2019 IL App (1st) 181993-U

No. 1-18-1993

Order filed September 10, 2019.

Modified upon denial of rehearing October 22, 2019.

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JAMES RIVER INSURANCE COMPANY, Plaintiff-Appellant, v. JUDLAU CONTRACTING, INC., IMPERIAL CRANE SERVICES, INC., and BURNS & MCDONNELL ENGINEERING CO., INC., Individually and d/b/a BURNS & MCDONNELL, Defendants-Appellees, (Omega Demolition Corp., and LaGrange Crane Service, Inc., Defendants).	)	Appeal from the Circuit Court of Cook County. Nos. 2016 CH 6406 & 2016 CH 7722 cons. The Honorable Sophia H. Hall, Judge Presiding.
JUDLAU CONTRACTING, INC., IMPERIAL CRANE SERVICES, INC., and BURNS & MCDONNELL ENGINEERING CO., INC., Individually and d/b/a BURNS & MCDONNELL, Defendants and Counterplaintiffs-Appellees, v. JAMES RIVER INSURANCE COMPANY, Plaintiff and Counterdefendant-Appellant.	)	

JUSTICE LAVIN delivered the judgment of the court.
Justice Pucinski concurred in the judgment.
Justice Hyman dissented.

ORDER

¶ 1 *Held*: Employer's liability exclusion precluded insurer's duty to defend because the underlying complaint alleged bodily injury to an insured's employee.

¶ 2 In this declaratory judgment action, plaintiff James River Insurance Company (James River) appeals the circuit court's finding that it had a duty to defend its insured, defendant Omega Demolition Corp. (Omega), as well as defendants Judlau Contracting, Inc. (Judlau), Imperial Crane Services, Inc. (Imperial Crane), and Burns & McDonnell Engineering Co., Inc. (Burns & McDonnell) (collectively referred to as "additional insureds") in a wrongful death and survival action under a commercial general liability (CGL) policy. The CGL policy issued to Omega included an employer's liability exclusion endorsement precluding coverage for bodily injury to an employee of any insured arising out of and in the course of employment by any insured. On appeal, James River contends that it had no duty to defend the additional insureds in the underlying action because the decedent, Vincente Santoyo, was an employee of Omega, its insured.[1] Because we conclude that the employer's liability exclusion applies, we reverse the circuit court's finding as to James River's duty to defend the additional insureds.

¶ 3 BACKGROUND

¶ 4 James River issued a CGL policy to Omega (No. 00068565-0) for the period October 1, 2015, to October 1, 2016. The policy provided coverage for "bodily injury" and "property

[1]James River also asserts that the same exclusion precludes a duty to defend its insured, Omega, against a third-party claim filed by LaGrange Crane Service, Inc. seeking contribution or indemnity. Neither LaGrange Crane nor Omega has filed a brief on appeal. James River advances no argument other than the employer's liability exclusion for refusing to defend its insured against the third-party claim, nor does it differentiate between the underlying personal injury claim and the third-party claim. It was James River's obligation as appellant to articulate the basis for reversing the trial court's order as it relates to LaGrange Crane's third-party claim. We express no opinion as to the viability of the third-party claim, but given James River's failure to advance any argument regarding this claim, we decline to reverse the trial court's order as it relates to LaGrange Crane.

damage." Relevant here is the policy's coverage for "bodily injury," defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." The CGL liability coverage form excluded from coverage "bodily injury" to "[a]n 'employee' of the insured arising out of and in the course of employment by the insured."

¶ 5 The policy included an employer's liability exclusion endorsement, which states in relevant part:

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

EXCLUSION – EMPLOYER'S LIABILITY

***

" SECTION 1−2. Exclusions, Employer's Liability, of this Coverage Part is deleted in its entirety and replaced with the following:

This insurance does not apply to any claim, suit, cost or expense arising out of 'bodily injury' to:

(a) Any 'employee' of any insured arising out of and in the course of:

(1) Employment by any insured; or

(2) Performing duties relating to the conduct of any insured's business; or

(b) The spouse, child, parent, brother, sister or relative of that 'employee' as a consequence of Paragraph a. above.

