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IN THE
COURT OF APPEALS OF INDIANA

Anthony Hughes and Jennifer Hughes,
Appellants-Plaintiffs,

v.

First American Title Insurance Company,
Appellee-Defendant.

April 1, 2021

Court of Appeals Case No. 20A-PL-1850

Appeal from the Howard Circuit Court

The Honorable Lynn Murray, Judge

Trial Court Cause No. 34C01-1806-PL-402

Friedlander, Senior Judge.

Statement of the Case

[1] Anthony and Jennifer Hughes ("Appellants") appeal the trial court's entry of summary judgment in favor of First American Title Insurance Company. We affirm.

Issue

[2] Appellants raise just one issue on appeal: whether the trial court erred by granting summary judgment in favor of First American.

Facts and Procedural History

[3] In 2012, Appellants purchased a parcel of real estate in Russiaville. As part of the transaction, Appellants obtained a policy of title insurance from First American. Unbeknownst to Appellants, however, the prior owners of the parcel had granted an easement across the entire south side of the parcel, the existence of which was not revealed in the title examination. Appellants subsequently became aware of the easement and, in June 2016, submitted a claim under their title policy. The following month First American notified Appellants it acknowledged coverage of their claim and was assessing options for resolution.

[4] In the meantime, Appellants filed suit against the easement holder and her boyfriend seeking declaratory and injunctive relief ("Injunction Suit"). After having obtained a preliminary injunction against these defendants, Appellants moved to dismiss their complaint on the day of trial in November 2017 "under circumstances where the easement was valid and [Appellants] were found to have used 'tire poppers' in an effort to thwart use of the [e]asement. Ultimately,

the court ordered [Appellants] to pay over $61,000 in attorney's fees and costs" to the easement holder and her boyfriend. Appealed Order p. 8, ¶ 26.[1]

[5] Appellants commenced this action in June 2018 seeking damages for their loss occasioned by both the easement and the Injunction Suit. Soon thereafter, First American obtained a diminution in value appraisal of Appellants' parcel finding a $3,000 diminution in value caused by the existence of the easement and forwarded the appraisal report to Appellants' counsel. Receiving no response from Appellants, First American tendered a $3,000 payment to Appellants' counsel in October 2018, which was never negotiated.

[6] In November 2019, First American moved for summary judgment. Appellants filed their response, and the court heard argument in June 2020. The following month the court issued its order granting First American's motion. Appellants then filed their motion to correct error, which the court denied. Appellants now appeal.

Discussion and Decision

[7] The trial court's grant of summary judgment is clothed with a presumption of validity, and the party who lost in the trial court has the burden of demonstrating that the grant of summary judgment was erroneous. *Auto-Owners Ins. Co. v. Benko*, 964 N.E.2d 886 (Ind. Ct. App. 2012), *trans. denied*. This Court

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[1] The parties accept most of the trial court's statement of facts as accurate, including this paragraph. *See* Appellants' Br. p. 6, Appellee's Br. p. 6.

applies the same standard of review as the trial court: summary judgment is appropriate only where the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Young v. Hood's Gardens, Inc.*, 24 N.E.3d 421 (Ind. 2015); *see also* Ind. Trial Rule 56(C).

[8] An insurance policy is a contract and is subject to the same rules of construction as other contracts. *Franke Plating Works, Inc. v. Cincinnati Ins. Co.*, 113 N.E.3d 257 (Ind. Ct. App. 2018), *trans. denied* (2019). We review the construction of contract terms de novo. *State Farm Fire & Cas. Co. v. Riddell Nat. Bank*, 984 N.E.2d 655 (Ind. Ct. App. 2013), *trans. denied*. When interpreting an insurance policy, the court's goal is to ascertain and enforce the parties' intent as manifested in the insurance contract. *Burkett v. Am. Fam. Ins. Grp.*, 737 N.E.2d 447 (Ind. Ct. App. 2000). If a contract term is unambiguous, it will be given its plain and ordinary meaning and will be conclusive upon the parties and the courts. *State Farm Fire & Cas. Co.*, 984 N.E.2d 655. If, however, the language of the policy is ambiguous, its meaning is generally construed in favor of the insured. *Empire Fire v. Frierson*, 49 N.E.3d 1075 (Ind. Ct. App. 2016). Contracts are to be read as a whole, and a court should construe the language in a contract so as not to render any words, phrases, or terms ineffective or meaningless in an attempt to harmonize the provisions rather than interpret them as conflicting. *State Farm Fire & Cas. Co.*, 984 N.E.2d 655. Additionally, an ambiguity does not exist simply because an insured and an insurer disagree

about the meaning of a provision, but only if reasonable people could disagree about the meaning of the contract's terms. *Empire Fire*, 49 N.E.3d 1075.

