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IN THE COURT OF APPEALS OF INDIANA

William Ebert, Michelle Ebert, Cora Ebert, Alexandra Ebert, Dan the Man LLC, Daniel Parks, and D&D Saloon LLC,

Appellants-Defendants,

v.

Illinois Casualty Company,

Appellee-Plaintiff.

August 30, 2021

Court of Appeals Case No. 21A-PL-69

Appeal from the Howard Superior Court

The Honorable Brant J. Parry, Judge

Trial Court Cause No. 34D02-1807-PL-555

Tavitas, Judge.

Case Summary

[1] In this declaratory judgment action, William Ebert, Michelle Ebert, Cora Ebert, Alexandra Ebert, Dan the Man LLC, Daniel Parks,[1] and D&D Saloon LLC appeal the trial court's grant of summary judgment to Illinois Casualty Company. This case involves two "show" bars in Kokomo by the name of Little Daddy's and Big Daddy's, owned by distinct entities with a common principal.[2] On July 5, 2015, William Spence consumed alcohol at Big Daddy's and was visibly intoxicated. After Spence became involved in an altercation, an employee of Little Daddy's, who happened to be helping out at Big Daddy's as a bouncer, removed Spence from the premises. In the parking lot, the bouncer insisted that Spence leave and threatened violence if Spence did not leave. Spence got into his truck and drove away. Shortly thereafter, he struck a car occupied by the Ebert family, causing significant injuries.

[2] The family sued Big Daddy's and Little Daddy's, asserting an array of theories of liability for both. The insurer of both businesses, Illinois Casualty Company ("Illinois Casualty"), provided both a general business owner's policy and a liquor liability policy for each bar, a total of four policies. Illinois Casualty filed a separate action for declaratory relief with respect to three of those policies. First, Illinois Casualty sought a judgment declaring that the liquor liability

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[1] The record inconsistently refers to "Daniel Park" and "Daniel Parks." For consistency, we use "Parks" as that is the surname that was utilized during Parks' deposition.

[2] During the relevant timeframe, Big Daddy's was owned by Dan the Man LLC, and Little Daddy's was owned by D&D Saloon LLC. Daniel Parks was the principal for both entities.

exclusion contained in both business owner's policies precluded coverage for any and all claims arising from the occurrences of July 5, 2015, and that, accordingly, Illinois Casualty did not owe a duty to defend or to indemnify under either policy. Additionally, Illinois Casualty sought a declaration that the liquor liability policy for Little Daddy's was inapplicable, on the grounds that Little Daddy's was not open on the night in question and, therefore, did not serve any alcohol. Accordingly, Illinois Casualty argued it owed no duties under the Little Daddy's liquor liability policy. Thus, Illinois Casualty reasoned that coverage was limited to that secured in the Big Daddy's liquor liability policy. Illinois Casualty then sought summary judgment as to all three policies, which the trial court granted. The Eberts, as well as the bars themselves, now appeal the declarations pertaining to the two general business owner's insurance policies.[3] Finding that the trial court erroneously interpreted the insurance contracts at issue, we reverse with respect to the declarations thereon and remand with instructions.

Issue

[3] In separate briefs, Appellants raise a single issue which we restate as whether coverage for all claims is excluded under the business owner's insurance policies.

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[3] Appellants do not contest the declarations pertaining to the Little Daddy's liquor liability policy.

Facts

[4] The designated evidence shows that, in 2015, Daniel Parks was the principal for two distinct entities—Dan the Man LLC and D&D Saloon LLC—which operated two bars in Kokomo: Little Daddy's and Big Daddy's ("the bars"). On July 5, 2015, William Spence patronized Big Daddy's, consumed alcohol, and then became embroiled in an altercation with another patron. Spence was "pretty trashed," and Christopher French ("Razor") intervened. Eberts' App. Vol. III p. 180. Razor was employed at the time as a bouncer and laborer by Little Daddy's, but he happened to be assisting at Big Daddy's that evening. Spence was ejected from the bar, and the police were called. After the police had come and gone, but before Spence had left the parking lot, Razor stepped outside and confronted Spence.

