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IN THE COURT OF APPEALS OF INDIANA

New Hampshire Insurance Company,
Appellant-Defendant,

v.

Indiana Automobile Insurance Plan,
Appellee-Plaintiff.

August 24, 2021

Court of Appeals Case No. 21A-PL-460

Appeal from the Marion Superior Court

The Honorable Heather A. Welch, Judge

Trial Court Cause No. 49D01-1902-PL-6478

Kirsch, Judge.

[1] This appeal arises from a grant of summary judgment in favor of the Indiana Automobile Insurance Plan ("the Plan") in the Plan's declaratory judgment action to determine whether the Plan had a duty to indemnify New Hampshire

Insurance Company ("NHIC") for NHIC's settlement of a $7.5 million claim pursuant to the parties' contract. The trial court granted summary judgment in favor of the Plan, concluding that: (1) the contract contained a condition precedent to indemnification, which required the Plan's governing committee to approve the settlement before NHIC was entitled to indemnification; and (2) the doctrines of waiver and estoppel did not bar the Plan from asserting the contractual language requiring NHIC to seek the Plan's governing committee's approval of the settlement as a condition precedent to indemnification. On appeal, NHIC argues that trial court erred in granting summary judgment to the Plan and raises several issues on appeal, which we consolidate and restate as:

I. Whether the trial court properly interpreted the plain language of the parties' contract, which required NHIC to seek approval from the Plan's governing committee before settling the claim as a condition precedent to indemnification; and

II. Whether disputed issues of material fact regarding the Plan's invocation of the condition precedent on the basis of waiver and estoppel preclude summary judgment.

[2] We affirm.

Facts and Procedural History

[3] The Plan is an association of licensed auto insurance companies in Indiana, formed to provide residual auto and commercial auto insurance for Indiana high-risk drivers who would otherwise be unable to obtain insurance through the voluntary insurance market. *Appellant's App. Vol. 3* at 5. The Plan is

administered by a governing committee, which is composed of representatives for participating insurers; insurance policies are written, issued, and administered by participating insurers that agree to be servicing carriers. *Id.* An insurer who agrees to be a servicing carrier does so pursuant to a written servicing carrier agreement. *Id.* The Plan's daily operations, including financial, accounting, and administrative services, were provided by the Automobile Insurance Plan Service Office ("AIPSO"). *Id.* at 6; *Appellant's App. Vol. 5* at 62-64.

[4] On January 28, 1994, the Plan and NHIC executed a Servicing Carrier Agreement ("SCA"). *Appellant's App. Vol. 3* at 6. Under the SCA, NHIC issued insurance policies and administered claims services to insureds in Indiana; in turn, the Plan was obligated to indemnify NHIC for losses sustained as a servicing carrier as set forth in the SCA. *Id.*; *Appellant's App. Vol. 2* at 63-64. As to indemnification, the SCA provided as follows:

> Section 8.1 Any insurer made or threatened to be made a party to any action because such insurer was, or is, a Servicing Carrier, shall be indemnified against all judgments, fines, amounts paid in settlement, reasonable costs and expenses, including attorney's fees, and any other liabilities that may be incurred as a result of such action, suit or proceeding, or threatened action, suit or proceeding, except in relation to matters as to which it is liable by reason of willful misconduct in the performance of its duties or obligations to the Plan, and, with respect to any criminal actions or proceedings, except when such insurer had reasonable cause to believe that its conduct was unlawful. Such indemnification shall be provided whether or not such insurer is a Servicing Carrier at the time of such action, suit or proceeding. Such

indemnification shall not be exclusive of other rights such insurer may have and shall pass to the successors, heirs, executors or administrators of such insurer. The termination of any civil or criminal action, suit or proceeding by a judgment, settlement, conviction or upon a plea of nolo contendere, or its equivalent, shall not, in itself, create a presumption that such insurer was liable by reason of willful misconduct, or that it had reasonable cause to believe that its conduct was unlawful. If any such action, suit or proceeding is compromised in excess of $10,000, it must be with the approval of the Governing Committee of the Plan. Such approval shall not be unreasonably withheld.

Section 8.2 Indemnification shall be awarded to the Servicing Carrier unless the Plan can show by clear and convincing evidence that (l) liability was due to willful misconduct on the part of the Servicing Carrier in the performance of its duties or obligations to the Plan; or (2) with respect to criminal actions or proceedings, that such Servicing Carrier had reasonable cause to believe that its conduct was unlawful. A Servicing Carrier seeking indemnification shall have a duty to fully cooperate with the Plan in the process of determining whether indemnification applies.

