a class-action lawsuit in Taiwan ("the Taiwan Class Action")[2] against [Thomson Taiwan], a Taiwanese company which owned and operated an electronics manufacturing plant in [Taoyuan,] Taiwan from the late 1980s to 1992. The workers sought damages for bodily injury allegedly resulting from exposure to organic solvents while working in the plant and living in dormitories near the plant. Over 99% of [Thomson Taiwan's] stock is owned by [Thomson Bermuda], and less than .01% is owned by [Technicolor USA], a Delaware corporation with its headquarters in Indiana. Both [Thomson Bermuda] and [Technicolor USA] are wholly owned subsidiaries of French electronics company [Technicolor] SA.
>
> The Taiwan Class Action was dismissed in 2005 and reinstated in 2006. In 2007, the plaintiffs attempted to name [Technicolor] SA, [Thomson Bermuda], and [Technicolor USA] as additional defendants based on corporate-veil-piercing and joint-liability theories. Those entities have not yet been served or entered an appearance in the Taiwan Class Action. In 2008, [Technicolor USA] filed a declaratory judgment action against its primary and umbrella liability insurers, seeking defense and indemnification costs for the Taiwan Class Action. The primary insurers included XL . . . .

---

[1] The Technicolor Entities have used multiple different names over time, and we have adjusted the language from our prior opinion to correspond to the names those entities are presently using.

[2] The parties agree that referring to Taiwan's procedure as a "class action" is somewhat of a misnomer in that there are important differences between Taiwan's mass-tort procedures and "class actions" under the Indiana Trial Rules. But the parties also agree that it is a good-enough short-hand for our purposes.

> In November 2009, [Technicolor USA] filed a motion for summary judgment as to the primary insurers' duty to defend, which the trial court granted by interlocutory order in July 2010 ("the Duty to Defend Order"). In the Duty to Defend Order, the trial court ruled that XL and [other insurers] have a duty to defend [Technicolor USA] in the Taiwan Class Action and reimburse [Technicolor USA] for reasonable and necessary defense costs, which would be determined later. . . .

Thomson Inc. v. Ins. Co. of N. Am., 11 N.E.3d 982, 986-87 (Ind. Ct. App. 2014) (footnote omitted), *trans. denied*. The trial court also ruled that Technicolor SA and Thomson Taiwan were insureds under XL's primary and umbrella policies with Technicolor USA. *Id.* at 988.

[5] The parties appealed the trial court's final judgment and raised numerous issues for our review, which we methodically addressed. As relevant here, we addressed the parties' arguments as to whether Thomson Taiwan was an insured under XL's umbrella policies with Technicolor USA.[3] We initially noted that, "[s]ince 1992, [Thomson Taiwan] has had no employees. [Technicolor USA's] general counsel, Meggan Ehret, has overseen [Thomson Taiwan's] defense in the Taiwan Class Action, and [Technicolor USA] employee Richard Dyer has overseen environmental remediation at the Taoyuan plant that was ordered by Taiwanese authorities." *Id.* at 989.

[3] We also held that Technicolor SA and Thomson Taiwan were insureds under XL's primary policies with Technicolor USA. *Thomson Inc.*, 11 N.E.3d at 1028-29.

[6] We then held as follows:

> XL does not dispute the trial court's observation that its umbrella policies insure "[Technicolor USA] and 'any company [over] which you [i.e., Technicolor USA] exercise control [and] actively manage.'" XL's XO App. at 68. And XL does not challenge the trial court's conclusion that this language "describes [Thomson Taiwan]—a company with no employees or facilities which [Technicolor USA] 'actively manages.'" *Id.* at 68-69. Thus, XL has effectively conceded that [Thomson Taiwan] is a named insured under its umbrella policies.

Id. at 1028-29 (footnotes omitted; some alterations original to *Thomson*).

[7] In 2015, the court in Taiwan that was hearing the Taiwan Class Action entered a judgment for the plaintiffs. Following that judgment, numerous former Thomson Taiwan workers who did not participate in the Taiwan Class Action joined together and initiated a Second Taiwan Class Action against the Technicolor Entities. The plaintiffs in the Second Taiwan Class Action included plaintiffs whose allegations were factually identical to those in the first class action. The plaintiffs in the Second Taiwan Class Action also included plaintiffs from other site locations.