[5] The following exchange, as retold by Razor, then occurred:

> But, anyway, I had stepped out the door, and I'm standing there smoking a cigarette. I said, "Where's your truck at?" [Spence] said, "Out there in the middle." And I said, "Go ahead and get it." He said, "I ain't falling for that 'cause if I come back on that property, [the police] said they was gonna arrest me." "You know they just left. If you want to get your a** out of here and go home, then now's the time to get in that damn truck and leave." So here he come across the parking lot. Open up [ ] the driver's door was away from me. His truck was facing the east. He got something out of the truck, and as he come around the a** end of that truck, he had a pipe in his hand. "What do you think you're gonna do?" He said, "I'm going in to get my hat." "Dude, you know you've got to go past me to get in here." I don't want no trouble with you, Razor. I don't want no smoke." He said, "I just want to get my hat." "You're not getting your

> damn hat, dude. You need to get in that damn truck and get the hell out of here 'cause you get any closer to me, I'm gonna stick that pipe up your a**." So he turned around and he went back and got in the truck, fired it up, and hauled a**. Stepped on that son of a b****, up and across the curb, throwing gravel, squalling [sic] tires, and headed northbound on 35.

Eberts' App. Vol. III pp. 178-79.

[6] Approximately ten to fifteen minutes later, Razor became aware of a "bad wreck down there at the stoplight." *Id*. at 180. Razor rode his motorcycle to the collision site to investigate. There Razor discovered the Ebert family, all significantly injured, as well as Spence and the two damaged vehicles.

[7] The Eberts brought a suit in the Howard Circuit Court against Daniel Parks, as well as the bars ("the underlying action").[4] The complaint was subsequently amended multiple times.[5] Among the allegations in the second amended complaint are the following:

> 37. At said time and place, the Defendant Dan the Man, LLC, d/b/a Big Daddy's Show Club, carelessly and negligently violated Indiana Code 7.1-5-10-15.5 in continuing to serve

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[4] The initial complaint was filed on December 7, 2016.

[5] Illinois Casualty designated the second amended complaint as evidence. The Eberts filed a motion for leave to file a third amended complaint on November 4, 2020, which was granted one week later. The record does not reflect that either party in this action ever moved to designate the third amended complaint as evidence in the summary judgment proceedings. Thus, we are limited to consideration of the claims as stated in the second amended complaint. *See, e.g., Indiana Farmers Mut. Ins. Co. v. Weaver*, 120 N.E.3d 280, 283 (Ind. Ct. App. 2019) (citing *Manley v. Sherer*, 992 N.E.2d 670, 673 (Ind. 2013)) ("Our review is limited to the designated evidence that was before the trial court . . . .").

alcohol to William Spence when Defendant knew or should have known that Mr. Spence was inebriated;

* * * * *

49. At said time and place, the Defendant, Dan the Man, LLC d/b/a Big Daddy's Show Club, was careless and negligent in one or more of the following respects:

> a. The Defendant carelessly and negligently continued serving alcohol to William Spence when it knew or should have known that Mr. Spence was inebriated and impaired;
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> b. The Defendant carelessly and negligently allowed William Spence to drive his vehicle from Defendant's premises when Defendant knew or should have known that Mr. Spence was inebriated and impaired;
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> c. The Defendant carelessly and negligently failed to notify law enforcement that William Spence had left Defendant's premises in an inebriated state and was operating his vehicle in an inebriated state, posing a danger to himself and others; and
>
> d. The Defendant carelessly and negligently failed to obtain alternative transportation for William Spence to prevent Mr. Spence from operating his vehicle in an inebriated and impaired state;

* * * * *

64. At said time and place, the Defendants, Daniel Parks, D & D Saloon LLC, individually and through their agents, were careless and negligent in one or more of the following respects:

> a. The defendant carelessly and negligently continued serving alcohol to William Spence when it knew or should have known that Mr. Spence was inebriated and impaired;
>
> b. The defendant carelessly and negligently allowed William Spence to drive his vehicle from the Defendant's premises when Defendant knew or should have known that Mr. Spence was inebriated and impaired;
>
> c. The Defendant carelessly and negligently failed to notify law enforcement that William Spence had left Defendant's premises in an inebriated state and was operating his vehicle in an inebriated state, posing a danger to himself and others; and
>
> d. The Defendant carelessly and negligently failed to obtain alternative transportation for William Spence to prevent Mr. Spence from operating his vehicle in an inebriated and impaired state;

Eberts' App. Vol. III pp. 105, 107-108, 110-111.