This exclusion applies:

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

(b) To any obligation to share damages with or repay someone else who must pay damages because of the injury; and/or

(c) To liability assumed under any 'insured contract.'

> For the purpose of this endorsement, wherever the word 'employee' appears above, it shall mean any member, associate, 'leased worker', 'temporary worker' or any person or persons loaned to or volunteering services to you.
>
> ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED."

¶ 6 The policy included various other definitions of "employee." Under the definition section of the policy, " 'Employee includes a 'leased worker'. 'Employee' does not include a 'temporary worker'." The "Employee Benefits Liability Coverage" endorsement defined "employee" as " "a person actively employed, formerly employed, on leave of absence or disabled, or retired. 'Employee' includes a 'leased worker.' 'Employee' does not include a 'temporary worker.' " Under the "Common Conditions and Definitions" section, " 'Employee' includes a 'leased worker' or a 'temporary worker.' " None of these other definitions excludes regular, wage-earning workers from the definition of "employee."

¶ 7 Defendants were involved in a project at a construction site located around I-90 and Touhy Avenue in Des Plaines, Illinois. The construction site was part of a larger bridge construction project on Interstate 90 involving the removal of existing bridges. Burns & McDonnell served as the project's construction manger. Judlau was the project's general contractor. Judlau contracted with Omega for the removal of steel beams and Omega was to perform all of the demolition work. Omega executed separate contracts with LaGrange Crane and Imperial Crane to supply the cranes and operators to perform the demolition work and remove the steel beams at the construction site. Judlau, Burns & McDonnell and Imperial Crane were named as additional insureds on Omega's policy; LaGrange Crane was not.[2]

[2]LaGrange Crane's contract with Omega did not require Omega to name LaGrange Crane as an additional insured. The circuit court rejected LaGrange Crane's summary judgment motion arguing to the contrary, a ruling not challenged by any party on appeal.

¶ 8 Vincente Santoyo was Omega's employee and worked as a laborer. Omega paid Santoyo weekly through April 10, 2016, and taxes were withheld from his compensation.

¶ 9 On April 5, 2016, Santoyo was working at the construction site. While performing his duties for Omega, two steel beams that were being removed fell on Santoyo. He later died from his injuries.

¶ 10 The next day, Maricelo Santoyo, as special administrator of Santoyo's estate, filed a wrongful death and survival action, which was later amended, against Judlau, Burns & McDonnell, Imperial Crane and LaGrange Crane, alleging in part that defendants were negligent in failing to maintain a safe work place and were responsible for the negligent erection, construction, placement, or operation of multi-ton steel beams and cranes that caused Santoyo's injuries and death. The complaint alleged that Santoyo was an employee of Omega and that he was injured at the construction site while performing demolition work for Omega.

¶ 11 LaGrange Crane filed a third-party complaint against Omega, seeking contribution and indemnity for all or a portion of any judgment entered against LaGrange in the underlying action. LaGrange Crane asserted that Santoyo was Omega's employee and that as a proximate result of Omega's negligence, Santoyo sustained the injuries leading to his death. LaGrange Crane tendered the underlying wrongful death action to Omega and James River for defense and indemnification. Judlau, Burns & McDonnell and Imperial Crane, as additional insureds under Omega's policy, also tendered defense and indemnification of the underlying complaint to James River. Omega, in turn, tendered its defense of LaGrange Crane's third-party complaint to James River.

¶ 12 James River declined coverage based on the policy's employer's liability exclusion because Santoyo was an employee of Omega.

¶ 13 James River filed this declaratory judgment action, asserting in relevant part that it had

no duty to defend or indemnify any of the defendants in the underlying action and the third party action because Santoyo was Omega's employee and the employer's liability exclusion precluded coverage for any claim or suit arising out of "bodily injury" to any "employee" of any insured arising out of and in the course of employment by any insured.

¶ 14 The additional insureds counterclaimed for declaratory judgment against James River, asserting that the employer's liability exclusion did not apply because Santoyo was not an employee as defined under the policy.

