MEMORANDUM DECISION

ATTORNEYS FOR APPELLANTS

Jerome L. Withered
Patrick I. Jones
Withered Burns, LLP
Lafayette, Indiana

ATTORNEYS FOR APPELLEE

Katherine J. Noel
Weston E. Nicholson
Noel Law
Kokomo, Indiana

IN THE COURT OF APPEALS OF INDIANA

John S. Wagner and Sharon G. Wagner,

Appellants-Plaintiffs,

v.

United Farm Family Mutual Insurance Company,

Appellee-Defendant.

December 29, 2022

Court of Appeals Cause No. 22A-PL-1419

Appeal from the Carroll Circuit Court

The Honorable Benjamin Diener, Judge

Trial Court Cause No. 08C01-1608-PL-21

Bradford, Chief Judge.

Case Summary

[1] John and Sharon Wagner own a lake house ("the House") on Lake Freeman in Carroll County, Indiana. United Farm Family Mutual Insurance Company ("Farm Bureau") insures the House with a "platinum" insurance policy ("the Policy"). In 2015, the Wagners noticed water and moisture problems in the House, with evidence of mold. Farm Bureau concluded that the damage was the same as that which was the subject of a previous claim, which the Wagners had not repaired, and denied coverage. The Wagners sued Farm Bureau alleging that it had wrongfully denied their claim for mold remediation. Both parties moved for summary judgment, and the trial court entered summary judgment in favor of Farm Bureau. The Wagners argue that the trial court erred in ruling that the Policy does not cover their loss. We disagree and affirm.

Facts and Procedural History

[2] The Wagners own the House on Lake Freeman. Farm Bureau insures the House with the Policy. In 2010, the House suffered storm damage to the roof for which Farm Bureau provided coverage. Two years later, the Wagners sought coverage for water staining around the living room chimney and other areas, and Farm Bureau's engineering report ("the Donan Report") determined that while there was no water intrusion through the roof, there was condensation in the House. Farm Bureau accepted the claim but there was no payout because it was within their deductible.

[3] In 2015, the Wagners again began to see water and moisture problems in the House, with evidence of mold. The Wagners reported the claim to Farm Bureau, which then inspected the House. After this inspection, Farm Bureau denied the claim, concluding that the damage was the same as the 2012 claim, which the Wagners had not repaired.

[4] Farm Bureau allegedly denied the 2015 claim based on the conditions and exclusions in the Policy. The Policy, in part, provides:

> We insure against risk of direct loss to property described in Coverage A and B only if that loss is a physical loss to property. We do not insure, however, for loss: […]
>
> 2. Caused by: […]
>
> e. Any of the following: […]
>
> (3) Smog, rust, or other corrosion, *mold*, wet or dry rot.

Appellants' App. Vol. II pp. 46–47 (emphasis added). The Policy also specifically excludes from coverage any "loss caused directly or indirectly by […] neglect of the 'insured' to use all reasonable means to save and preserve property at and after the time of a loss." Appellants' App. Vol. II pp. 48–49. "Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." Appellants' App. Vol. II p. 48. Further, the Policy clarifies that:

> 2. We do not insure for loss to property described in Coverages A or B caused by any of the following. However, any ensuing loss to property described in

> Coverages A and B not excluded or excepted in this policy is covered.
>
> > c. Faulty, inadequate or defective: […]
> >
> > > (2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, [or] compaction[.]

Appellants' App. Vol. II p. 50.

[5] In August of 2016, the Wagners sued Farm Bureau, alleging that Farm Bureau had breached its duty to them under the Policy by denying coverage for the 2015 claim. Prior to and during this litigation, the parties each hired experts to inspect the House and investigate the cause of the mold. The Wagners retained Link Management, Inc. ("Link") to inspect the House in February of 2018. Link identified a leak in the crawlspace sewer main, improperly installed ductwork, and mold growth in the crawlspace. Link concluded that the sewer main leak had caused mold growth in the crawlspace, which the faulty ductwork had then spread throughout the House. Link identified faulty or defective workmanship and construction as the source of these issues.

[6] A few months later, Farm Bureau retained EFI Global ("EFI") to inspect the House. EFI concluded that excess moisture had caused mold growth in the crawlspace. EFI suspected that an inadequate "vapor-resistant barrier" had caused the excessive moisture, which had been exacerbated by poorly-located vents. EFI surmised that water entry into the House had resulted from "deferred maintenance" of the roof, chimney, and flue. Appellants' App. Vol.

III p. 97. EFI also concluded that some types of molds identified in the House had sprouted from "humidity issues and a lack of proper conditioning." Appellants' App. Vol. III p. 79. Subsequently, the Wagners retained ServiceMaster by Clean Air Management to inspect the House, assess the damage, and estimate the cost to remedy the damage, which came out to be $259,405.00.