[8] Each bar had an identical general business owner's insurance policy and a separate identical liquor liability policy. All four policies were provided by Illinois Casualty. The two general business owner's policies (one for each bar) contain the following provision:

> (c) This insurance does not apply to . . . "Bodily injury" or "property damage" for which any insured may be held liable by reason of:
>
> (1) Causing or contributing to the intoxication of any person;

> (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
>
> (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.
>
> This exclusion - c.(l), c.(2), and c.(3), applies even if the claims allege negligence or other wrongdoing in:
>
> (a) The supervision, hiring, employment, training, or monitoring of others by an insured; or
>
> (b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol;
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> [i]f the "occurrence" which caused the "bodily injury" or "property damage" involved that which is described in Paragraph (1), (2), or (3) above.

Eberts' App. Vol. II pp. 21-22.

[9] On August 5, 2018, Illinois Casualty filed a separate action in the Howard Superior Court seeking declaratory relief. Specifically, Illinois Casualty sought a declaration that Illinois Casualty "does not owe any duty to defend or indemnify Defendants DAN THE MAN LLC, DAN PARKS, and D& D SALOON LLC in regard to the Underlying Suit under certain insurance policies issued by [Illinois Casualty]." *Id*. at 16-17. Illinois Casualty argued that all of the Eberts' claims fall within the coverage exclusion contained within the general business owner's insurance policies. Thus, Illinois Casualty argued

it should be absolved of its duty to defend and its duty to indemnify under the business owner's policies and under the Little Daddy's liquor liability policy, which only applies when alcohol is furnished on the premises of Little Daddy's. Neither party alleges such an occurrence.[6]

[10] On November 25, 2019, Illinois Casualty filed a motion for summary judgment on its petition for declaratory judgment, and on November 4, 2020, the trial court held a hearing on the motion. On December 13, 2020, the trial court entered an order granting summary judgment to Illinois Casualty and found as follows:

> 17. The Court finds that the language of the exclusion in the Businessowners [sic] policy is not ambiguous. Reasonable people would not differ as to the meaning of the words "intoxication" or "under the influence".
>
> 18. The Businessowners [sic] Policy provides no coverage for an insured who is held liable for damages resulting from causing or contributing to the intoxication of a person, furnishing alcohol to a person who is impaired. There is also no coverage for claims against an insureds [sic] alleged negligence or wrongdoing in providing or failing to provide transportation with respect to any person that may be under the influence, or the supervision, hiring, employment, training, or monitoring of others by the insured.

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[6] The practical upshot of such a holding would be that Illinois Casualty would only have duties to defend and indemnify with respect to the Eberts' claims covered under the liquor liability policies, which have lower coverage limits. As we will explain *infra*, however, only one of the liquor liability policies applies in this case.

19. Therefore, just as in *Prop-Owners Ins. Co. v*[.] *Ted's Tavern, Inc.*, 85[3] N.E.2d 973 (Ind. Ct. App. 2006), this Court employs the efficient and predominant cause analysis. The question is are all counts related to the intoxication of William Spence.

20. In this instance, the efficient and predominating cause of the injuries was William Spence's intoxication. Without Mr. Spence being intoxicated, there would be no lawsuit. The cause of the injuries suffered by the Eberts' [sic] was William Spence operating a vehicle while intoxicated.

21. As stated in *Ted's Tavern*, while the Court recognizes the horrible loss suffered here, the Court is not at liberty to extend insurance coverage beyond that provided by the unambiguous language in the Policy. *Franz v. State Farm Fire & Cas. Co.*, 754 N.E.2d 978, 981 (Ind. Ct. App. 2001).

22. The Court now finds that Illinois Casualty Company did not and does not owe Defendants Dan the Man, LLC, D&D Saloon, LLC, and/or Daniel Parks, any duty to defend or duty to indemnify with respect to the underlying lawsuit, 34C01-1612-CT-00926, *Ebert et al. v. William Spence, Dan the [M]an, LLC, d/b/a Big Daddy's Show Club, et al* or for any other claim arising directly or indirectly out of the incident alleged in the underlying lawsuit, pursuant to the Liquor Liability Policy for D&D Saloon, LLC.