¶ 15 The additional insureds, LaGrange Crane and James River filed cross-motions for summary judgment on the issue of James River's duty to defend and indemnify, specifically as to whether Santoyo was an "employee" as defined under the policy. The circuit court granted the additional insureds' summary judgment motions and denied James River's summary judgment motion, finding that James River had a duty to defend the additional insureds in the underlying action because Santoyo was not an "employee" within the employer's liability exclusion. The court reasoned that because the exclusion defined "employee" to mean "any member, associate, 'leased worker,' 'temporary worker' or any person *** loaned to or volunteering services," and Santoyo, as a regular employee of Omega, did not fall into any of those categories, the exclusion did not apply. The court did not enter a ruling on James River's duty to indemnify because any ruling would be premature given that the underlying action remained pending.

¶ 16 The circuit court entered a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) that there was no just reason for delaying enforcement or appeal of its ruling on James River's duty to defend. James River timely appealed.

¶ 17 ANALYSIS

¶ 18 James River's sole claim on appeal is that summary judgment should be entered in its favor because the circuit court erred in finding that Santoyo was not an "employee" under the

employer's liability exclusion.

¶ 19 Disposition by summary judgment is appropriate when the issue presents a question of law, which, as relevant here, may involve construction of and a determination of the parties' rights and obligations under an insurance policy. *Cincinnati Insurance Co. v. American Hardware Manufacturers Ass'n,* 387 Ill. App. 3d 85, 98 (2008). Summary judgment should be granted only where "the pleadings, depositions, admissions on file, together with the affidavits, if any, show 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." 735 ILCS 5/2–1005(c) (West 2016); *Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co.,* 215 Ill. 2d 121, 127-28 (2005).

¶ 20 Our review of the circuit court's ruling on a motion for summary judgment is *de novo. Standard Mutual Insurance Co. v. Lay,* 2013 IL 114617, ¶ 15. *De novo* review is also appropriate because we are construing an insurance policy, which raises a question of law. *Guillen v. Potomac Insurance Co. of Illinois,* 203 Ill. 2d 141, 149 (2003).

¶ 21 In a declaratory judgment action concerning an insurer's duty to defend, a court compares the factual allegations of the underlying complaint to the language of the relevant coverage provisions of the insurance policy. *Pekin Insurance Co. v. Wilson,* 237 Ill. 2d 446, 455 (2010); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.,* 154 Ill. 2d 90, 125 (1992); *Acuity Insurance Co. v. 950 W. Huron Condominium Ass'n*, 2019 IL App (1st) 180743, ¶ 24. If the factual allegations pled in the underlying complaint fall within, or potentially within the policy's coverage, the insurer's duty to defend is triggered. *Wilson,* 237 Ill. 2d at 455; *Outboard Marine Corp.*, 154 Ill. 2d at 125; *950 W. Huron Condominium Ass'n*, 2019 IL App (1st) 180743, ¶ 24**.** And the allegations of the underlying complaint must be liberally construed in favor of the insured, resolving any doubt about coverage in the insured's favor. *950 W. Huron Condominium*

Ass'n, 2019 IL App (1st) 180743, ¶ 24.

¶ 22 Because an insurance policy is a contract, we apply general rules of contract interpretation to an insurance policy. *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010); *First Mercury Insurance Co. v. Nationwide Security Services, Inc.*, 2016 IL App (1st) 143924, ¶ 26. A court's primary objective in construing an insurance policy's language is to ascertain and give effect to the parties' intentions as expressed through that policy's language. *Nationwide Security Services, Inc.*, 2016 IL App (1st) 143924, ¶ 26. Provisions excluding or limiting coverage will be read narrowly and the applicability of the exclusion must be clear and free from doubt. *Gillen*, 215 Ill. 2d at 393; *Empire Indemnity Insurance Co. v. Chicago Province of Society of Jesus*, 2013 IL App (1st) 112346, ¶ 39. The insurer bears the burden of affirmatively demonstrating that a claim falls within an exclusion. *American Zurich Insurance Co. v. Wilcox & Christopoulos, L.L.C.*, 2013 IL App (1st) 120402, ¶ 34; *Continental Casualty Co. v. McDowell & Colantoni, Ltd.*, 282 Ill. App. 3d 236, 241 (1996).

