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IN THE
COURT OF APPEALS OF INDIANA

Indiana Repertory Theatre,
Appellant-Plaintiff,

v.

The Cincinnati Casualty Company and McGowan Insurance Group LLC,[1]
Appellees-Defendants

January 4, 2022

Court of Appeals Case No. 21A-PL-628

Appeal from the Marion Superior Court

The Honorable Heather A. Welch, Judge

Trial Court Cause No. 49D01-2004-PL-013137

May, Judge

[1] The Indiana Repertory Theatre ("IRT")[2] appeals the trial court's decision denying IRT's motion for partial summary judgment and granting partial summary judgment for Cincinnati Casualty Company ("Cincinnati Casualty").[3]

[1] The trial court's summary judgment order does not pertain to the claims involving McGowan Insurance Group, LLC, and it does not participate in this appeal.

[2] IRT is joined by three amici. The first, The League of Resident Theatres ("LORT"), is a "not-for-profit organization and the largest professional theater association of its kind in the United States." (Br. of LORT at 6.) IRT is a member theater of LORT. The second, United Policyholders ("UP"), is a "non-profit organization whose mission is to serve as a voice and a source of information and guidance for insurance consumers around the country and an advocate for their interests." (Br. of UP at 4.) The third, Independent Colleges of Indiana ("ICI"), "is a non-profit association that serves as the collective voice for Indiana's 29 private, non-profit colleges and universities." (Br. of ICI at 8.)

[3] Cincinnati Casualty is joined by three amici. The first, American Property Casualty Insurance Association ("APCIA"), is "the primary national trade association for home, auto, and business insurance." (Cincinnati Casualty Amici Br. at 7.) The second, National Association of Mutual Insurance Companies ("NAMIC"), is "the largest property and casualty insurance trade group in the country[.]" (*Id.*) The third, the Insurance Institute of Indiana ("III"), is the "primary trade association representing the property and casualty industry in the state of Indiana. (*Id.* at 8.)

IRT presents multiple issues on appeal, one of which we find dispositive: whether the trial court erred when it determined the contract language "direct physical loss or direct physical damage" did not encompass IRT's claim for loss of use of its facilities during the COVID-19 pandemic. While we sympathize with the plight of IRT as well as other small businesses and not-for-profit entities in similar situations, the plain language of the insurance contract does not support coverage for COVID-19-related loss of use. We affirm.

Facts and Procedural History[4]

[2] As stated in the record, IRT

> is the largest professional nonprofit theatre in Indiana. IRT presents live theatre performance September through May and rents its facilities for other performances and events the rest of the year. IRT employs approximately 65 full-time year-round and seasonal employees in the design and production of theater sets, scenes, costumes, lighting and sound effect, in addition to actors, writers, directors and other artists. IRT also welcomes nearly 40,000 school children from across the state to student matinees each season.

(Appellant's App. Vol. II at 62-3.) IRT is located in downtown Indianapolis. At all times relevant to this appeal, IRT had an insurance policy[5] ("Policy")

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[4] We held oral argument on this case on November 19, 2021, as part of the Defense Trial Counsel of Indiana's ("DTCI") annual conference in French Lick, Indiana. We thank counsel for their excellent presentations and advocacy, and we thank DTCI for organizing the event.

[5] As will be discussed *infra*, the parties disagree about what type of insurance policy exists.

with Cincinnati Casualty. The Policy is 379 pages and contains multiple subtypes of coverage, each called a "form." (Appellant's App. Vol. III at 27.)

[3] On March 6, 2020, the first case of COVID-19 was reported in Indiana. The rapid spread of COVID-19 caused federal, state, and local governments to issue a series of executive orders and actions to attempt to contain the transmission of the virus. Indiana Governor Eric Holcomb also issued an Executive Order on March 6, 2020, declaring a public health emergency for the State of Indiana. On March 10, 2020, IRT held a performance of the production Murder on the Orient Express ("The Play") and hosted a pre-show happy hour event. On March 11, 2020, the World Health Organization declared COVID-19 to be a global pandemic. On March 12, 2020, Indianapolis Mayor Joseph Hogsett and the Marion County Health Department ("MCHD") ordered a thirty-day suspension of all non-essential gatherings of more than 250 people. IRT had scheduled performances of The Play on March 12, 13, and 14. After Mayor Hogsett's order, IRT advised patrons that seating would be limited to 250 attendees for each upcoming performance of The Play.