23. The Court now finds that Illinois Casualty Company did not and does not owe Defendants Dan the Man, LLC, D&D Saloon, LLC, and/or Daniel Parks, any duty to defend or duty to indemnify with respect to the underlying lawsuit, 34C01-1612-CT-00926, *Ebert et al. v. William Spence, Dan the [M]an, LLC, d/b/a Big Daddy's Show Club, et al* or for any other claim arising directly or indirectly out of the incident alleged in the underlying lawsuit, pursuant to the Businessowners [sic] Policy for D&D Saloon, LLC.

> 24. The Court now finds that Illinois Casulaty [sic] Company did not and does not owe Defendants Dan the Man, LLC, D&D Saloon, LLC, and/or Daniel Parks, any duty to defend or duty to indemnify with respect to the underlying lawsuit, 34C01-1612-CT-00926, *Ebert et al. v. William Spence, Dan the [M]an, LLC, d/b/a Big Daddy's Show Club, et al* or for any other claim arising directly or indirectly out of the incident alleged in the underlying lawsuit, pursuant to the Businessowners [sic] Policy for Dan the Man, LLC.
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> 25. The Court now finds that Illinois Casulaty [sic] Company does owe Defendants Dan the Man, LLC, D&D Saloon, LLC, and/or Daniel Parks, the duty to defend or duty to indemnify with respect to the underlying lawsuit, 34C01-1612-CT-00926, *Ebert et al. v. William Spence, Dan the [M]an, LLC, d/b/a Big Daddy's Show Club, et al* or for any other claim arising directly or indirectly out of the incident alleged in the underlying lawsuit, pursuant to the Liquor Liability Policy for Dan the Man, LLC.

Eberts App. Vol. II pp. 13-14. The Eberts and the bars now appeal.

Analysis

[11] Appellants argue that the coverage exclusion in the general insurance policies does not apply to all of the Eberts' claims.[7] They contend, therefore, that it was

[7] We note that the trial court concluded that Illinois Casualty "did not and does not owe Defendants . . . any duty to defend or duty to indemnify with respect to the underlying lawsuit . . . or for any other claim arising [from] . . . the underlying lawsuit, pursuant to the Liquor Liability Policy for [Little Daddy's]." Eberts' App. Vol. II p. 14. Appellants do not contest this finding. To the contrary, their arguments for the applicability of the general business owner's policy for Little Daddy's depend on the fact that no employees of Little Daddy's ever furnished Spence with alcohol. Regardless, the Little Daddy's liquor liability policy covers acts that occur on the premises of Little Daddy's. That is not where the events of July 5, 2015, occurred. The only claims relating to Little Daddy's stem from the actions or inactions of Razor, one of its employees. Accordingly, the trial court correctly concluded that Illinois Casualty owes neither a duty to defend, nor a duty to indemnify, under the Little Daddy's liquor liability policy.

error for the trial court to grant summary judgment. "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 Public Schools*, 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).

[12] The party moving for summary judgment bears the burden of making a prima facie showing that there is no 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.* 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.*

[13] 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, Indiana Dep't of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018), *cert. denied*. Because the trial court entered findings of fact and conclusions of law, we also reiterate that findings of fact and conclusions of law entered by the trial court aid our review, but they do not bind us. *Matter of Supervised Estate of Kent*, 99 N.E.3d 634, 637 (Ind. 2018).

I. Duty to Defend under the Business Owner's Policies

[14] We turn, then, to the question of whether Illinois Casualty owes a duty to defend arising from the twin general business owner's insurance policies. Insurance agreements are examples of adhesion contracts, wherein the insurance company sets forth the terms, and the would-be insured may accept or decline, but not counter-offer. *See, e.g.*, *Sanford v. Castleton Health Care Ctr., LLC*, 813 N.E.2d 411, 417 (Ind. Ct. App. 2004) (citing *Pigman v. Ameritech Pub., Inc.*, 641 N.E.2d 1026, 1035 (Ind. Ct. App. 1994)), *trans. denied*. "Interpretation and construction of contract provisions are questions of law." *B&R Oil Co., Inc. v. Stoler*, 77 N.E.3d 823, 827 (Ind. Ct. App. 2017) (citing *John M. Abbott, LLC v. Lake City Bank*, 14 N.E.3d 53, 56 (Ind. Ct. App. 2014)), *trans. denied*. "As such, cases involving contract interpretation are particularly appropriate for summary judgment." *Id*. "[B]ecause the interpretation of a contract presents a question of law, it is reviewed *de novo* by this court." *Id*. (citing *Jenkins v. S. Bend Cmty. Sch. Corp.*, 982 N.E.2d 343, 347 (Ind. Ct. App. 2013), *trans. denied*.).

