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IN THE

COURT OF APPEALS OF INDIANA

Scottsdale Insurance Company, *et al.*,

Appellants-Defendants,

v.

Harsco Corporation,

Appellee-Plaintiff.

November 21, 2022

Court of Appeals Case No. 21A-PL-2483

Appeal from the Marion Superior Court

The Hon. Heather Welch, Judge

Trial Court Cause No. 49D01-1001-PL-2227

Bradford, Chief Judge.

Case Summary

[1] In the Spring of 2007, Harsco Corporation ("Harsco") and Pennsylvania utility company PPL Montour Company, LLC ("PPL"), entered into a contract ("the PPL Contract") to construct and maintain an elevator at a PPL worksite, and Harsco subcontracted with Metro Elevator Company, Inc. ("Metro"), to lease and install the elevator. At the time, Metro's commercial general liability ("CGL") and umbrella insurer was Scottsdale Insurance Company ("Scottsdale"), and Harsco was made an additional insured pursuant to Metro's policy with Scottsdale ("the CGL Policy").

[2] In April of 2007, Harsco employee Christopher Rainey fell from an elevator installed by Metro and was seriously injured. In 2009, Rainey filed a personal-injury lawsuit against PPL and Metro in Pennsylvania, and, after Scottsdale refused to cover Harsco, Harsco filed an insurance-coverage action against Scottsdale and others in Indiana. In April of 2011, the Marion Superior Court ("the trial court") entered partial summary judgment in favor of Harsco, concluding that Scottsdale owed it a defense. In November of 2011, Rainey's personal-injury action settled, and the trial court stayed this case pending resolution of a Pennsylvania proceeding allocating responsibility for funding the settlement. In 2013, the Pennsylvania court determined that Metro was 0% at fault for Rainey's accident and Harsco was 100%. Ultimately, the trial court entered summary judgment in favor of Harsco, concluding that it was entitled to indemnification for its contribution to the settlement of Rainey's personal-injury action pursuant to both the CGL Policy and Harsco's umbrella coverage

with Scottsdale ("the Umbrella Policy"). The trial court ordered that Scottsdale pay Harsco over $5,000,000.00 in damages, which consisted of approximately $70,000.00 in defense costs and approximately $5,000,000.00 in indemnification and interest. Scottsdale contends that the trial court erred in determining that it is required to indemnify Harsco pursuant to the CGL and Umbrella Policies and in ordering the payment of at least some of the defense costs. Because we agree with Scottsdale's first contention but not the second, we affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

[3] In the Spring of 2007, Harsco and PPL entered into the PPL Contract to install and maintain an elevator at a PPL worksite, and Harsco subcontracted with Metro to lease and install the elevator. The PPL Contract listed Metro as a "third party subcontractor" and required both Metro and Harsco to maintain CGL insurance coverage. Appellant's App. Vol. III p. 114.

[4] The contract entered into by Harsco and Metro ("the Metro Contract") on April 11, 2007, provided that Metro would supply, erect, and fasten an elevator to the building; Harsco would provide "reasonable and proper care" for the elevator and prepare the site for elevator installation; and Harsco would be an additional insured pursuant to the CGL Policy. Appellant's App. Vol. III p. 128. Pursuant to the terms of the CGL Policy, Scottsdale had a duty to defend and pay sums Metro became legally obligated to pay as damages for bodily injury up to the $1,000,000.00 per-occurrence limit. Pursuant to the CGL Policy's additional insured endorsement ("the AI Endorsement"), "owners,

lessees, or contractors" are automatically "additional insured[s]" when such coverage is required by a "construction agreement." Appellant's App. Vol. VIII p. 157. The CGL Policy further provides, however, that such an additional insured "is an additional insured only with respect to liability for 'bodily injury' […] caused, in whole or in part, by […] Your acts or omissions; or […] The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured." Appellant's App. Vol. VIII p. 157.