¶ 23 When construing an insurance policy, we must give the words used their plain, ordinary and popular meaning. *Western Casualty & Surety Co. v. Brochu*, 105 Ill. 2d 486, 495 (1985); *Young v. Allstate Insurance Co.*, 351 Ill. App. 3d 151, 158 (2004); see *Aetna Casualty & Surety Co. v. Beautiful Signs, Inc.*, 146 Ill. App. 3d 434, 435 (1986) (finding a nearly identically worded exclusion unambiguous). Here, the plain, ordinary and popular meaning of "employee" is "one employed by another usually for wages or salary and in a position below the executive level." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/employee (last visited June 21, 2019). But the additional insureds assert that we must ignore the plain, ordinary and popular meaning of "employee" because the employer's liability exclusion endorsement provided that "employee" "shall mean any member, associate, 'leased worker', 'temporary worker' or any person or persons loaned to or volunteering services to you."

According to the additional insureds, under the exclusion, claims by regular, wage-earning employees arising out of and in the course of their employment must be defended by James River. They argue that because Santoyo was an individual working for Omega for wages, he is not an "employee" within the meaning of the employer's liability endorsement. We find such an interpretation contravenes the plain, ordinary and popular meaning of the word "employee" and frustrates the purpose of the employer's liability exclusion.

¶ 24 We must certainly give effect to the meaning of "employee" within the context of the endorsement, but in doing so, we cannot construe the meaning of the word in a manner that directly conflicts with its commonly understood meaning. See *Outboard Marine Corp.*, 154 Ill. 2d at 108 (clear and unambiguous words in a policy must be given their plain, ordinary and popular meaning); *Thompson v. Gordon*, 241 Ill. 2d 428, 442 (2011) (contracts should not be interpreted in a way that is contrary to the plain and obvious meaning of the words used). The endorsement's definition of employee includes six categories of individuals not commonly considered to be employees. Because the employer's liability exclusion precludes coverage for bodily injury to "any employee," we can reasonably ascertain that James River intended to broaden the scope of individuals considered "employees" subject to the exclusion by including, among others, leased, temporary, or loaned workers. James River's intent is further demonstrated by the fact that the endorsement expanded the definition of employee under the general coverage form from "*an* employee of *the* insured" to "*any* employee of *any* insured," and included categories of individuals not appearing in the other meanings of "employee" set forth in the policy. (Emphasis added.)

¶ 25 Construing the language of the employer's liability exclusion in context, we cannot interpret "shall mean" as *limiting* the definition of employee to only the six enumerated categories of individuals and to the exclusion of regular, wage-earning employees. See *People v.*

Valley Steel Products Co., 71 Ill. 2d 408, 419 (1978) ("shall mean" was not interpreted as all inclusive). And there is no dispute that "employee" must include the six enumerated categories of individuals. Moreover, a reasonable policyholder considering the totality of the employer's liability exclusion would understand the exclusion applied to its regular employees. See *Munoz*, 237 Ill. 2d at 437 (contracts are construed consistent with the ordinary expectations of reasonable people); *Smith v. West Suburban Medical Center*, 397 Ill. App. 3d 995, 1000 (2010) (same).

¶ 26 We must also construe the term "employee" used in the employer's liability exclusion not in isolation, but in context of the policy as a whole, considering the type of insurance, the nature of the risks involved, the subject matter insured and the overall purpose of the policy. *Lapham-Hickey Steel Corp. v. Protection Mutual Insurance Co.*, 166 Ill. 2d 520, 529 (1995); *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993); *Vivify Construction, LLC v. Nautilus Insurance Co.*, 2017 IL App (1st) 170192, ¶ 18; *Empress Casino Joliet Corp. v. W.E. O'Neil Construction Co.*, 2016 IL App (1st) 151166, ¶ 62.