[15] "'The goal of contract interpretation is to determine the intent of the parties when they made the agreement.'" *Celadon Trucking Servs., Inc. v. Wilmoth*, 70 N.E.3d 833, 839 (Ind. Ct. App. 2017) (quoting *Tender Loving Care Mgmt., Inc. v. Sherls*, 14 N.E.3d 67, 72 (Ind. Ct. App. 2014)), *trans. denied*. "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*. "If contract language is unambiguous, this court may not look to extrinsic evidence to expand, vary, or

explain the instrument but must determine the parties' intent from the four corners of the instrument." *Id*. "And, in reading the terms of a contract together, we keep in mind that the more specific terms control over any inconsistent general statements." *DLZ Ind., LLC v. Greene Cnty.*, 902 N.E.2d 323, 328 (Ind. Ct. App. 2009) (citing *City of Hammond v. Plys*, 893 N.E.2d 1, 4 (Ind. Ct. App. 2008)).

[16] The text is the lodestar of a written contract, and we will not construe unambiguous provisions. *See Winterton, LLC v. Winterton Investors, LLC*, 900 N.E.2d 754, 759 (Ind. Ct. App. 2009), *trans. denied.* Nor may a court write a new contract for the parties or supply missing terms under the guise of construing a contract. *State Military Dep't v. Cont'l Elec., Co.*, 971 N.E.2d 133, 142 (Ind. Ct. App. 2012) (quotation marks and citation omitted), *trans. denied*. Where the subjective intent of the parties is at odds, the text controls. If necessary, the text of a disputed provision may be understood by reference to other provisions within the four corners of the document. *See City of Portage v. S. Haven Sewer Works, Inc.* (*In re S. Haven Sewer Works, Inc.*), 880 N.E.2d 706, 711 (Ind. Ct. App. 2008). But when the meaning of the text is clear, recourse to other provisions of the contract is unnecessary, and we may not forage through the contract looking for other provisions. It is well settled that when the terms of a contract are clear and unambiguous, they are conclusive, and courts will not construe the contract or look to extrinsic evidence, but will merely apply the contractual provisions. *Dvorak v. Christ*, 692 N.E.2d 920, 925 (Ind. Ct. App. 1998).

Claire's Boutiques, Inc. v. Brownsburg Station Partners LLC, 997 N.E.2d 1093, 1098 (Ind. Ct. App. 2013).

[17] If, however, "a contract is ambiguous, the parties may introduce extrinsic evidence of its meaning, and the interpretation becomes a question of fact. A word or phrase is ambiguous if reasonable people could differ as to its meaning. A term is not ambiguous solely because the parties disagree about its meaning." *Celadon Trucking*, 70 N.E.3d at 839 (internal quotations and citation omitted). "If the language is deemed ambiguous, the contract terms must be construed to determine and give effect to the intent of the parties when they entered into the contract." *Id*. (citing *Tender Loving Care*, 14 N.E.3d at 72). "'Courts may properly consider all relevant evidence to resolve an ambiguity.'" *Id*. "'Extrinsic evidence is evidence relating to a contract but not appearing on the face of the contract because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement.'" *Id*. "An ambiguous contract should be construed against the party who furnished and drafted the agreement." *Id*.

[18] Our first task is to determine whether the general insurance policies are ambiguous. Illinois Casualty sought a declaratory judgment with respect to whether the general business owner's insurance policies imposed: (1) a duty to defend; and (2) a duty to indemnify the insured.