[5] In addition to the AI Endorsement, the CGL Policy contains several provisions relevant to Scottsdale's arguments on appeal. The first page of the coverage form provides, in part, that "[t]hroughout this policy the words 'you' and 'your' refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy." Appellant's App. Vol. VIII p. 141. The CGL Policy's exclusions include: (1) "'Bodily injury' […] for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement" (the "Contractual Liability Exclusion"); (2) "'Bodily injury' to [… a]n 'employee' of the insured arising out of and in the course of [… e]mployment by the insured" (the "Employer's Liability Exclusion"); and (3) "[a]ny obligation of the insured under a worker's compensation […] law" (the "Worker's Comp Exclusion"). Appellant's App. Vol. VIII p. 142.

[6] The CGL Policy, however, also provides that the contractual-liability and employer's-liability exclusions do not apply to "liability assumed by the insured under an 'insured contract'" ("the Insured Contract Exception"). Appellant's

App. Vol. III p. 142. "Insured contract" includes an "elevator maintenance agreement" and an indemnity agreement, defined as any provision "under which you assume the tort liability of another party to pay for 'bodily injury' […] to a third person […], caused, in whole or in part, by you or by those acting on your behalf." Appellant's App. Vol. VIII p. 167.

[7] Metro had also purchased the Umbrella Policy from Scottsdale, with a $5,000,000.00 per-occurrence limit. The Umbrella Policy provides coverage when the amount of "damages by reason of settlement or judgments" exceeds the CGL Policy's limits. Appellant's App. Vol. III pp. 196, 198, 212–13. Moreover, the Umbrella Policy provides that "[a]ny additional insured under any policy of 'underlying insurance' will automatically be an insured under this insurance." Appellant's App. Vol. III p. 207.

[8] On April 22, 2007, Harsco and Metro were performing work for PPL at its worksite in Pennsylvania when Rainey, a Harsco employee, fell two stories from scaffolding installed by Harsco and was seriously injured. On July 21, 2009, Rainey filed a personal-injury lawsuit against, *inter alia*, PPL and Metro in Pennsylvania state court, and Harsco, while immune pursuant to Pennsylvania's workers-compensation statute, was involved because PPL was seeking indemnification from Harsco. After Scottsdale declined to cover Harsco, Harsco filed an insurance-coverage action against Metro, Scottsdale, and Harsco's insurer, ACE American Insurance Company, in the trial court. On April 26, 2011, the trial court entered partial summary judgment in favor of Harsco, concluding that Harsco was an additional insured pursuant to the CGL

Policy and was therefore owed a defense. The trial court granted Scottsdale's request to have the matter certified for interlocutory appeal, but we declined to exercise jurisdiction.

[9] In early November of 2011, Rainey's personal-injury action settled, and the trial court stayed this case while a Pennsylvania proceeding allocated responsibility for funding the settlement. The result of that proceeding was that the Pennsylvania trial court determined Harsco to be 100% at fault for Rainey's injury and Metro 0% at fault, leaving coverage issues to be determined in this action by agreement of the parties. The parties returned to the trial court to resolve the insurance-coverage dispute, and on July 9, 2018, the trial court again entered partial summary judgment in favor of Harsco, concluding that it was entitled to indemnification for its contribution to Rainey's settlement as an additional insured of Scottsdale.

[10] Harsco later added a claim pursuant to the Umbrella Policy, and, in late 2019, both parties moved for summary judgment on the umbrella-coverage question and on damages. On July 10, 2020, the trial court entered summary judgment in favor of Harsco on the umbrella-coverage question but concluded that a genuine issue of material fact precluded summary judgment on the question of damages. On December 15, 2020, the trial court held an evidentiary hearing, and, on March 31, 2021, issued a damages order. In the order, the trial court awarded Harsco $3,000,000.00 in indemnification, $70,975.93 in defense costs, and $1,980,997.95 in prejudgment interest, for a total of $5,051,973.87. On October 12, 2021, the trial court awarded Harsco an additional $152,065.39,

which reflected additional interest accrued through September of 2021, for a final total of $5,204,039.26.