¶ 27 At issue here is a CGL policy, which a business usually obtains to cover " 'damages that the insured becomes legally obligated to pay to a third party because of bodily injury or property damage.' " *Archer Daniels Midland Co. v. Burlington Insurance Co. Group, Inc.*, 785 F. Supp. 2d 722, 728 (2011) (quoting Black's Law Dictionary 809 (7th ed. 1999)). Under a CGL policy, liability for damages not covered by more specific types of liability insurance policies (*e.g.*, business, automobile and worker's compensation) are generally covered. *Id.*; see *Beautiful Signs, Inc.*, 146 Ill. App. 3d at 436 (worker's compensation insurance provides coverage for employee injuries). CGL policies usually include employer's liability exclusions, which are designed to preclude coverage for bodily injury to employees of the insured that arise within the scope of employment because those losses are normally covered by worker's compensation insurance. *Beautiful Signs, Inc.*, 146 Ill. App. 3d at 436; *Brile v. Estate of Brile*, 296 Ill. App. 3d 661, 669

(1998); *General Accident Fire & Life Assurance Corp. v. Professional Golfers Association of America*, 40 Ill. App. 3d 592, 594 (1976). The employer's liability exclusion is also referred to as the "employee exclusion" or the "worker's compensation" exclusion. *U.S. Fidelity & Guaranty Co. v. Globe Indemnity Co.*, 60 Ill. 2d 295, 298 (1975); *Professional Golfers Ass'n of America*, 40 Ill. App. 3d at 594. The employer's liability exclusion is intended to distinguish an employer's liability to its employees as opposed to liability to third parties, because worker's compensation statutes address the extent of an employer's liability to its employees. *Professional Golfers Ass'n of America*, 40 Ill. App. 3d at 594. Insuring against the liability to employees under a general liability of insurance would be costly and redundant. *Id.* By the same token, we conclude that no reasonable employer purchasing a CGL policy with an employer's liability exclusion would understand that the policy would cover claims by employees for injuries arising out of and in the course of their employment. Finally, as noted above, no other definition of "employee" in James River's policy excludes regular, wage-earning employees and the additional insureds do not articulate why the interpretation they advocate makes sense.

¶ 28 Given the scope of a CGL policy and the purpose of the employer's liability exclusion, we cannot conclude that James River intended to define "employee" to include only the six enumerated non-traditional categories of employees, to the exclusion of regular, wage-earning workers. Adopting such an interpretation of employee in the context of the employer's liability exclusion in the CGL policy would be counterintuitive, to say the least. To avoid absurd results, the employer's liability exclusion must be interpreted to apply to the ordinary commonly understood meaning of "employee," *i.e.*, a wage-earning individual employed by another. See *Founders Insurance Co. v. Walker*, 2015 IL App (1st) 141301, ¶ 50 (the language of an insurance policy cannot be interpreted in a way that produces absurd results). And, as relevant to the employer's liability exclusion in James River's policy, that definition also includes the six

categories of workers generally not deemed to be employees.

¶ 29 Furthermore, even if James River had intended to define "employee" to include only the six categories listed in the exclusion, the same result would be obtained because the traditional meaning of "employee" is also found in the definition of "associate," which appears among the six categories. "Associate" is defined as an "employee" or "worker." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/employee (last visited October 7, 2019); American Heritage Dictionary (4th ed. 2006). In that case, because "employee" would no longer carry its ordinary commonly understood meaning, the term would not be rendered meaningless if that definition instead was applied to "associate," nor would James River's employment of both terms in the exclusion be duplicative. While our dissenting colleague has located other definitions to support his position that "associate" is "highly ambiguous," we will not invent an ambiguity where none exists to achieve a desired result. *Oakley Transportation, Inc. v. Zurich Insurance Co.*, 271 Ill. App. 3d 716, 722 (1995). It is well settled that the mere absence of a definition does not render a policy term ambiguous, nor is an ambiguity created simply because the parties disagree about the meaning of that term. *Nicor, Inc. v. Associated Electric & Gas Insurance Services Ltd.*, 223 Ill. 2d 407, 417 (2006).

¶ 30 James River's policy provides general liability coverage and does not cover liability for damages sustained by an employee that would be covered by worker's compensation insurance. And public policy favors recovery for an employee's injuries under a worker's compensation policy because an employee can recover without a showing of negligence and the liability of the employer is limited. *Globe Indemnity Co.*, 60 Ill. 2d at 298; *Garland v. Morgan Stanley & Co.*, 2013 IL App (1st) 112121, ¶ 24.