> In Indiana, the duty to defend is broader than coverage liability. *Trisler v. Indiana Ins. Co.*, 575 N.E.2d 1021, 1023 (Ind. Ct. App. 1991). Consequently, if it is determined that an insurer has a contractual duty to defend, the insurer will not be relieved of that obligation, regardless of the claim. *Id*. After an insurer has made an independent determination that it has no duty to defend, it must either clarify its obligation to defend the insured through a

> declaratory judgment action or defend its insured under a reservation of rights. *Liberty Mut. Ins. Co. v. Metzler*, 586 N.E.2d 897, 902 (Ind. Ct. App. 1992), *trans. denied*.
>
> When determining whether a duty to defend exists, the insurer must look to the allegations in the complaint coupled with the facts known to the insurer after reasonable investigation. *American States Ins. Co. v. Aetna Life & Cas. Co.*, 177 Ind. App. 299, 311, 379 N.E.2d 510, 518 (1978). Accordingly, we may consider the evidentiary materials offered by the parties to show coverage or exclusion. *Trisler*, 575 N.E.2d at 1023. No defense is required if the pleadings or investigation indicate that a claim is outside coverage limits or excluded under the policy. *Id*. Although ambiguities are construed in favor of the insured, clear and unambiguous policy terms will be given their ordinary meaning. *Id*.

Smith v. Progressive Se. Ins. Co., 150 N.E.3d 192, 202 (Ind. Ct. App. 2020), *trans. denied*.

[19] The text of the coverage exclusion in the general business insurance policies provides:

> This insurance does not apply to . . . "Bodily injury" or "property damage" for which any insured may be held liable by reason of:
>
> > (1) Causing or contributing to the intoxication of any person;
> >
> > (2) 'The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

> (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.
>
> This exclusion - c.(l), c.(2), and c.(3), applies even if the claims allege negligence or other wrongdoing in:
>
> (a) The supervision, hiring, employment, training, or monitoring of others by an insured; or
>
> (b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol;
>
> If the "occurrence" which caused the "bodily injury" or "property damage" involved that which is described in Paragraph (1), (2), or (3) above.

Eberts' App. Vol. II pp. 21-22.

[20] We look at the plain language of the policies and find that the text of the coverage exclusion in the general business owner's insurance policies in question is unambiguous. The plain language of those policies clearly excludes coverage arising from dram shop liability, as would otherwise be imposed by actions violating Indiana Code Section 7.1-5-10-15.5.[8] The language of the

[8] Indiana Code Section 7.1-5-10-15.5(b) provides:

> A person who furnishes an alcoholic beverage to a person is not liable in a civil action for damages caused by the impairment or intoxication of the person who was furnished the alcoholic beverage unless:

coverage exclusion in the general business owner's policies, just like the language of the dram shop statute, unambiguously declares that the root of liability is the *furnishing* of alcohol to another party.[9] Thus, the question before us on this appeal is: do the Eberts assert any claims that could potentially prevail *independently* of whether defendants furnished Spence with alcohol?

[21] Without commenting on the validity of the claims, or their likelihood of success on their merits, we find that the negligence theory based on allowing Spence to leave the premises despite knowledge of his intoxication, for example, does not require proof that the bars "caused or contributed" to said intoxication.[10] As such, this is not a claim for which the business owner's policy excludes coverage, and, thus, the duty to defend attaches. In fact, Illinois Casualty admits that the exclusion only covers claims "for which the insured *is liable by reason of causing or contributing to the intoxication of any person*, furnishing of alcoholic beverages to a person under the influence of alcohol, or violation of

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> (1) the person furnishing the alcoholic beverage had actual knowledge that the person to whom the alcoholic beverage was furnished was visibly intoxicated at the time the alcoholic beverage was furnished; and
>
> (2) the intoxication of the person to whom the alcoholic beverage was furnished was a proximate cause of the death, injury, or damage alleged in the complaint.

[9] In the language of the insurance policy: liability arising from injury or damage where a party has "[c]ause[d] or contribute[d]" to the underlying intoxication.

[10] The same is true for the negligence theory where the hook for liability is the failure to call the police and inform them that an intoxicated patron had just left and was about to operate a vehicle. Both claims are essentially passive failure to intervene theories of liability, which are not contemplated by the coverage exclusion.

any statute, ordinance or regulation relating to the sale, distribution or use of alcoholic beverages." Eberts' App. Vol. II p. 85.