[4] On March 16, 2020, Mayor Hogsett and the MCHD ordered that, effective March 17, 2020, "all . . . live performance venues . . . shall be closed to the public through April 6, 2020." (*Id*. at 143.) The same day, IRT released the following statement: "With much consideration for the State of Indiana and City of Indianapolis' COVID-19 guidelines and the health and well-being of our patrons, staff, and artists, Indiana Repertory Theatre has made the extremely difficult decision to close the public for the rest of the 19-20 Season."

(Appellant's App. Vol. VI at 134.) On March 18, 2020, IRT recorded a live performance of The Play in its theatre with a "small house of IRT staff, designers, Board members, and actors' families" and offered that recording for purchase. (*Id.* at 140.)

[5] On March 20, 2020, IRT filed a claim with Cincinnati Casualty, asserting "loss of business income and extra expense as a result of the COVID-19 pandemic." (Appellant's App. Vol. IV at 138.) On March 23, 2020, Cincinnati Casualty responded with a letter indicating it would investigate the claim, reciting the relevant portions of the Policy, and asking IRT for additional information regarding its claim, including "any direct physical loss or damage to your premises or property at your premises by the Coronavirus[;]" "whether you have been ordered by a civil authority, such as a government official, to close, or restrict access to, your premises[;]" and the identification of "any property, other than your own, that suffered direct physical loss or direct physical damage, thereby causing the civil authority to issue [an order closing or restricting access to the property]." (*Id.* at 145.) "IRT did not respond to the Correspondence or provide any of the requested information[.]" (Appellant's App. Vol. VI at 57.)

[6] "A few days later" Cincinnati Casualty sent IRT a letter denying coverage under the Policy. It stated:

> At the threshold, there must be direct physical loss or damage to Covered Property caused by a covered cause of loss in order for the claim to be covered. . . . Direct physical loss or damage

> generally means a physical effect on Covered Property, such as deformation, permanent change in physical appearance or other manifestation of a physical effect. Your notice of claim indicates that your claim involves Coronavirus. However, the fact of the pandemic, without more, is not direct physical loss or damage to property at the premises.

(Appellant's App. Vol. II at 40-1.)[6]

[7] On April 3, 2020, IRT filed a claim against Cincinnati Casualty seeking "a judgment declaring the scope of Cincinnati's obligation to pay IRT's losses under a commercial property insurance policy related to the novel coronavirus and COVID-19 pandemic." (*Id*. at 61.) On June 8, 2020, Cincinnati Casualty filed its answer to IRT's amended complaint.[7] On June 26, 2020, IRT filed a motion for partial summary judgment against Cincinnati Casualty. On August 31, 2020, Cincinnati Casualty filed its memorandum in opposition to IRT's motion for partial summary judgment and filed its own cross-motion for partial summary judgment. On December 3, 2020, the trial court held a remote hearing and heard argument on the parties' cross-motions for partial summary judgment.

[8] On March 12, 2021, after granting multiple motions to supplement legal authority from both parties, the trial court entered its order granting Cincinnati

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[6] Neither party directs us to the location of a copy of the denial letter, and we have been unable to locate it in the record. This quote appears in the trial court's order, and neither party disputes the language.

[7] IRT amended its complaint on April 10, 2020, to include a negligence claim against McGowan Insurance Company, LLC.

Casualty's motion for partial summary judgment and denying IRT's motion for partial summary judgment. As part of that order, the trial court also granted IRT's request for "additional time to develop evidence regarding the presence of the SARS-CoV-2 virus inside its theatre." (*Id.* at 56.) On March 19, 2021, IRT filed a motion to certify the trial court's March 12 order as a final judgment under Indiana Trial Rule 56(C). On April 8, 2021, the trial court granted IRT's motion and declared its March 12 order a final judgment for the purposes of appeal.