Nothing herein contained shall be deemed to bind an insurer which the Plan has determined not to be entitled to indemnification or to preclude such insurer from asserting the right to such indemnification by legal proceedings. Such indemnification as is herein provided shall be apportioned among all CAIP[1] subscribers, including any named in an action, suit or proceeding, in the same manner as other revenues or liabilities of CAIP are apportioned among CAIP subscribers.

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[1] CAIP refers to the Commercial Automobile Insurance Procedure. *Appellant's App. Vol. 2* at 54, 68.

Appellant's App. Vol. 2 at 63-65. Among other matters covered by the SCA, the SCA provided that NHIC was deemed an independent contractor subject to the Plan's authority to enforce compliance with reasonably applied servicing standards, that the Plan was to make "prompt payment" to NHIC of "all fees, allowances, and other reimbursements" to which NHIC was entitled, and that the Plan was to account to NHIC for "all CAIP subscribers for the transactions conducted pursuant to CAIP." *Id.* at 59, 62-63. The SCA also included a dispute resolution provision. *Id.* at 69.

[5] NHIC was a servicing carrier for the Plan from January 28, 1994, until March 31, 2009. *Appellant's App. Vol. 3* at 6. After March 31, 2009, and pursuant to the SCA, NHIC continued as a servicing carrier to adjust claims on policies that it had written before March 31, 2009. *Id.* While NHIC was a servicing carrier for the Plan, it issued a Truckers Automobile Form Insurance Policy (ARU 282-74-12) to Eastern Express, Inc. ("Eastern Express"), which was effective from February 1, 2004, to February 1, 2005. *Appellant's App. Vol. 4* at 62-66, 118-23.

[6] On September 30, 2004, Danny Watkins ("Watkins") a truck driver allegedly under lease with Eastern Express, was involved in a trucking accident in Missouri, which caused bodily injury to another motorist, Rabin Stovall, Jr. ("Stovall"). *Id.* at 172-76. Stovall sued Watkins and Eastern Express in Missouri state court ("Underlying Action"), seeking personal injury damages. *Id.* Stovall alleged that Watkins was acting within the course and scope of his agency or employment with Eastern Express at the time of the accident. *Id.* at

173. However, NHIC provided a defense only to Eastern Express and did not defend Watkins. *Id.* at 13, 202. Eastern Express filed two motions for summary judgment, contending that Watkins was not acting within the course and scope of his employment with Eastern Express when the accident occurred. *Id.* at 182-99. Both of Eastern Express's motions for summary judgment were denied. *Id.* at 188-92, 199.

[7] On December 14, 2009, Stovall voluntarily dismissed Eastern Express without prejudice. *Id.* at 200. Stovall tried his claims against an undefended Watkins, and on November 15, 2011, obtained a verdict of $11 million against Watkins. *Id.* at 200, 202-08. Following the judgment in the Underlying Action, Watkins and Stovall executed an agreement in which Watkins assigned Stovall his claims against NHIC for coverage and bad faith. *Appellant's App. Vol. 5* at 2-4.

[8] On August 28, 2014, Stovall, as Watkins's assignee, sued NHIC ("Garnishment Action") seeking to collect the $11 million judgment plus interest, attorney fees, statutory penalties and punitive damages. *Appellant's App. Vol. 4* at 2-3, 11-24. After litigating for more than three years, NHIC mediated with Stovall on December 11, 2017, and agreed to settle the Garnishment Action for $7.5 million. *Appellant's Conf. App. Vol. 5* at 5. The final settlement agreement and release between NHIC and Stovall was executed on January 30, 2018.[2]

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[2] NHIC faced the potential financial exposure of more than $14.5 million in the Garnishment Action, which included the $11 million verdict plus approximately $3.5 million in post-judgment interest, making the $7.5 million settlement "a very good outcome" in light of Missouri law that is generally favorable to plaintiffs in such circumstances. *Appellant's Conf. App. Vol. 3* at 211-13 (footnote omitted).