Discussion and Decision

[11] Scottsdale appeals from the trial court's entry of summary judgment in favor of Harsco on several bases, including coverage pursuant to the CGL Policy, coverage pursuant to the Umbrella Policy, and Scottdale's duty to defend Harsco. When reviewing the grant or denial of a summary judgment motion, we apply the same standard as the trial court. *Merchs. Nat'l Bank v. Simrell's Sports Bar & Grill, Inc.*, 741 N.E.2d 38 3, 386 (Ind. Ct. App. 2000). Summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. *Id.*; Ind. Trial Rule 56(C). To prevail on a motion for summary judgment, a party must demonstrate that the undisputed material facts negate at least one element of the other party's claim. *Merchs. Nat'l Bank*, 741 N.E.2d at 386. Once the moving party has met this burden with a *prima facie* showing, the burden shifts to the nonmoving party to establish that a genuine issue does in fact exist. *Id*. The party appealing the summary judgment bears the burden of persuading us that the trial court erred. *Id*. "In determining whether there is a genuine issue of material fact precluding summary judgment, all doubts must be resolved against the moving party and the facts set forth by the party opposing the motion must be accepted as true." *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 438–39 (Ind. Ct. App. 1990), *trans. denied*.

[12] All of Scottsdale's summary-judgment claims require us to examine the provisions of the CGL Policy. Generally, insurance contract provisions are subject to the same rules of interpretation and construction as are other contract terms. *Sharp v. Ind. Union Mut. Ins. Co.*, 526 N.E.2d 237, 239 (Ind. Ct. App. 1988) (internal citation omitted), *trans. denied*. While some special rules for the construction of insurance contracts have been developed due to the disparity in bargaining power between insurers and insureds, if a contract is clear and unambiguous, the language of the contract must be given its plain meaning. *Id.* (internal citation omitted). Moreover, Indiana courts have specifically held that although a dispute between an insurer and its insured requires that ambiguities be resolved against the insurer, this is not the case where a party who has not paid premiums to the insurer seeks status as an additional insured. *See Barga v. Ind. Farmers Mut. Ins. Group, Inc.*, 687 N.E.2d 575, 578 (Ind. Ct. App. 1997) ("When, as here, […] the injured party is not the named insured, the policy is construed from a neutral stance."), *trans. denied*.

I. Whether Harsco is Entitled to Indemnity

[13] The CGL Policy obligates Scottsdale to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' […] to which this insurance applies" and imposes on the insurer a "duty to defend the insured against any 'suit' seeking those damages." Appellant's App. Vol. VIII p. 141. The CGL Policy designates as an additional insured—"with respect to liability for "bodily injury' […] caused, in whole or in part, by (1) [y]our acts or omissions; or (2) [t]he acts or omissions of those acting on your behalf"—

anyone with whom Metro "agreed in writing […] that such person or organization be added as an additional insured[.]" Appellant's App. Vol. VIII p. 157.

[14] Scottsdale does not dispute that Harsco qualifies as an additional insured. The Metro Contract expressly required Metro to make Harsco an additional insured, both by requiring Metro's "Standard Insurance to apply" and by incorporating an attached letter addendum that requires "Metro's standard insurance certificate listing [Harsco] as an additional insured." Appellant's App. Vol. III pp. 127, 130–31. Scottsdale, however, can avoid having to defend and indemnify Harsco if it successfully carries its "burden of proving [the] applicability" of a policy exclusion. *Keckler v. Meridian Sec. Ins. Co.*, 967 N.E.2d 18, 23 (Ind. Ct. App. 2012), *trans. denied*.

A. The CGL Policy

1. The Meaning of "caused, in whole or in part"

[15] Scottsdale first argues that the indemnity agreement exception in the CGL Policy does not apply to additional insureds like Harsco because Metro did not "cause[], in whole or in part," Rainey's accident because it was found to be 0% liable for it. Appellant's App. Vol. VIII p. 157. Harsco argues that this language describes a "but for" causal relationship, not a more-difficult-to-prove proximate-cause relationship. If true, the finding of the Pennsylvania court that Metro was 0% at fault would not prevent coverage so long as Rainey's accident would not have happened but for Metro's actions. A significant majority of

other courts addressing this exact same question have rejected Harsco's argument, and so do we.