¶ 31 In sum, Santoyo was an "employee" and James River had no duty to defend the additional insureds because the employer's liability exclusion precludes coverage.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, we reverse the circuit court's order granting summary judgment in favor of Judlau, Imperial Crane and Burns & McDonnell, and denying James River's motion for summary judgment because we find that James River did not have a duty to defend the underlying complaint. We remand directing the circuit court to enter summary judgment in favor of James River and against Judlau, Imperial Crane and Burns & McDonnell. We affirm the circuit court's ruling denying James River's motion for summary judgment as to LaGrange Crane's third-party complaint.

¶ 34 Reversed in part; affirmed in part; and remanded with directions.

¶ 35 JUSTICE HYMAN dissenting:

¶ 36 James River Insurance Company drafted the employer liability exclusion endorsement that defines six categories of persons who qualify as "employees." Despite none of the categories applying to Vincente Santoyo, the majority quite wrongly concludes that the exclusion endorsement does apply to Santoyo. To reach this conclusion, the majority misinterprets the exclusion endorsement's definition of "employee." Neither the plain language of the definition of "employee," the rules of contract interpretation, case law, nor public policy support the majority's result. So I respectfully dissent.

¶ 37 Meaning of "Employee" Under the Endorsement

¶ 38 We liberally construe the exclusion endorsement's language to favor the policyholder, with all doubts and ambiguities resolved for extending coverage. See *Village of Hoffman Estates v. Cincinnati Insurance Co.*, 283 Ill. App. 3d 1011, 1014 (1996) (citing *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 74 (1991)). The policy is read as a whole, implementing every provision, if possible, because we assume that the drafter inserted each word deliberately and intended it to serve a purpose. *Id*.

¶ 39 The plain and ordinary meaning of the words in the insurance policy control unless otherwise defined in the policy. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill.2d 90, 108 (1992); *American National Fire Insurance Co. v. National Union Fire Insurance Co. of Pittsburg, PA*, 343 Ill. App. 3d 93, 103 (2003). See *Wilkin*, 144 Ill. 2d at 74 (quoting *Hartford Accident & Indemnity Co. v. Case Foundation Co.*, 10 Ill. App. 3d 115, 121 (1973)) ("Where a policy provision is clear and unambiguous, its language must be taken in its 'plain, ordinary and popular sense.' ") But, by assigning its own meaning to "employee" for purposes of the exclusion endorsement, James River has supplanted the plain and ordinary meaning.

¶ 40 The exclusion endorsement states that the policy does not apply to any claim for "bodily injury" to "[a]ny 'employee' of any insured arising out of or in the course of: (1) [e]mployment by any insured; or (2) [p]erforming duties related to the conduct of any insured's business." Importantly, this part of the endorsement does not define "employee" but merely states that an "employee" engaged in employment or business-related activities will not be covered by the policy. Further on, James River explicitly defines "employee" for purposes of the exclusion endorsement. The common definition of "employee" has been supplanted and replaced. Instead, "employee" for purposes of the exclusion endorsement "shall mean any member, associate, 'leased worker,' 'temporary worker,' or any person or persons loaned to or volunteering services to you."

¶ 41 I agree with the majority that the plain and ordinary meaning of "employee" includes a person who works for wages or a salary, like Santoyo. But in drafting the exclusion endorsement, James River made the decision to set aside the plain and ordinary meaning and presented its own definition of "employee," and its own definition departs from what "employee" traditionally means. "Employee," as written, limited, and adopted by James River, "shall mean" the six categories of persons. Because James River chose "shall mean," and not "include" or "among

others," we must preserve the meaning James River assigns to the word and not a meaning ordained by what James River might have wanted.

¶ 42 The majority would have us read "employee" to mean not only what James River precisely defines as its full meaning, but add another category, namely, "employee," the word being defined. *Chatham Corp. v. Dann Insurance*, 351 Ill. App. 3d 353, 359 (2004) (citing general and well-established rule that "a court 'will not add terms to the contract of insurance which the parties have not included in the language of the policy.' *Walsh v. State Farm Mutual Automobile Insurance Co.*, 91 Ill.App.2d 156, 164 (1968)."). For purposes of the endorsement exclusion, "employee" serves as the proxy for the six categories and "employee" is not mentioned or referred to as one of the six categories. If James River wanted "employee" also to mean a person employed for wages or a salary, it could have said so. It did not, and we cannot add a seventh category simply on the presumption that James River intended something else.