Appellant's App. Vol. 3 at 214-19. NHIC did not inform the Plan or its governing committee of the mediation or settlement before it settled the Garnishment Action. *Id.* at 7-8. Instead, NHIC settled without the Plan or governing committee's knowledge or approval, and only then began to discuss whether or how to notify the Plan and pursue an indemnity claim. *Appellant's Conf. App. Vol. 5* at 16-25. NHIC notified AIPSO on May 1, 2018, and an AIPSO representative processed an initial payment of $89,167.55 to NHIC, indicating that an additional $4,420,000.00 would be paid "when the funds become available." *Appellant's App. Vol. 4* at 5; *Appellant's Conf. App. Vol. 5* at 16-25; *Appellant's App. Vol. 5* at 94-95, 151-53

[9] After the $89,167.55 partial payment had been made, on May 1, 2018, AIPSO then notified the Plan that NHIC had reported a multi-million-dollar loss that stemmed from a $7.5 million payment it made to settle the Garnishment Action, which appeared in a February 2018 quarter end "Stat Summary information." *Appellant's App. Vol. 3* at 7, 207; *Appellant's App. Vol. 5* at 151. Both NHIC's settlement and the partial payment that AIPSO processed were done without the knowledge or consent of the Plan or governing committee. *Appellant's App. Vol. 5* at 152-53. Later, on May 16, 2018, the Plan contacted AIPSO, seeking additional information related to NHIC's settlement of the Garnishment Action and asking that no assessment of the Plan's members be conducted until the Plan's governing committee could meet and determine whether the Plan's members should be assessed to cover the $7.5 million settlement. *Id.* at 153, 155. AIPSO then informed NHIC that the Plan was

placing the matter on the agenda for discussion during the next meeting of the governing committee. *Id.* at 105.

[10] Over the next nine months, the Plan continued its review of whether NHIC was entitled to indemnification, and received additional documentation, information, and communications related to both the Underlying Action and the Garnishment Action. *Id.* at 104-15, 153-54, *Appellant's App. Vol. 3* at 7-8. During that period, NHIC was informed in late September of 2018 that the loss reported for the $7.5 million settlement of the Garnishment Action had been reversed to $0 pending the Plan's review. *Appellant's App. Vol. 5* at 168. NHIC also agreed in early October of 2018 that a reversal of the earlier $89,167.55 partial payment was "logical" while its request for indemnification was under review. *Id.* at 166-68. Out of concern for certain statutory reporting requirement penalties, NHIC did not return the $89,167.55 partial payment and requested that it be considered "a credit against the total billed" for the settlement of the Garnishment Action and requested that the balance of the settlement be paid. *Id*. at 165. While the review was ongoing, NHIC did not make a written demand regarding its request for indemnification or for payment as permitted by the contractual dispute resolution provision of the SCA. *Id.* at 154. On February 15, 2019, the Plan informed NHIC that its indemnification request had been denied. *Id.* at 124.

[11] The Plan filed this action on February 15, 2019, seeking a declaratory judgment that NHIC was not entitled to indemnification. *Appellant's App. Vol. 2* at 4, 41-53. The Plan amended the complaint to include a request that NHIC be

ordered to return the $89,167.55 partial payment. *Id.* at 103-17. NHIC answered the Plan's amended complaint, asserting affirmative defenses, including waiver and estoppel, and counterclaimed for breach of contract and declaratory judgment that the Plan owed indemnification for the $7.5 million settlement. *Id.* at 118, 136, 148-50. The Plan moved for summary judgment on October 22, 2020 on all pending claims and counterclaims and designated evidence in support of its motion, arguing that NHIC's failure to obtain the Plan's approval before settling the Garnishment Action barred indemnity pursuant to the SCA and that NHIC was unjustly enriched by retaining the $89,167.55 partial payment. *Id.* at 168, 172; *Appellant's App. Vol. 3* at 1-2. NHIC filed its response and designation of evidence on November 20, 2020, contending that NHIC's failure to obtain the Plan's approval before settling the Garnishment Action was not a bar to obtaining indemnity because it was not a condition precedent to indemnity and that the Plan was barred from raising NHIC's failure to seek approval from the Plan before settlement under principles of waiver and estoppel. *Appellant's App. Vol. 5* at 28, 37-38, 54-124. The Plan filed its reply on December 11, 2020 and supplemental designation of evidence. *Id.* at 125, 148-49. On January 22, 2021, the trial court heard oral argument on the Plan's motion for summary judgment. *Appellant's App. Vol. 2* at 18. On February 19, 2021, the trial court granted the Plan's motion for summary judgment. *Id.* at 19, 21-40. In its order, the trial court concluded that: (1) NHIC was not entitled to indemnification because it failed to comply with the condition precedent to indemnification set forth in the SCA; (2) NHIC's waiver and estoppel defenses failed as a matter of law; and (3) NHIC should

return the $89,167.55 payment it had received from AIPSO. *Id.* at 30-40. NHIC now appeals.