[16] The United States Circuit Court of Appeals for the Fifth Circuit, in a duty-to-defend case, examined the phrase "caused, in whole or in part" and concluded that it required an allegation that the named insured, "or someone acting on its behalf, proximately caused [the] injuries." *Gilbane Bldg. Co. v. Admiral Ins. Co.*, 664 F.3d 589, 598 (5th Cir. 2011). In doing so, it noted that "the Texas Supreme Court has defined 'caused by' as requiring proximate causation." *Id*. (citing *Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 202–03 (Tex. 2004) (citing *Red Ball Motor Freight, Inc. v. Emp'rs Mut. Liab. Ins. Co.*, 189 F.2d 374, 378 (5th Cir. 1951)).

[17] The Fourth Circuit reached the same conclusion in *Capital City Real Estate, LLC v. Certain Underwriters at Lloyd's London, Subscribing to Policy Number: ARTE018240*, 788 F.3d 375 (4th Cir. 2015), by relying on the holding in *Gilbane* and by noting that

> commentators have also examined the language at issue and concluded that an additional insured is covered where a named insured is at least partially negligent. *See, e.g.*, Scott C. Turner, *Insurance Coverage of Construction Disputes* § 42:4 (2015) (stating that when the "ISO issued revised versions of its additional insured endorsements" in 2004, it "attempt[ed] to narrow coverage for additional insureds" such that "for there to be insurance for the additional insured … the named insured must be negligent at least in part").

Id. at 380.

[18] The Supreme Court of North Dakota also reached the same conclusion, holding that the same policy language at issue here only required the named insured "to have in part 'caused' the injury, rather than be actually liable for it." *Borsheim Builders Supply, Inc. v. Manger Ins., Inc.*, 917 N.W.2d 504, 511 (N.D. 2018). While this language, in isolation, might seem to support Harsco's position, the issue in that case was not whether but-for or proximate causation was the standard, but, rather, whether Borsheim's insurance could cover an additional insured where Borsheim itself could not be held liable due to operation of North Dakota's worker's compensation act. *Id*. Indeed, the *Borsheim* Court specifically cited to *Capital City Real Estate* and noted that case's reliance on *Gilbane* and Turner's *Insurance Coverage of Construction Disputes*, making it abundantly clear that it understood "caused" to mean "proximately caused." *Borsheim*, 917 N.W.2d at 511.

[19] Numerous other state and federal decisions have reached the same result. *See also First Mercury Ins. Co. v. Shawmut Woodworking & Supply Inc.*, 48 F. Supp. 3d 158, 174 (D. Conn. 2014), *aff'd*, 660 F. App'x 30 (2d Cir. 2016) ("[T]he progression from 'arising out of' to 'caused, in whole or in part, by' shows that that 'liability' refers in both instances to causation and the amendment was intended to require proximate causation by the insured rather than simply but-for causation."); *Place v. P.F. Chang's China Bistro, Inc.*, 2015 WL 11145058, at *7 (W.D. Tenn. 2015) ("[T]he additional insured endorsement [...] invokes coverage for […] the additional insured only in circumstances where [the named insured's] actions are the proximate cause of the injury to [the

underlying plaintiff]."); *City of N.Y. v. Fleet Gen. Ins. Grp., Inc.*, 2021 WL 1906467, at *7 (E.D.N.Y. May 12, 2021) (citing *First Mercury Ins. Co. v. Preferred Contractors Ins. Co.*, 136 N.Y.S.3d 728, 728 (N.Y. App. Div. 2021)) ("Accordingly, as many courts in New York have already concluded, this language requires an insurer to defend an additional insured when the complaint alleges that actions of the named insured were a proximate cause of the damages being sought."). In summary, the great weight of authority on this issue supports Scottsdale's position, that "caused, in whole or in part" necessarily implies "*proximately* caused, in whole or in part."

[20] A significant outlier is *Ramara, Inc. v. Westfield Insurance Co.*, 814 F.3d 660 (3d Cir. 2016), a case in which Westfield asserted that, for the additional insured endorsement to apply, it must have been alleged that the injuries had been proximately caused by Ramara's acts or omissions. *Id*. at 667. Ramara argued that only a "but-for" causation analysis was required, and the Third Circuit concluded that the additional insured's "but-for causation interpretation [was] correct" and that the policy provisions "support[] Ramara's but-for reading." *Id*. at 676. Even if we were to find this conclusion compelling, which (in light of the above authority) we do not, we observe that the above is *obiter dicta*, as the *Ramara* Court also concluded that "Ramara is entitled to a defense in the Axe case even under Westfield's narrow interpretation of the Additional Insured Endorsement limiting coverage to situations in which an insured's contractor's actions proximately caused a plaintiff's injuries." *Id*. In summary, we adopt the holdings and reasoning of those cases in which it was determined

that Metro's acts or omissions would have to have been a proximate cause, at least in part, of Rainey's injuries for coverage to occur.