[8] Technicolor USA was one of the original defendants in the Second Taiwan Class Action. However, the plaintiffs in the second action voluntarily dismissed their claims against Technicolor USA following an appellate court decision in the first action that had rejected holding Technicolor USA vicariously liable through Thomson Taiwan. At least during the time that Technicolor USA was

a party to the Second Taiwan Class Action, the Technicolor Entities incurred their own defense costs.

[9] Following the initiation of the Second Taiwan Class Action, the Technicolor Entities filed the instant action against XL and other insurers seeking to require, once again, the insurers to provide coverage for the Technicolor Entities' defense in the Second Class Action. The following three trial court orders ensued:

- A July 2021 Amended Order on partial summary judgment in which the trial court concluded that XL had no duty to defend the Technicolor Entities in the Second Taiwan Class Action following the dismissal of Technicolor USA from that action;
- An August 2022 Order affirming the July 2021 Amended Order but also revising the prior order to clarify an issue relating to deductibles and self-insured retention costs;
- A June 2023 Judgment, with findings of fact and conclusions thereon following an evidentiary hearing, in which the court found and concluded that XL owed $142,564.50 in defense costs, and prejudgment interest on those costs, incurred by the Technicolor Entities in the Second Taiwan Class Action prior to the dismissal of Technicolor USA.

[10] This appeal ensued.

1. The trial court erred when it declined to give preclusive effect to our prior holding that Thomson Taiwan is an insured under the XL umbrella policies.

[11] We first address the Technicolor Entities' argument on cross-appeal, namely, whether the trial court erred when it determined in the July 2021 Amended Order on partial summary judgment (and the corresponding language affirming

that order in the August 2022 Order) that XL had no duty to defend the Technicolor Entities in the Second Taiwan Class Action following the dismissal of Technicolor USA from that action. Our standard of review is well settled:

> When this Court reviews a grant or denial of a motion for summary judgment, we "stand in the shoes of the trial court." Summary judgment is appropriate "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." We will draw all reasonable inferences in favor of the non-moving party. We review summary judgment de novo.

Arrendale v. Am. Imaging & MRI, LLC, 183 N.E.3d 1064, 1067-68 (Ind. 2022) (citations omitted).

[12] The Technicolor Entities' argument on this issue is narrow: whether our holding in *Thomson* that Thomson Taiwan was an insured under XL's umbrella policies is entitled to preclusive effect here. Specifically, the Technicolor Entities assert that our prior holding represents a matter of issue preclusion, which is also known as collateral estoppel. As our Supreme Court has explained:

> Three conditions lay the foundation for collateral estoppel: "(1) a final judgment on the merits in a court of competent jurisdiction; (2) identity of the issues; and (3) the party to be estopped was a party or the privity of a party in the prior action." *National Wine & Spirits, Inc. v. Ernst & Young, LLP*, 976 N.E.2d 699, 704 (Ind. 2012), *cert. denied*, 569 U.S. 1018, 133 S. Ct. 2780, 186 L. Ed. 2d 219 (2013). The second requirement will fail "if the issue is one that was **not actually litigated and determined**[.]" *Id.* (emphasis added). In deciding whether issue preclusion is appropriate,

> Indiana courts also examine two salient considerations—(a) "whether the party against whom the judgment is pled had a full and fair opportunity to litigate the issue," and (b) "whether it would be otherwise unfair under the circumstances to permit the use of collateral estoppel." *Id.* (internal citation and quotation marks omitted). These twin considerations shape whether collateral estoppel is fitting in a case.

Miller v. Patel, 212 N.E.3d 639, 646-47 (Ind. 2023) (alteration original to *Miller*).

[13] Without question, our opinion in *Thomson* meets the first requirement for issue preclusion, and there is also no question that all of the parties here were parties in the prior Indiana action. As for whether the issue we addressed in *Thomson* and the issue before the trial court in the July 2021 Amended Order were the same issues, we agree with the Technicolor Entities that they were.