[9] Subject to exclusions, the title insurance policy provided to Appellants by First American covers against "*actual loss*, including any costs, attorneys' fees and expenses provided under this Policy." Appellants' App. Vol. II, p. 61 (Ex. F of First American's Desig. of Evid.) (emphasis added). Such loss must result from one or more of the enumerated covered risks, one of which is that "[s]omeone else has an easement on the Land." *Id.*

[10] This case turns on the meaning of the term "actual loss." Appellants argue that the term includes their "loss" of $61,000 due to the judgment that was entered against them in the Injunction Suit as it was a loss that resulted from a covered risk (i.e., the easement).

[11] Title insurance is a contract of insurance against loss or damage caused by encumbrances upon or defects in the title to real estate. Ind. Code § 27-7-3-2(a) (2013); *see also* Ind. Code § 27-7-3-2(g)(2) (defining "title policy" as "a policy issued by a company that insures or indemnifies persons with an interest in real property against loss or damage caused by a lien on, an encumbrance on, a defect in, or the unmarketability of the title to the real property"). "'The purpose of title insurance is to insure that title to the property is vested in the named insured, subject to the exceptions and exclusions stated in the policy.'" *House v. First Am. Title Co.*, 858 N.E.2d 640, 643 (Ind. Ct. App. 2006) (quoting *Linder v. Ticor Title Ins. Co. of Cal., Inc.*, 647 N.E.2d 37, 40 (Ind. Ct. App. 1995)).

[12] In *Linder*, the Linders bought a parcel of real estate and obtained a policy of title insurance. It was later discovered that the parcel was encumbered by an easement that had not been disclosed in the title search. The Linders brought an action against the title insurance company. The Linders' policy limited the amount of damages to the lesser of either their "actual loss" or the face value of the policy. Following a trial, the court awarded damages to the Linders based upon the damage to their property because of the easement and found that the measurement of damages was the difference between the value of the property with the defect and the value of the property without the defect. The question on appeal was whether the trial court had properly measured the damages. In affirming the trial court on this issue, this Court determined that the Linders' "actual loss is the diminution in value of the property caused by the easement." 647 N.E.2d at 39.

[13] Indiana is not alone in this holding. Several states have determined that under an owner's policy of title insurance, the actual loss of the insured is the difference in value of the property with the encumbrance and its value without the encumbrance. *See Twin Cities Metro-Certified Dev. Co. v. Stewart Title Guar. Co.*, 868 N.W.2d 713 (Minn. Ct. App. 2015); *Swanson v. Safeco Title Ins. Co.*, 925 P.2d 1354 (Ariz. Ct. App. 1995); *L. Smirlock Realty Corp. v. Title Guarantee Co.*, 469 N.Y.S.2d 415 (N.Y. App. Div. 1983); *Hartman v. Shambaugh*, 630 P.2d 758 (N.M. 1981); *Fohn v. Title Ins. Corp. of St. Louis*, 529 S.W.2d 1 (Mo. 1975); *Southern Title Guar. Co. v. Prendergast*, 478 S.W.2d 806 (Tex. Civ. App. 1972). *Cf. Pres. Cap. Consultants, LLC v. First Am. Title Ins. Co.*, 751 S.E.2d 256 (S.C.

2013) (stating that purpose of title insurance is to place insured in position he thought he occupied when policy was issued; thus, generally measure of damages should compare encumbered value of parcel with value of parcel without encumbrance); *see also* 44 AM. JUR. 2D *Insurance* § 1543 (2021) (explaining that in cases where title encumbrance is not or cannot be removed, insured's loss for title insurance purposes is difference between fair market value of property if no impairment existed and fair market value with impairment; also observing that although terms of individual title insurance agreements can control method of valuation, purpose of title insurance is to place insured in position that insured thought he or she occupied when policy was issued).

[14] Moreover, title insurance does not insure against the conduct of the insured and does not cover matters involving personal dealings between individuals. 46 C.J.S. *Insurance* § 1742 (2021). Only title to the parcel was insured under Appellants' policy with First American—not any actions Appellants took to keep the easement holder from using the easement. Stated another way, the loss was not a result of the existence of the easement; rather, the loss Appellants seek to recover is a result of their actions concerning the easement. Appellants acknowledge the truth of this in their briefs to this Court in which they state: "'[A]ctual loss' is loss that is actually incurred by an Owner *as a result of some title defect* which falls within the scope of the 'Covered Risk' under the Policy." Appellants' Br. p. 17 (emphasis added). Further, "Appellants incurred a loss in the form of monetary judgment entered against them as a result of the dissolution of the preliminary injunction that had been entered with respect to

actions and conduct within the Easement." *Id.* And finally, that "Appellants here have taken action to prevent a third party from the excavation, manipulation and permanent change to their property within the easement," and "what they seek to recover is the damage and actual loss which they incurred in defending against the exercise of the easement." Appellants' Reply Br. p. 5.

[15] Based on the foregoing, we conclude Appellants should be reimbursed for the actual loss they suffered in reliance on their policy of title insurance, and such loss is the diminution in value of the property caused by the existence of the easement.

[16] Judgment affirmed.

Vaidik, J., and Mathias, J., concur.