2. The Indemnity Exception

[21] Scottsdale next argues that the indemnity agreement exception in the CGL Policy, which refers to liability "you assume" and bodily injury caused by "you or those acting on your behalf[,]" does not provide coverage because (1) the words "you" and "your" refer only to named insureds, *i.e.*, Metro, and (2) Harsco was not working on Metro's behalf. Appellant's App. Vol. VIII pp. 141, 167. If we accept this argument, there was no injury caused by "you or those acting on your behalf" and, because Harsco was found to be 100% at fault for Rainey's injuries, no coverage. For its part, Harsco argues that the words "you" and "your" in the indemnity agreement exception includes additional insureds such as Harsco, meaning that the exception does not apply to it. Additionally, Harsco argues that it was acting on Metro's behalf when it erected the scaffolding from which Rainey fell. We are persuaded by Scottsdale's arguments.

[22] As for the meaning of "you" and "your," the CGL Policy clearly provides that "[t]hroughout this policy the words 'you' and 'your'" refer to the named insured or "any other person or organization qualifying as a Named Insured under this policy." Appellant's App. Vol. VIII p. 141. While the CGL Policy clearly contemplates that third parties *can* qualify as named insureds, nothing in it designates Harsco as a named insured, and, indeed, Harsco does not even

claim to be one. There is nothing ambiguous about this language, and we therefore conclude that it is dispositive of this claim.

[23] Although the language above is sufficient to sustain our disposition, we would also note that accepting Harsco's interpretation of this language would render large portions of the CGL Policy nonsensical. In the paragraph following the paragraph containing the language just discussed, the CGL Policy provides that "[t]he word 'insured' means any person or organization qualifying as such under Section II—Who Is An Insured." Section II generally addresses the identification of additional insured parties, such as Harsco, and was amended in the CGL Policy to read, in relevant part:

> Section II — Who Is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy.

Appellant's App. Vol. VIII p. 157. Were we to accept the notion that the CGL Policy's use of "you" and "your" included additional insureds, any use of the word "insured" in the policy would be meaningless. It is well-settled that "courts must accept an interpretation of a contract which harmonizes the provisions of it[,]" *Evansville-Vanderburgh Sch. Corp. v. Moll*, 264 Ind. 356, 363, 344 N.E.2d 831, 837 (1976), and "[c]ourts will make all attempts to construe the language in a contract so as not to render any words, phrases, or terms ineffective or meaningless." *Est. of Eberhard v. Ill. Founders Ins. Co.*, 742 N.E.2d 1, 3 (Ind. Ct. App. 2000). All of this is to say that the CGL Policy clearly

distinguishes between "named" and "additional" insureds and accepting Harsco's argument in this regard would render that distinction meaningless. This we will not do.

[24] While Harsco cites to four cases from various federal Circuit Courts of Appeal to support its argument, it is well-settled that "lower federal court decisions may be persuasive but have non-binding authority on state courts." *Ind. Dep't of Pub. Welfare v. Payne*, 622 N.E.2d 461, 468 (Ind. 1993). To the extent that any of these cases stands for the proposition that we should ignore the clear language of the CGL Policy that "you" and "your" refer only to named insureds throughout the policy, we are not persuaded.

[25] Harsco also points to the record of an unrelated federal case involving Scottsdale in which, according to Harsco, Scottsdale took a position contrary to the one it takes in this litigation regarding the meaning of "you" and "your" in an insurance contract. Harsco contends that this inconsistency automatically renders the language at issue ambiguous and that any ambiguity needs to be resolved against Scottsdale. We need not address the propriety of the trial court taking judicial notice of the records of that proceeding, however, because the position that Scottsdale took in that case is not actually inconsistent with the position it takes here. Rather, it is the facts of the two cases that are different. In that case, the party for which Scottsdale sought coverage was not merely an additional insured pursuant to a blanket provision like Harsco, but a "*Named* additional insured[,]" whose name appeared as an additional insured in the policy at issue. Appellant's App. Vol. III pp. 186, 191 (emphasis added).