[7] In March of 2022, Farm Bureau moved for summary judgment, alleging that because the 2012 and 2015 claims were similar claims and the Wagners had failed to mitigate the 2012 claim, they were not entitled to coverage under the Policy. The Wagners also moved for summary judgment, arguing that they were entitled to coverage because the 2015 loss is an "ensuing loss caused by defective workmanship" and "inadequate maintenance[.]" Appellants' Br. p. 11. In June of 2022, the trial court granted Farm Bureau's motion and denied the Wagners', finding that "there is no question of fact that the loss the Wagners complain of is excluded under the policy." Appellants' App. Vol. II p. 19. On appeal, the Wagners argue that the trial court erred in granting summary judgment in favor of Farm Bureau.

Discussion and Decision

[8] "We review summary judgment *de novo*, applying the same standard as the trial court." *Young v. Hood's Gardens, Inc.*, 24 N.E.3d 421, 423 (Ind. 2015). "[S]ummary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material facts and that the

moving party is entitled to judgment as a matter of law.'" *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (quoting Ind. Trial Rule 56(C)). We will draw "all reasonable inferences in favor of […] the non-moving parties[.]" *Id*. Further, "[w]e will affirm a summary judgment on appeal if it is sustainable under any theory or basis found in the evidentiary matter designated to the trial court." *Aide v. Chrysler Fin. Corp.*, 699 N.E.2d 1177, 1180 (Ind. Ct. App. 1998), *trans. denied*. While not binding on us, a trial court's grant of "summary judgment […] enters the process of appellate review clothed with a presumption of validity" and the appellant must persuade us that the trial court erred. *Ind. Dept. of State Revenue v. Caylor-Nickel Clinic, P.C.*, 587 N.E.2d 1311, 1312–13 (Ind. 1992).

[9] Insurance contracts "are subject to the same rules of construction as other contracts." *Burkett v. Am. Fam. Ins. Grp.*, 737 N.E.2d 447, 452 (Ind. Ct. App. 2000). We construe insurance contracts as a whole, not limiting our review to individual words, phrases, or paragraphs, and giving unambiguous language its clear meaning. *Id*. (citing *Anderson v. State Farm Mut. Auto. Ins. Co.*, 471 N.E.2d 1170, 1172 (Ind. Ct. App. 1984)). "[B]ecause the interpretation of a contract is a matter of law, cases involving the interpretation of insurance contracts are particularly appropriate for summary judgment." *Id.* (citing *Westfield Cos. v. Rovan, Inc.*, 722 N.E.2d 851, 855 (Ind. Ct. App. 2000), *trans. denied*). The Wagners allege that the water damage and mold found in 2015 is a covered "ensuing loss" and not a "loss caused by mold[.]" Appellants' Br. pp. 15, 18. For its part, Farm Bureau argues that "the Policy specifically excludes coverage

for the Wagners' claimed loss" because the 2012 and 2015 claims are effectively the same, and the Wagners neglected to preserve the property. Appellee's Br. p. 11.

[10] To begin, the Wagners acknowledge that "[a]ccording to both parties' engineering experts, defective workmanship […] in the crawlspace and inadequate maintenance of the roof caused the water and moisture damage, including mold, which led to the 2015 claim." Appellants' Br. p. 15. In other words, the Wagners argue that the mold complained of in the 2015 claim is an ensuing loss of defective workmanship. However, in our view, the Wagners' argument on this point is misguided. This case instead turns on the question of neglect.

[11] The real question here is whether the Wagners' neglect of their 2012 claim excludes Farm Bureau's coverage of their 2015 claim. In the absence of ambiguity, the words in an insurance contract "are given their ordinary meaning." *Bradshaw v. Chandler*, 916 N.E.2d 163, 166 (Ind. 2009). Moreover, "[a]n exclusionary clause must clearly and unmistakably express the particular act or omission that will bring the exclusion into play." *Jackson v. Jones*, 804 N.E.2d 155, 158 (Ind. Ct. App. 2004). Here, the Policy states that Farm Bureau "do[es] not insure for loss caused directly or indirectly by […] neglect of the 'insured' to use all reasonable means to save and preserve property at and after the time of a loss." Appellants' App. Vol. II pp. 48–49. "Such loss is excluded *regardless of any other cause* or event contributing concurrently or in any sequence to the loss." Appellants' App. Vol. II p. 48 (emphasis added). The

Policy is clear: Farm Bureau will not provide coverage when a homeowner neglects to make repairs and that neglect, either in whole or in part, contributes to a subsequent loss.