Discussion and Decision

[12] "When this Court reviews a grant or denial of a motion for summary judgment, we 'stand in the shoes of the trial court.'" *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020) (quoting *Murray v. Indianapolis Pub. Schs.*, 128 N.E.3d 450, 452 (Ind. 2019)). 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 a judgment as a matter of law." *Murray*, 128 N.E.3d at 452; *see also* Ind. Trial Rule 56(C). The party moving for summary judgment bears the burden of making a prima facie showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Burton*, 140 N.E.3d at 851. The burden then shifts to the non-moving party to show the existence of a genuine issue. *Id.*

[13] On appellate review, we resolve "[a]ny doubt as to any facts or inferences to be drawn therefrom . . . in favor of the non-moving party." *Id.* We review the trial court's ruling on a motion for summary judgment de novo, and we take "care to ensure that no party is denied his day in court." *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013). "We limit our review to the materials designated at the trial level." *Gunderson v. State, Ind. Dep't of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018), *cert. denied,* 139 S. Ct. 1167 (2019). We will affirm upon any theory or basis supported by the designated materials. *Henderson v. Reid Hosp.*

and Healthcare Servs., 17 N.E.3d 311, 315 (Ind. Ct. App. 2014), *trans. denied.* In the summary judgment context, we are not bound by the trial court's specific findings of fact and conclusions of law. *Rice v. Strunk*, 670 N.E.2d 1280, 1283 (Ind. 1996). The trial court's findings and conclusions merely aid our review by providing us with a statement of reasons for the trial court's actions. *Id.*

I. Contract Interpretation

[14] NHIC first argues that the trial court incorrectly concluded that the language in section 8.1 of the SCA providing "[i]f any such action, suit or proceeding is compromised in excess of $10,000, it must be with the approval of the Governing Committee of the Plan," *appellant's app. vol. 2* at 64, is a condition precedent that required the Plan's governing committee to approve the settlement before NHIC could settle and be indemnified. "Summary judgment is especially appropriate in the context of contract interpretation because the construction of a written contract is a question of law. *TW Gen. Contracting Servs., Inc. v. First Farmers Bank & Tr.*, 904 N.E.2d 1285, 1287-88 (Ind. Ct. App. 2009).

[15] Indemnity agreements are contracts subject to the rules and principles of contract construction. *Symons v. Fish*, 158 N.E.3d 352, 361 (Ind. Ct. App. 2020) (citing *Henthorne v. Legacy Healthcare, Inc.*, 764 N.E.2d 751, 756 (Ind. Ct. App. 2002)). "The goal of contract interpretation is to determine the intent of the parties when they made the agreement." *Tender Loving Care Mgmt., Inc. v. Sherls*, 14 N.E.3d 67, 72 (Ind. Ct. App. 2014). This court must examine the plain

language of the contract, read it in context, and whenever possible, construe it so as to render every word, phrase, and term meaningful, unambiguous, and harmonious with the whole. *Id.* Construction of the terms of a written contract generally is a pure question of law. *Id.* If, however, a contract is ambiguous, the parties may introduce extrinsic evidence of its meaning, and the interpretation becomes a question of fact. *Broadbent v. Fifth Third Bank*, 59 N.E.3d 305, 311 (Ind. Ct. App. 2016), *trans. denied*. "A word or phrase is ambiguous if reasonable people could differ as to its meaning." *Id.* A term is not ambiguous solely because the parties disagree about its meaning. *Id.*

[16] In particular, NHIC contends that the language the trial court construed as a condition precedent was not expressly characterized as such in the SCA, and NHIC's failure to obtain the Plan's approval before it settled the Garnishment Action is not fatal to its effort to obtain indemnity from the Plan. A condition precedent is "a condition which must be performed before the agreement of the parties becomes a binding contract or which must be fulfilled before the duty to perform a specific obligation arises." *AquaSource, Inc. v. Wind Dance Farm, Inc.*, 833 N.E.2d 535, 539 (Ind. Ct. App. 2005).