Because Scottsdale's position in the federal case was not actually inconsistent with its position in this case, that fact does not help Harsco, even if we assume, *arguendo*, that the trial court properly took notice of the records of that unrelated case.

[26] We now address Harsco's argument that it was working on behalf of Metro when it installed the scaffolding from which Rainey fell. As mentioned, the CGL Policy provides that an additional insured, such as Harsco, "is an additional insured only with respect to liability for 'bodily injury' […] caused, in whole or in part, by […] Your acts or omissions; or […] *The acts or omissions of those acting on your behalf*; in the performance of your ongoing operations for the additional insured." Appellant's App. Vol. VIII p. 157 (emphasis added). Harsco, the argument goes, was acting on Metro's behalf because its preparation of the site allowed Metro to actually install the elevator. Harsco, however, provides us with no authority for the proposition that a general contractor acts on behalf of a subcontractor that it hires whenever it does something that allows the subcontractor to complete its work, and our research has uncovered none.

[27] We now turn to the language of the CGL Policy itself to see if it provides any support for Harsco's argument. Although "on your behalf" is not defined in the CGL Policy, it is well-settled that "[w]hen interpreting the meaning of the words used in a contract, they should be given their plain, ordinary, and popularly accepted meanings." *USA Life One Ins. Co. of Ind. v. Nuckolls*, 682 N.E.2d 534, 539 (Ind. 1997). Black's defines "on behalf of" as "in the name of,

on the part of, as the agent or representative of[,]" *Behalf*, BLACK'S LAW DICTIONARY (11th ed. 2019), while Webster's defines the phrase as "in the interest of[,] as the representative of[,] for the benefit of[.]" WEBSTER'S THIRD NEW INT'L DICTIONARY 198 (Phillip Babcock Gove et al. eds., G.&C. Merriam Company 1964). While "on behalf of" is a phrase that includes an element of benefit, we think it encompasses more and have little hesitation in concluding that, in building the scaffolding, Harsco was not acting on Metro's behalf, it was acting on PPL's. PPL hired Harsco to install and maintain an elevator, so all that Harsco did was ultimately in service of that obligation. Any obligations Harsco had to Metro pursuant to their contract were secondary to their primary obligation to PPL, and any benefit to Metro incidental. Under the circumstances (PPL hired Harsco, who, in turn, hired Metro), we think that it is not reasonable to conclude that Harsco was acting on Metro's behalf when it erected the scaffolding.[1]

[28] Moreover, it is apparent that, were we to accept Harsco's argument on this point, it would render large portions of the CGL Policy meaningless, essentially swallowing up all provisions that might exclude coverage to an additional insured like Harsco for any reason, such as the requirement that Metro must be at least partly at fault for the tort in order for Harsco to be covered under Metro's policy. To get straight to the point, if we take Harsco's argument that a

[1] We think the phrase "those acting on your behalf" is clearly referring to any second-tier subcontractors Metro might have hired in order to fulfill its contractual obligation to Harsco.

general contractor acting in such a way as to make it possible for a subcontractor to do its work is "acting on its behalf" to its logical conclusion, then the simple act of hiring the subcontractor would suffice. This expansive and novel interpretation of the language in question runs counter to the other provisions of the CGL Policy and the popularly-accepted understanding of what it means to be acting on another's behalf.