[22] To be sure, the claims relating to causing or contributing to intoxication, including claims relating to the failure to provide alternative transportation, clearly *do* rely on allegations that place them within the coverage exclusion. Those claims are similar to those in *Property-Owners Ins. Co. v. Ted's Tavern*, *Inc.*, 853 N.E.2d 973 (Ind. Ct. App. 2006), on which Illinois Casualty heavily relies. The insurance company in *Ted's Tavern* argued that "the only sustainable counts against [Ted's Tavern] arise out of or are related to the intoxication of [Ted's Tavern] patron, [ ] which the Policy clearly excludes."[11] *Property-Owners Ins. Co. v. Ted's Tavern*, *Inc.*, 853 N.E.2d 973, 980 (Ind. Ct. App. 2006). As a matter of first impression in *Ted's Tavern*, we adopted the efficient and predominant cause analysis and reasoned that every claim raised was either a direct assertion or a careful restyling of a single core negligence claim: "'carelessly and negligently' **serving and continuing to serve alcoholic beverages** to [a patron] when the defendants knew or should have known he was intoxicated and soon thereafter could be driving drunk." *Id.* at 983 (emphasis added).

[23] In *Ted's Tavern*, there was no question that each of the claims was based on the furnishing of alcohol by the bar, and thus, all the claims there were essentially dram shop claims. The critical commonality to all the counts in *Ted's Tavern*

[11] The coverage exclusion in that case was substantively similar to the one at issue here.

was not *just* that the patron was intoxicated, but that the bar and its employees had *caused* the patron to be intoxicated. That is not so here, and, thus, this case is materially distinguishable. Though all of the Eberts' claims *relate factually* to Spence's intoxication, some of them do not *legally rely* on the bar causing or contributing to that intoxication. The latter is the requirement for a claim to fall within the coverage exclusion.

[24] In other words, some of the Eberts' claims rely on Spence's impairment independently of whether the bars served alcohol to him. Liability could attach under the failure to intervene theories if Spence had arrived already intoxicated, and not been served. Indeed, liability could attach under those theories even if Spence's impairment had resulted from something other than alcohol, such as an epileptic seizure, the throes of delusion, or a diabetic incident. If Illinois Casualty wished to exclude coverage for any and all claims arising from intoxication generally or from intoxicated patrons, then it would have drafted a contract that said so. We decline Illinois Casualty's invitation to apply the so-called "efficient and predominant cause" doctrine here because to do so on the facts of this case would be to ignore the requirement to afford the plain, unambiguous language of a contract provision its ordinary meaning. Illinois Casualty has a contractual duty to defend the bars arising from each of the general business owner's policies. The trial court erred in declaring otherwise.

II. Duty to Indemnify

[25] The trial court also declared that Illinois Casualty had no duty to indemnify under the business owner's general policies. "'The obligation to

indemnify[,however,] does not arise until the party seeking indemnity suffers loss or damages[.]'" *Underwood v. Fulford*, 128 N.E.3d 519, 525 (Ind. Ct. App. 2019) (quoting *Indianapolis–Marion Cnty. Pub. Library v. Charlier Clark & Linard, PC*, 929 N.E.2d 838, 848 (Ind. Ct. App. 2010), *trans. denied*), *trans. denied*. "'In contribution or indemnification cases, the damage that occurs is the incurrence of a monetary obligation that is attributable to the actions of another party.'" *Id*. (quoting *Pflanz v. Foster*, 888 N.E.2d 756, 759 (Ind. 2008)); *see also TLB Plastics Corp. v. Procter & Gamble Paper Prods. Co.*, 542 N.E.2d 1373, 1376 (Ind. Ct. App. 1989) (stating that a party seeking indemnity suffers loss "at the time of payment of the underlying claim, payment of a judgment on the underlying claim, or payment in settlement of the underlying claim"), *reh'g denied, trans. dismissed*.

[26] In *Ind. Farmers Mut. Ins. Co. v. N. Vernon Drop Forge, Inc.*, 917 N.E.2d 1258 (Ind. Ct. App. 2009), *trans. denied*, a commercial general liability insurer sought declaratory judgment against its insured: a steel forge. The insurer argued that it had no duty to defend an action asserting an array of torts, breach of contract, and strict liability stemming from some contaminated dirt. The trial court granted summary judgment and ordered the insurer to indemnify the defendants up to the limits of the coverage required by the policy. On appeal, we reversed the portion of the trial court's judgment concerning indemnification, holding:

> IFMI argues that the trial court erroneously ordered indemnification at this point in the proceedings. We agree.