[17] Here, section 8.1 of the SCA provides, in pertinent part, that "[a]ny insurer made or threatened to be made a party to any action because such insurer was, or is, a Servicing Carrier *shall be indemnified*" without regard to "whether or not such insurer is a Servicing Carrier at the time of the action, suit, or proceeding."

Appellant's App. Vol. 2 at 63-64 (emphasis added).[3] Thus, this language establishes a right to indemnity. In addition, section 8.1 of the SCA specified that "[i]f any such action, suit or proceeding is compromised in excess of $10,000, it must be with the approval of the Governing Committee of the Plan" and that "[s]uch approval shall not be unreasonably withheld." *Id.* at 64. Reading these provisions in section 8.1 together, the plain language: (1) establishes that a servicing carrier, such as NHIC, who has been "made a party to an action" has a right to indemnification; and (2) provides that if the action, suit, or proceeding to which NHIC was made a party "is compromised in excess of $10,000, it *must be with the approval of the Governing Committee of the Plan*" whose "approval shall not be unreasonably withheld." *Id.* (emphasis added). The plain language of section 8.1 of the SCA subjects the right to indemnification to the condition that the Plan's governing committee must first approve a settlement in excess of $10,000. It does not say that a servicing carrier, like NHIC, shall receive an award of indemnity independent of the governing committee's approval of a settlement in excess of $10,000.00.

[18] Section 8.2 of the SCA, which also addresses indemnification, further provides, in part, that:

> Indemnification *shall be awarded* to the Servicing Carrier unless the Plan can show by clear and convincing evidence that (l) liability was due to willful misconduct on the part of the

[3] The two exceptions that limit a servicing carrier's right to indemnity for willful misconduct or for cases involving a criminal action or proceeding are not at issue in this appeal. *Appellant's App. Vol. 2* at 64.

> Servicing Carrier in the performance of its duties or obligations to the Plan; or (2) with respect to criminal actions or proceedings, that such Servicing Carrier had reasonable cause to believe that its conduct was unlawful. A Servicing Carrier seeking indemnification shall have a duty to fully cooperate with the Plan in the process of determining whether indemnification applies.

Id. (emphasis added). *Id.* Thus, this language expands upon section 8.1 and specifies that: (1) the Plan shall award indemnity; (2) to determine whether indemnification applies, the servicing carrier has a duty to fully cooperate with the Plan; and (3) if the Plan can show by clear and convincing evidence that either of the two circumstances that act as bars to indemnity is applicable, it will not provide indemnity in such a circumstance. Thus, section 8.2 of the SCA addresses the award of indemnity to which a servicing carrier, such as NHIC, may be entitled.

[19] To determine the effect of a failure to obtain the approval of the Plan's governing committee before settling an action for an amount exceeding $10,000, we must read sections 8.1 and 8.2 of the SCA together and construe those provisions to harmonize them. *See Tender Loving Care Mgmt.*, 14 N.E.3d at 72. NHIC contends that the trial court's characterization of the language in section 8.1 of the SCA as a condition precedent improperly injected a timing component that was not expressly stated in that provision, rendered the language in section 8.1 a preapproval, and overlooked the language specifying that the governing committee could not unreasonably withhold settlement approval. It contends that because the language of section 8.1 of the SCA is

silent as to when the Plan's governing committee must approve the settlement, it does not create a condition precedent to settlement approval. We disagree.

[20] Our reading of these provisions leads us to the conclusion that the Plan's governing committee must give its approval to the settlement, which it cannot "unreasonably" withhold, as a condition precedent to an insurer who is or was a servicing carrier having a right to indemnification. *Id.* at 64. The language providing that settlement approval "shall not be unreasonably withheld" indicates that the Plan's governing committee has had an opportunity to evaluate whether a settlement in excess of $10,000 is reasonable before the right to indemnity is operative. *Id.* This language created a condition precedent. *See AquaSource, Inc.*, 833 N.E.2d at 539 (provision in contract stating that it was "subject to approval" by board of directors was a condition precedent); *Ind. State Highway Comm'n v. Curtis*, 704 N.E.2d 1015, 1018 (Ind. 1998) (provision in settlement agreement stating that it was subject to approval by the Indiana department of transportation was a condition precedent); *Blakely v. Currence*, 172 Ind. App. 668, 671, 361 N.E.2d 921, 922 (1977) (provision that purchase agreement was subject to loan approval was a condition precedent). In addition, section 8.1 of the SCA is silent on the actual award of indemnity and speaks generally about the right to indemnification, while section 8.2 of the SCA addresses the *award* of indemnification, if applicable. Indeed, section 8.2 begins: "Indemnification *shall be awarded*" – unless an exception applies – and requires a servicing carrier seeking indemnification "to fully cooperate with the Plan" to determine "whether indemnification applies." *Appellant's App. Vol. 2* at

64-65. This is an expansion upon the language of section 8.1 of the SCA which establishes a general right to indemnity that is subject to condition precedent of governing committee approval of a settlement in excess of $10,000, to be eligible for indemnification by the Plan.