¶ 43 Let's say an endorsement regarding "dogs" contained its own definition of "dogs." According to the endorsement "dogs shall mean boxers, poodles, and greyhounds." We would not presume "dogs" also includes other breeds of dogs. The language has limited the word "dogs" only to those three breeds. Similarly, "employee" means exactly what James River says it means, nothing more.

¶ 44 James River's use of "shall" is telling. James River expressly confined the categories of persons by singling out the word "shall." In a contract, we construe "shall" as mandatory. *In re Marriage of Ackerley,* 333 Ill. App. 3d 382, 398 ("shall" in a contract connotes a mandatory obligation); *Professional Executive Center v. LaSalle National Bank,* 211 Ill. App. 3d 368, 379 (1991) (in private contracts, Illinois courts interpret "may" as permissive and "shall" as mandatory). Conversely, in a statute "shall" is not always mandatory and its meaning depends on legislative intent. See *UDI No. 10, LLC v. Dep't of Pub. Health,* 2012 IL App (1st) 103476, ¶ 21

("shall" in statute may be interpreted as permissive, depending on context of provision and intent of drafters); *Grant v. Dimas*, 2019 IL App (1st) 190799 ¶ 64 ("shall" in statute usually indicates mandatory intent, but word's meaning is not fixed or inflexible, and is grounded on "nature, objects, and the consequences which would result from construing it one way or another.").

¶ 45 In addition, the majority asserts that despite "shall mean" indicating a precise, narrower operational definition, we should find that James River actually intended to broaden the exclusion exception. In short, the majority wants to substitute "among others" or "includes" for "shall mean." Maybe that is what James River wanted to do, maybe not. But if James River intended for the exclusion exception to apply to persons like Santoyo, it did not say so, and to rule in its favor, the majority misconstrues and improperly uses "shall mean." Indeed, in two other sections of the policy, James River defined "employee" using the word "includes." Alternatively, James River simply could have said that wage earning workers are excluded from coverage.

¶ 46 The majority gets around the obvious limiting nature of the definition by finding that "shall mean" is not limiting language. For support, the majority relies on the readily distinguishable decision of *People v. Valley Steel Products Co.,* 71 Ill. 2d 408, 419 (1978), which found corporate defendants subject to criminal prosecution even though the statute did not include corporations in the definition of what a person "shall mean."

¶ 47 First, *Valley Steel* was a criminal case that required interpretation of a criminal statute; we are tasked with interpreting an insurance contract. The rules of construction for interpreting a statute do not apply to interpreting an insurance policy. As explained in *State Farm Mutual Insurance Co. v. Progressive Northern Insurance Co.*, 2015 IL App (1st) 140447, ¶ 110, cases interpreting residency issues under an election statute do not apply to interpreting whether an insured lost coverage by moving to a different state for college. We found that because the

insurer could not explain why the goals and purposes of the election statutes and insurance law are closely aligned, the definition and rules contained in the election statute would not govern interpretation of an insurance policy Similarly, why would "shall mean" in a criminal statute convey the same meaning in an insurance policy?

¶ 48 More significantly, *Valley Steel* does not discuss or explain the phase "shall mean." Instead, the *Valley Steel* court addressed whether the legislature intended to change the law on corporate liability for the failure to pay a tax by removing the words "and include" from the phrase, "shall mean and include." The court found that it did not, and failed to consider whether "shall mean" constitutes limiting language or how it should be interpreted. Aside from *Valley Steel*, James River cites no other cases to support its contention.