[14] In *Thomson*, we held that Thomson Taiwan was an insured under XL's umbrella policies. *Thomson*, 11 N.E.3d at 1029. Specifically, we held that XL did "not challenge the trial court's conclusion" that the language of those policies captured Thomson Taiwan, which Technicolor USA had "actively manage[d]." *Id.* Thus, we concluded that XL had "effectively conceded that [Thomson Taiwan] is a named insured under its umbrella policies." *Id.*

[15] The trial court here declined to follow that holding on the theory that the dismissal of Technicolor USA from the Second Taiwan Class Action obviated the possibility that Technicolor USA could be held vicariously liable for Thomson Taiwan's conduct. But the trial court's reasoning is incorrect. We held that Thomson Taiwan was an insured under the language of the umbrella

policies because XL had conceded that Technicolor USA actively managed Thomson Taiwan, which was the policy language that determined who aside from Technicolor USA might be an insured. That conclusion remains true regardless of whether vicarious liability can be extended under Taiwanese law from Thomson Taiwan to Technicolor USA. In other words, who is an "insured" under the policies and who is ultimately liable to the plaintiffs are different questions. *See 5200 Keystone Ltd. Realty, LLC v. Netherlands Ins. Comp.*, 29 N.E.3d 156, 161 (Ind. Ct. App. 2015) ("It is the nature of the claim, not its merits, that determines an insurer's duty to defend."), *trans. denied*.

[16] Still, in its response on this issue, XL asserts that it would be unfair to permit the use of collateral estoppel here because Technicolor USA is trying to have it both ways.[4] According to XL, Technicolor USA conceded to an Indiana trial court that it had actively managed Thomson Taiwan and then disputed the same—successfully—in the first Taiwan Class Action. But, like the trial court, XL's argument conflates the distinct issues of who is an insured with who may be ultimately liable. Further, XL is in no position to criticize the Technicolor Entities for trying to have it both ways; as we made clear in *Thomson*, it was *XL* that had conceded to our Court that Thomson Taiwan was an insured under the language of the umbrella policies, and yet now it is XL that is trying to avoid that concession in the instant action. *Cf. Woodruff v. Ind. Fam. & Soc. Servs.*

[4] XL also argues that it did not have a full and fair opportunity to litigate this issue in the original Indiana court proceedings. XL's assertion has no merit, and we do not consider it.

Admin., 964 N.E.2d 784, 792 n.5 (Ind. 2012) (noting that "he who seeks equity" must "come into court with clean hands") (quotation marks omitted).

[17] The trial court erred when it declined to give our prior holding that Thomson Taiwan is an insured under XL's umbrella policies preclusive effect. Accordingly, we reverse the trial court's award of damages and remand for a new damages hearing.

2. As the issue is likely to recur on remand, we add that XL may not have its judgment on damages reduced by "stacking" its insureds' various deductibles and self-insured retention costs.

[18] Given our holding above, XL's challenges on direct appeal are moot. We of course do not typically address moot issues, but we may make an exception for issues that are likely to recur on remand. *See, e.g.*, *Wallen v. Hossler*, 130 N.E.3d 138, 147 (Ind. Ct. App. 2019), *trans. denied*.

[19] We address one such issue here. XL had several policies with Technicolor USA, some of which provided for certain deductibles and some of which required self-insured retention payments. According to XL, in determining the amount of damages for which it is liable for its insureds' costs of defense, the trial court is required to subtract from the insureds' costs each of those deductibles and self-insured retention costs.

[20] We reject XL's assertions. The issues in the instant proceedings are related to XL's duty to defend its insureds and the corresponding costs of that defense.

XL's argument might have merit with respect to any ultimate judgment on liability in Taiwan, but it has no merit here.

[21] Contrary to XL's argument, once its duty to defend *under any one policy for any one occurrence* came into effect, all claims and allegations against its insureds were XL's duty to defend against. *See* *Transamerica Ins. Servs. v. Kopko*, 570 N.E.2d 1283, 1285 (Ind. 1991) ("[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 . . . ."). Thus, XL's attempt to reduce the costs of its insureds' defense by attempting to stack all the policies' deductibles and self-insured retention costs is not consistent with its duty to defend its insureds.

Conclusion

[22] For the above-stated reasons, we reverse the trial court's judgment on damages and remand for a new damages hearing consistent with this opinion.

[23] Reversed and remanded.

Altice, C.J., and Bailey, J., concur.

ATTORNEYS FOR APPELLANT/CROSS-APPELLEE

Bradford S. Moyer
Plunkett Cooney, PC
Indianapolis, Indiana

Jeffrey C. Gerish
Plunkett Cooney, PC
Bloomfield Hills, Michigan

Matthew S. Ponzi
John P. Eggum

Foran Glennon Palandech Ponzi & Rudloff PC
Chicago, Illinois

ATTORNEYS FOR APPELLEES/CROSS-APPELLANTS

George M. Plews
Sean M. Hirschten
Plews Shadley Racher & Braun LLP
Indianapolis, Indiana