[21] Here, NHIC never sought the approval of the Plan's governing committee before it settled the Garnishment Action for $7.5 million. *Appellant's App. Vol. 3* at 8. Because NHIC never obtained the approval of the Plan's governing committee before settlement, it failed to satisfy a condition precedent to indemnification and was not entitled to such an award pursuant to the plain language of the SCA. As discussed, our review of the SCA leads us to the conclusion that before NHIC was entitled to an award of indemnity it had to obtain the Plan's approval of the settlement because the amount compromised exceeded $10,000.00. Moreover, NHIC's argument that focuses on whether governing committee approval of the settlement in the Garnishment Action was "unreasonably withheld" puts the cart before the horse: the governing committee's opportunity to approve the settlement had to occur before settlement. We find no error in the trial court's interpretation of the language as a condition precedent. Because it is undisputed that NHIC never sought approval of the settlement in the Garnishment Action before settling, it was not

entitled to indemnification. Therefore, the trial court properly granted summary judgment to the Plan on this issue.[4]

II. Waiver and Estoppel

[22] NHIC next argues that under principles of waiver and estoppel AIPSO's partial payment toward the $7.5 million settlement indemnification request creates a genuine issue of material fact preventing summary judgment. With respect to waiver and estoppel in the insurance context, the Indiana Supreme Court has explained:

> The terms "estoppel" and "waiver" ordinarily have distinct and separate meanings, but "estoppel" is often used synonymously with "implied waiver." *Tate v. Secura Ins.*, 587 N.E.2d 665, 671 (Ind. 1992).
>
> Technically, there is a distinction between "waiver" and "estoppel." A waiver is an intentional relinquishment of a known right and is a voluntary act, while the elements of estoppel are the misleading of a party entitled to rely on the acts or statements in question and a consequent change of position to his detriment. But in the law of insurance, the distinction between "estoppel" and "implied waiver" is not easy to preserve,

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[4] NHIC also argues that to interpret the language in section 8.1 of the SCA as a condition precedent creates an extreme forfeiture or penalty because the failure to seek the governing committee's approval before settling the Garnishment Action was not an essential part of the Plan's exchange for performance and raises a question about whether failure to approve would have been unreasonable. NHIC did not raise this argument to the trial court when opposing summary judgment. It is well-established that failure to raise an argument or issue below results in waiver of that issue. *See L.H. Control Inc. v. Custom Conveyor, Inc.*, 974 N.E.2d 1031, 1042 (Ind. Ct. App. 2012); *Dunaway v. Allstate Ins. Co.*, 813 N.E.2d 376, 387 (Ind. Ct. App. 2004). Thus, that argument is waived. Similarly, because we conclude that the language clearly and unambiguously creates a condition precedent, we need not address NHIC's arguments that the language is in any way ambiguous as to the creation of a condition precedent.

> and, quite commonly, in insurance cases, the courts have found it unnecessary or inadvisable to make a distinction between them and have used the terms interchangeably.
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> *Id.* (quoting *Travelers Ins. Co. v. Eviston,* 110 Ind. App. 143, 154, 37 N.E.2d 310, 314 (1941)). In describing the doctrine of estoppel, this Court has explained, "[a]lthough variously defined, it is a concept by which one's own acts or conduct prevents the claiming of a right to the detriment of another party who was entitled to and did rely on the conduct." *Brown v. Branch*, 758 N.E.2d 48, 51-52 (Ind. 2001). Further, "one who by deed or conduct has induced another to act in a particular manner will not be permitted to adopt an inconsistent position, attitude, or course of conduct that causes injury to such other." *Id.* at 52.

Ashby v. Bar Plan Mut. Ins. Co., 949 N.E.2d 307, 312-13 (Ind. 2011).