Discussion and Decision

[9] We review summary judgment using the same standard as the trial court: summary judgment is appropriate only where the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Rogers v. Martin*, 63 N.E.3d 316, 320 (Ind. 2016). All facts and reasonable inferences are construed in favor of the non-moving party. *City of Beech Grove v. Beloat*, 50 N.E.3d 135, 137 (Ind. 2016). Where the challenge to summary judgment raises questions of law, we review them de novo. *Rogers*, 63 N.E.3d at 320. That the parties have filed cross-motions for summary judgment does not alter our standard of review. *Floyd Cnty. v. City of New Albany*, 1 N.E.3d 207, 213 (Ind. Ct. App. 2014), *trans. denied*.

[10] When interpreting an insurance policy, we give plain and ordinary meaning to language that is clear and unambiguous. *Meridian Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 698 N.E.2d 770, 773 (Ind. 1998). Policy language is unambiguous if

reasonable people could not honestly differ as to its meaning. *Id*. To this end, we look to see "if policy language is susceptible to more than one interpretation." *Id*. Further,

> [a]mbiguous provisions in insurance policies are construed in favor of the insured. *American States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996). This is particularly true with unclear provisions that limit or exclude coverage. *Id*. Where provisions limiting coverage are not clearly and plainly expressed, the policy will be construed most favorably to the insured, to further the policy's basic purpose of indemnity. *Masonic Accident Ins. Co. v. Jackson*, 200 Ind. 472, 164 N.E. 628 (1929). "This strict construal against the insurer is driven by the fact that the insurer drafts the policy and foists its terms upon the customer. 'The insurance companies write the policies; we buy their forms or we do not buy insurance.'" *American States Ins. Co.*, 662 N.E.2d at 947 (quoting *American Economy Ins. Co. v. Liggett*, 426 N.E.2d 136, 142 (Ind. Ct. App. 1981)).

Id. "A reasonable construction that supports the policyholder's position must be enforced as a matter of law." *Everett Cash Mut. Ins. Co. v. Taylor*, 926 N.E.2d 1008, 1014 (Ind. 2010). "A division between courts as to the meaning of the language in an insurance contract is evidence of ambiguity[,]" *Travelers Indem. Co. v. Summit Corp. of America*, 715 N.E.2d 926, 936 (Ind. Ct. App. 1999), however, our Indiana Supreme Court has also held, "we do not think that a split of authority on the meaning of similar contract terms necessarily means that these terms are ambiguous." *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243, 248 (Ind. 2005).

[11] As part of its "BUILDING AND PERSONAL PROPERTY COVERAGE FORM (INCLUDING SPECIAL CAUSES OF LOSS)" (Appellant's App. Vol. III at 27) (formatting in original), as part of "SECTION A. COVERAGE" (*id*.) (formatting in original), the Policy states, "We will pay for direct 'loss' to Covered Property at the 'premises' caused by or resulting from any Covered Cause of Loss." (*Id*.) In the introduction to the policy, there is language indicating, in relevant part, "words and phrases that appear in quotation marks have special meaning. Refer to SECTION G. DEFINITIONS." (*Id*.) (formatting in original). Under "SECTION A. COVERAGE[,]" (*id*.) (formatting in original), the phrase "Covered Causes of Loss" is defined as "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." (*Id*. at 29.) "SECTION G. DEFINITIONS" (*id*. at 38) (formatting in original) defines loss as "accidental physical loss or accidental physical damage." (*Id*.)

[12] Regarding the interpretation of this language in the Policy, the trial court concluded:

> The Court finds that when read together and in context, the Policy's requirement of direct physical loss or damage to property is not ambiguous. The Court points out that IRT must demonstrate that its insured property underwent some type of direct and physical loss or damage. Here IRT has asserted that it lost the use of its theatre for its intended purpose. The inquiry is whether this loss of use is a direct physical loss to property. The Court finds that it is not. IRT's loss of use does not have any physical impact on its property. No evidence exists that the theatre was physically different on March 23, 2020 when IRT announced "the IRT is closed due to the State of Indiana's COVID-19 orders." To properly construe the Policy, the court