¶ 49 Relevant here is *American States Insurance Co v. Koloms*, 177 Ill. 2d 473, 479 (1997).The Illinois Supreme Court held that insurance policy exclusions are to be applied only where the terms are clear, definite, and explicit and must be interpreted narrowly, with all doubts and ambiguities regarding the duty to defend resolved in favor of the insured and against the insurer. Although I would find the exclusion to be explicitly limited to the six types of persons, the language could be considered ambiguous. In that case, we must construe that ambiguity in favor of the insureds. James River decided to redefine "employee" and it is bound by its own definition. As the majority notes, the insurer bears the burden of affirmatively demonstrating that a claim falls within an exclusion. *American Zurich Insurance Co. v. Wilcox & Christopoulos, L.L.C.*, 2013 IL App (1st) 120402, ¶34. James River falls short of meeting that burden.

¶ 50 Public Policy

¶ 51 James River argues that permitting Santoyo to be a covered employee under the policy and endorsement would violate Illinois public policy because the employer's liability exclusion requires an employee injured due to an employer's negligence to file a worker's compensation

claim rather than sue his or her employer. The majority says that to rule otherwise would be costly and redundant and not anticipated by the insured, who would expect that its employees' on-the-job injuries would be covered by workers compensation.

¶ 52 In deciding whether the exclusion exemption violates Illinois public policy, we determine whether the exclusion exemption is "so capable of producing harm that its enforcement would be contrary to the public interest." *Country Preferred Insurance Co. v. Whitehead*, 2012 IL 113365, ¶ 28. This requires that the exclusion exemption language be plainly contrary to what the constitution, the statutes, and the decisions of the courts have declared as Illinois public policy, or manifestly injurious to the public welfare. *Id.*

¶ 53 As noted, we construe an exclusion exception liberally, favoring the insured and against the insurer. *Koloms*, 177 Ill. 2d at 479. James River drafted the policy; it should be held to its defined terms. Further, although the majority spends several paragraphs discerning what James River *may* have intended when it drafted the exclusion, it gives short shrift to what the insured parties expected under the exclusion's plain language. The insureds expected coverage under the policy and it would be injurious to the public welfare to now deny it.

¶ 54 And that the Worker's Compensation Act governs an employee's on-the-job injuries does not offer a reason to deny coverage. The Worker's Compensation Act provides an exclusive remedy and prevents an employee from obtaining a double recovery for on-the-job injuries. It does not prevent an employer, like Omega, from obtaining insurance coverage for claims, and it is not contrary to the public welfare to permit it to do so. Moreover, the additional insureds did not employ Santoyo, thereby removing any concern about double coverage under the Workers Compensation Act as to those defendants. The insureds expected coverage under the terms of the James River policy, and it would be contrary to public policy to deny them that coverage.

¶ 55 Santoyo Was Not an "Associate"

¶ 56 James River's contention that Santoyo was an "associate" also has no merit. "Associate," has numerous possible meanings. For instance, the American Heritage Dictionary defines associate as a "person who united with another or other in an act, enterprise, or business; a partner or colleague," a "companion; a comrade," "a member of an institution or society who is granted only partial status or privileges." American Heritage Dictionary (4th ed. 2006). Black's Law Dictionary defines it as a "colleague or companion" or a "junior member of an organization or profession." Black's Law Dictionary (11th ed. 2019). These definitions do not include the meaning James River suggests—a wage earning worker.

¶ 57 The majority cites the Merriam Webster Online Dictionary definition of associate, which lists, in order, "partner," "colleague," "companion," "comrade," and lastly, "employee or worker." This merely demonstrates the weakness of the majority's argument by validating that "associate" has multiple meanings and that Santoyo is not an associate, as the word is most commonly defined. Moreover, the numerous possible definitions of "associate" highlight the ambiguity of the word. Ambiguity exists if a term is susceptible to more than one reasonable interpretation. *Nicor, Inc. v. Associated Electric & Gas Insurance Services, Ltd.*, 223 Ill. 2d 407, 417 (2006). At minimum, the exclusion exception, which does not define "associate," is highly ambiguous and bereft of a uniform definition. As already noted, case law requires courts to interpret an ambiguous provision in favor of insureds to protect their reasonable expectation of coverage. *Society of Mount Caramel v. National Ben Franklin Insurance Co. of Illinois*, 291 Ill. App 3d 360, 366 (1997). Should courts, depart from precedent and refuse to enforce the drafter's own definitions, most contracts, let alone insurance policies, would be turned into moldering muddle.