[23] Citing principles of agency law, NHIC contends that there is a factual question about the scope of AIPSO's authority to waive the SCA provision requiring the Plan's governing committee to approve the settlement. NHIC directs us to designated evidence showing that AIPSO had entered into an "Operations Management Services Agreement" in which AIPSO was the "exclusive provider of all services necessary and proper for the efficient daily operation" of the Plan, which included responsibility for the Plan's financial and administrative services. *Appellant's App. Vol. 5* at 62. It also directs us to designated evidence that the Plan continued its review of NHIC's indemnification request by seeking additional documentation from NHIC and using AIPSO as an intermediary. Related to its waiver argument, NHIC also contends that the Plan is estopped from asserting NHIC's failure to obtain the

Plan's governing committee's approval of the settlement is fatal to its indemnification request because AIPSO made a partial payment to it and stated that, when available, additional funds would be forthcoming. NHIC further contends that the Plan used AIPSO to request additional documentation from NHIC in its review of NHIC's indemnification request, which led NHIC to believe it would be indemnified for its settlement of the Garnishment Action, and that it was prevented from invoking the SCA's dispute resolution clause because its indemnification request was under review .

[24] "Whether an agency relationship exists is generally a question of fact, but if the evidence is undisputed, summary judgment may be appropriate." *Alva Elec., Inc. v. Evansville-Vanderburgh Sch. Corp.*, 7 N.E.3d 263, 268 (Ind. 2014). Here, there is no dispute that the partial payment came not from the Plan but from AIPSO, the Plan's "exclusive provider" of administrative and financial services. *Appellant's App. Vol. 5* at 62. Indeed, the designated evidence showed that AIPSO would, among others things, "provide all necessary prescribed financial and accounting services" for the Plan, which included maintenance of operating accounts and accounts receivable, management of investment services, filing of tax forms and payment of applicable taxes, making all entries into all books, ledgers, and statistical summary control, monthly closing of books and preparation of trial balances, and balancing of quarterly financial statements. *Appellant's App. Vol. 5* at 64. However, the designated evidence did not show that AIPSO had any authority with respect to the ability to waive any conditions of the SCA; in fact, the SCA itself provides that waiver of the SCA

or a term contained therein may occur only "by an instrument in writing signed by the parties." *Appellant's App. Vol. 2* at 68.

[25] The designated evidence instead showed that both NHIC's settlement and the partial payment that AIPSO processed were done without the knowledge or consent of the Plan or governing committee. *Appellant's App. Vol. 5* at 152-53. When the Plan became aware of the partial payment and AIPSO's statement that additional funds would be forthcoming, it stopped any other payments to NHIC, reversed the loss report due to the settlement in the Garnishment Action to $0, requested the return of the partial payment money, and began an investigative process with respect to indemnification. *Id.* at 153-54, 165-168. The designated evidence showed that receipt of the partial payment from AIPSO, which was reduced to zero and requested back, was not sufficient to show that NHIC relied on any assurances from the Plan or that the Plan's conduct was misleading because the Plan never authorized the partial payment.

[26] NHIC's contentions as to the nature of the relationship between AIPSO and the Plan with respect to waiver and estoppel overlooks that, pursuant to the SCA, the authority to approve a settlement in excess of $10,000 lies only with the Plan's governing committee and not with AIPSO. There was no dispute that the initial payment and promise to pay did not come from the Plan's governing committee or with its authorization. Likewise, the designated evidence established that the Plan's subsequent conduct of using AIPSO to request documents for NHIC relevant to its review, did not show that the Plan had induced NHIC "to believe and act upon [its] conduct in good faith and without

knowledge of the facts" with respect to NHIC's indemnification request. *See Purdue Univ. v. Wartell*, 5 N.E.3d 797, 807 (Ind. Ct. App. 2014) (addressing the elements of equitable estoppel). Because there is no genuine issue of material fact that the Plan had waived or was estopped from asserting the SCA's contractual requirement that NHIC first obtain its governing committee's approval to settle before NHIC could obtain indemnification, the trial court properly granted summary judgment on this issue.[5]

[27] Affirmed.

May, J., and Vaidik, J., concur.

[5] Because we conclude that there was no dispute as to any material fact that the Plan's governing committee had to approve the settlement of the Garnishment Action before NHIC was properly entitled to indemnification, we also affirm the trial court's order requiring that NHIC return the $89,167.55 partial payment to the Plan.