[29] In summary, because we accept Scottsdale's arguments that, in order for there to be coverage, Metro's acts or omissions would have had to have been shown to be a proximate cause of Rainey's injuries, the terms "you" and "your" in the CGL Policy refer only to the named insureds, and that Harsco was not acting on behalf of Metro when it erected the scaffolding, we conclude that Scottsdale has no obligation to indemnify Harsco pursuant to the CGL Policy.[2]

B. The Umbrella Policy

[30] Umbrella liability policies, in contrast to primary policies, have been recognized as providing "unique and special coverage." *Monroe Guar. Ins. Co. v. Langreck*, 816 N.E.2d 485, 494 (Ind. Ct. App. 2004) (internal citation omitted). Umbrella coverage is often characterized as "catastrophe coverage," designed to prevent against losses that are so substantial they could bankrupt the insured. *See id.* (internal citation omitted). The language of a particular umbrella policy and its

[2] Scottsdale also argues that coverage is precluded by the employer's liability exclusion in the CGL Policy and that the payments Harsco made to resolve Rainey's claim are excluded under the policies' worker's compensation exclusion. Because we have already concluded that there is no coverage on other grounds, we need not address these arguments.

description of coverage are important in distinguishing between primary and umbrella policies. *See id*. It is the burden of a person or entity seeking coverage under an insurance policy to establish that the claim at issue comes within the policy's insuring provisions. *See PSI Energy, Inc. v. Home Ins. Co.,* 801 N.E.2d 705, 727 (Ind. Ct. App. 2004), *trans. denied*. Only once that burden is met does the burden shift to the insurer to demonstrate that policy exclusions nonetheless preclude coverage. *See id*.

[31] Here, the Umbrella Policy states that any additional insured under any policy of "underlying insurance" will automatically be an insured under this insurance. Appellant's App. Vol. VIII p. 207. Thus, the threshold showing that Harsco must make is that it is entitled to coverage under the underlying insurance policy, *i.e.*, the CGL Policy. For the reasons discussed above, Harsco cannot make this showing.

II. Duty to Defend

[32] This leaves the question of whether Harsco has established that Scottsdale had a duty to defend it at any point in this litigation. The CGL Policy imposes upon Scottsdale a "duty to defend the insured against any 'suit' seeking those damages." Appellant's App. Vol. VIII p. 141. Whether an insurer has a duty to defend a particular lawsuit is determined by examining the nature of the underlying complaint. *Transamerica Ins. Servs. v. Kopko*, 570 N.E.2d 1283, 1285 (Ind. 1991). An insurer's duty to defend is broader than its duty to indemnify. *Seymour Mfg. Co., v. Com. Union Ins. Co.*, 665 N.E.2d 891, 892 (Ind. 1996).

[33] Scottsdale argues that the trial court, for various reasons, erred in awarding Harsco defense fees for the time before Scottsdale began defending Harsco in the Pennsylvania coverage action (which is effectively an admission by Scottsdale that it *was* obligated to defend Harsco after that point). Scottsdale, however, did not raise this argument below and has therefore waived it for appellate consideration. *See, e.g.*, *Breneman v. Slusher*, 768 N.E.2d 451, 463 (Ind. Ct. App. 2002) ("An appellant who presents an issue for the first time on appeal under these circumstances waives the issue for purposes of appellate review."), *trans. denied*. Scottsdale also seems to argue, without citation to the record, that it has already paid some of the $70,975.93 it was ordered to pay to Harsco for defense fees. Without pointing to anything in the record supporting this assertion, Scottsdale has failed to establish that it has any merit. Finally, Scottsdale notes that the trial court indicated that Scottsdale's defense obligations to Harsco would conclude if it were determined in the underlying tort action that the claim was unrelated to Metro's operations, acts, or omissions, which, in fact, is precisely what occurred in February of 2013 when the Pennsylvania trial court found Metro 0% responsible for Rainey's accident. Scottsdale does not point to anything in the record to indicate that any fees accruing after February of 2013 were awarded to Harsco, and we can consequently give Scottsdale no relief on this particular claim.

Conclusion

[34] We conclude that Harsco is not entitled to indemnification pursuant to either the CGL Policy or the Umbrella Policy. We also conclude, however, that

Scottsdale has failed to establish that the trial court erroneously ordered it to pay any portion of $70,975.93 to Harsco pursuant to Scottsdale's duty to defend. Consequently, we affirm in part, reverse in part, and remand with instructions to enter judgment in favor of Harsco in the amount of $70,975.03.

[35] We affirm the judgment of the trial court in part, reverse in part, and remand with instructions.

Bailey, J., and May, J., concur.