[12] To clarify, in 2012, the Wagners complained of water staining around the chimney. The Donan Report explains that: (1) there had been no evident water intrusion from the roof to damage the chimney, living room ceiling beam, or east wall of the kitchen; (2) the water stains on the living room ceiling, chimney, and kitchen wall had been caused by condensation; (3) the roof covering had an unsealed section at the northern end of the east eave; and (4) the unprofessional patching around the fireplace and furnace flue chimneys had not adequately sealed the chimneys. The Donan Report also noted that the "clogged gutter and downspout could cause water damage at the location of the gutter" and "should be kept clear." Appellants' App. Vol. II p. 198. The engineering reports evaluating the 2015 claim concluded that "water entry has occurred through the roofing installation around the fireplace chimney[,]" the "[w]ater entry through the roof and soffit at the southwest corner of the living room is the result of deferred maintenance […] of the roofing installation at that location, and of the gutter/downspout system[,]" and there had been "water leakage from the sewer pipe[,]" improperly-installed ductwork, and "discontinuity in the vapor-resistant barrier" in the crawlspace which was "likely a major source of mold throughout the Ho[us]e." Appellants' App. Vol. III p. 97; Appellants' App. Vol. II p. 142.

[13] The Wagners correctly point out that the 2012 Donan Report identifies condensation as the main issue and the 2018 reports indicate mold, but the Donan Report specifically noted numerous other problems that, at least in part, contributed to the loss complained of in the 2015 claim. For example, the Donan Report informed the Wagners that the chimneys were not adequately sealed, there was an unsealed section of the roof, and the clogged gutter and downspout could result in water damage at that location. Farm Bureau had the House inspected, and their expert determined that the 2015 "damages claimed are from the [2012] loss, and the repairs were never completed from that loss." Appellants' App. Vol. II p. 186. Further, Farm Bureau indicated that the Wagners had informed Farm Bureau that "they did not repair" the damages in the 2012 loss. Appellants' App. Vol. II p. 32. As a result, the Policy does not provide coverage for the 2015 claim because the Wagners' "neglect […] to use all reasonable means to save and preserve property at and after the time of [the 2012] loss" contributed, at least in part, to the damages that constitute the 2015 claim. Appellants' App. Vol. II pp. 48–49. As mentioned, the neglect exclusion precludes coverage here "*regardless of any other cause* or event contributing concurrently or in any sequence to the loss." Appellants' App. Vol. II p. 48 (emphasis added).

[14] Farm Bureau acknowledges that "few Indiana courts have addressed a similar neglect exclusion" and draws our attention to *Groves v. American Family Mutual Insurance Company, S.I.*, 479 F.Supp.3d 796, 801 (E.D. Wis. 2020), which considered an identical neglect exclusion. There, an insured sought coverage

for mold that had developed in his cabin after the roof had collapsed but before the collapse had been discovered. *Id*. at 798–99. The *Groves* court determined that for the neglect exclusion to apply, "'the insured must have knowledge of a readily identifiable, imminent, and real peril endangering the property[.]'" *Id*. at 801 (quoting *Tuchman v. Aetna Cas. & Sur. Co*., 52 Cal. Rptr. 2d 274, 279 (1996). However, the court concluded that the neglect exclusion did not apply in that instance because the plaintiff had no knowledge of the roof collapse and no obligation to repair "could arise until Plaintiff knew of the loss and need to do so." *Id*. at 802.

[15] Unlike the plaintiff in *Groves*, the Wagners were on notice that water, "a readily identifiable, imminent, and real peril[,]" was damaging the House. *Id*. at 801. For instance, the Donan Report, while not identifying mold specifically as the 2018 reports did, indicated that there were unsealed sections of the roof, chimney, and a clogged gutter and downspout that could lead to water intrusion and further damage to the House. Then, EFI's 2018 report found, in part, that water intrusion into the House had occurred through the unsealed roofing installation at the chimney and the gutter and downspout location, which the Wagners had not repaired. In other words, the reports from the 2015 claim indicate that the Wagners' failure to address, repair, or investigate the 2012 claim contributed to the loss complained of in the 2015 claim, at least in part, which, again, the Wagners do not dispute. As a result, because the neglect exclusion applies "*regardless of any other cause* or event contributing concurrently

or in any sequence to the loss[,]" the Policy does not provide coverage for the 2015 claim. Appellants' App. Vol. II p. 48 (emphasis added).

[16] Put simply, in 2012, the Wagners became aware of condensation damaging the House and the potential for water intrusion from various points; however, the record indicates that they took no action to investigate or repair the cause of the 2012 claim, bringing the neglect exclusion into play for their 2015 claim. To conclude otherwise would render the neglect exclusion meaningless. When interpreting contracts, we "make every attempt to construe the contractual language such that no words, phrases, or terms are rendered ineffective or meaningless." *Niezer v. Todd Realty, Inc.*, 913 N.E.2d 211, 216 (Ind. Ct. App. 2009) (citing *S.C. Nestel, Inc. v. Future Constr., Inc.*, 836 N.E.2d 445 (Ind. Ct. App. 2005)), *trans. denied*. Here, the Policy states clearly that Farm Bureau will provide no coverage for losses arising directly or indirectly from an insured's neglect, regardless of other concurrent or subsequent contributing causes. Therefore, we conclude that the Wagners' failure to address the 2012 claim constituted neglect which contributed, at least in part, to their 2015 claim, thus activating the neglect exclusion.

[17] The judgment of the trial court is affirmed.

Pyle, J., and Tavitas, J., concur.