> Although we have concluded that IFMI has the duty to defend NVDF in the underlying suit, IFMI's duty to indemnify cannot be assessed until litigation has concluded. NVDF even concedes that "[i]t is clear that the policy requires coverage for only harms that were unintended and unexpected," and "the liability to David Reed for any unintended and unexpected harm cannot be determined until after a trial." Appellees' Br. p. 29, 30. We conclude that the indemnification order was premature. To the extent the trial court's order already requires IFMI to indemnify the defendant insureds, we reverse it.

Ind. Farmers Mut. Ins. Co. v. N. Vernon Drop Forge, Inc., 917 N.E.2d 1258, 1276 (Ind. Ct. App. 2009), *trans. denied*.

[27] In *Ind. Ins. Co. v. Kopetsky*, 11 N.E.3d 508 (Ind. Ct. App. 2014),[12] an insurer sought declaratory judgment that it had no duty to defend or indemnify an insured lot vendor and developer for a series of claims arising from contamination of the lot. Vendor filed a series of counterclaims. Vendor's widow, Patricia, was eventually substituted as a party, and the trial court granted summary judgment to her on the coverage issue but dismissed the counterclaim. Nevertheless, on appeal we held that:

> Indiana Insurance contends that the trial court erred in concluding that it would ultimately have a duty to indemnify Patricia for any liabilities covered by the Policies. We agree with Indiana Insurance that the issue of indemnity is not ripe for

[12] Transfer was initially granted in this case, but upon further consideration our Supreme Court determined that it should not assume jurisdiction and reinstated our initial opinion as Court of Appeals precedent. *See Indiana Ins. Co. v. Kopetsky,* 27 N.E.3d 1068 (Ind. 2015).

> review on any basis when there has been no finding of liability in the underlying lawsuit.

Indiana Ins. Co. v. Kopetsky, 11 N.E.3d 508, 529 (Ind. Ct. App. 2014), *opinion corrected on reh'g*, 14 N.E.3d 850 (Ind. Ct. App. 2014).

[28] The source of the duty to defend is the contract, but the scope of that duty is determined by our case law. Our case law makes clear that, if an insurer owes a duty to defend an insured as to one claim in an action arising from a policy, it must defend the insured against *all* claims arising as part of that action. *Smith,* 150 N.E.3d at 202 (Ind. Ct. App. 2020) ("In Indiana, the duty to defend is broader than coverage liability. Consequently, if it is determined that an insurer has a contractual duty to defend, the insurer will not be relieved of that obligation, regardless of the claim.") (internal citations omitted).

[29] While the source of the duty to indemnify is also the contract, the duty to indemnify does not attach until a later triggering event: the suffering of some loss by the insured. It may be the case that Illinois Casualty will not owe a duty to indemnify the businesses for every claim. But the bars have not yet suffered a loss. The duty to indemnify has not been triggered. Accordingly, questions regarding indemnity are unripe and, therefore, premature.

[30] In the meantime, Illinois Casualty owes a duty to defend the bars. The underlying liability action must first be pursued to some end result. Only then will Illinois Casualty's indemnity questions be ripe for consideration. Accordingly, we reverse the trial court and remand with instructions that the

declaratory judgment action—as it pertains to the questions of indemnity arising from the general business owner's policies—be dismissed without prejudice. *See, e.g., Medical Assurance Co., Inc. v. Hellman,* 610 F.3d 371, 375 (7th Cir. 2010)) (holding that: "The district court was aware that the duty-to-indemnify claim was not ripe, but rather than dismiss that aspect of the case, it included it in the stay that was issued. The proper disposition, however, would have been to dismiss." (citing *Nationwide Ins. v. Zavalis,* 52 F.3d 689, 693 (7th Cir. 1995)).

Conclusion

[31] The trial court erred when it concluded that the business owner's policies precluded coverage for all of the Eberts' claims. Thus, Illinois Casualty has a duty to defend the bars arising from each of the business owner's policies. Accordingly, we reverse the trial court's declarations pertaining to the general business owner's policies. We remand with instructions that those portions of Illinois Casualty's complaint that seek declarations about its duty to indemnify under those policies be dismissed without prejudice.

[32] Reversed and remanded.

Mathias, J., and Weissmann, J., concur.