> must give effect to the physical requirement, which is also consistent with the law of Indiana and other jurisdictions that have dealt with the issue. If loss of use alone qualified as direct physical loss to the property, then the term "physical" would have no meaning. The Court cannot interpret the Policy in a way that nullifies one of its terms. The Court finds that the Policy requires physical alteration to the premises to trigger the business income coverage.
>
> Other provisions of the Policy also support the conclusion that there is no business income coverage without structural alteration to property. The business income coverage applies to the "period of restoration." The "period of restoration" begins with the date of loss and ends on the date when "the property at the 'premises' should be repaired, rebuilt or replaced" or "business is resumed at a new permanent location." The Court notes that there is nothing to "repair," "rebuild" or "replace" if the premises have not been damaged. The Court further notes that COVID-19 has not physically harmed or changed the theatre. IRT has produced no evidence that the virus was ever present at its theatre. In addition, the evidence shows that IRT undertook projects at the theatre during the pandemic, demonstrating that the treater was not uninhabitable. This evidence defeats any conclusion that the loss of use IRT experienced had a physical impact on the theatre premises or that the theatre was completely unusable. Because there is nothing to repair, replace or rebuild; there has been no direct physical loss.

(Appellant's App. Vol. II at 54-55) (citations to the record omitted).

[13] IRT contends the Policy language is ambiguous because "physical loss or physical damage" is subject to different interpretations not only by a reasonable policyholder, but also by courts. IRT asserts the Policy language "accidental physical loss or accidental physical damage" encompasses the alleged presence

of COVID-19 on its premises and thus the trial court erred in granting summary judgment.

[14] IRT first points to the dictionary definitions of "loss" and "damage" and notes those definitions do not require an observable change in the condition of the property. "Loss" is defined as "the act or fact of losing : failure to keep possession : deprivation." *Webster's Third Int'l Dictionary* 1338 (Unabridged ed. 1966) (definition in the context of property). "Damage" is "loss due to injury : injury or harm to person, property, or reputation : hurt, harm." *Id*. at 571 (formatting in original). Based on those definitions, IRT contends that a claimant, such as IRT, could have "physical loss or physical damage" without the premises being "altered or impacted" as "IRT could not physically use the theatre to host live performances because doing so would expose patrons to a lethal disease." (Br. of Appellant at 41, 45) (emphasis in original).

[15] In support of its argument, IRT cites a number of pre-pandemic cases outside our jurisdiction that IRT claims demonstrate "standard-form 'physical loss' language **included** property that is unusable or unsafe for its intended purpose, even without tangible alteration or structural damage." (*Id*. at 26-7) (emphasis in original). However, these cases are readily distinguishable[8] because they involve policies that included language providing protection from "risk of" loss.

[8] IRT also directs us to a trial court's conclusion in *Cook v. Allstate Ins. Co*., 2007 Ind. Super. LEXIS 32 (2007). It should be noted "a conclusion of law by a circuit court in a case from which no appeal has been taken is not binding precedent upon this court." *Ind. Dept. of Nat. Res. v. United Minerals, Inc.*, 686 N.E.2d 851, 857 (Ind. Ct. App. 1997), *trans. denied*.

See, *e.g.*, *Hampton Foods Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349 (8th Cir. 1986) (Court held "imminent danger of collapse" of grocery store, evidenced by the plaster falling from the ceiling and the owner of the building telling grocery store patrons and employees to vacate, was "loss or damage . . . resulting from all risks of direct physical loss" as covered by the claimants' insurance policy.); *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799 (N.H. 2015) (Court reversed summary judgment on behalf of insurance company and concluded "'physical loss' need not be read to include only tangible changes to the property that can be seen or touched, but can also encompass changes that are perceived by the sense of smell" in a case for reimbursement of losses caused by cat urine odor. The policy language stated: "We insure against risk of direct loss to property described in Coverage A, only if that loss is a physical loss to the property."); *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Col. 1968) (Court held "direct physical loss" had occurred when, because of "accumulation of gasoline around and under the church building, the premises became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous"; the relevant policy language stated: "This policy is extended to insure against all other risks of direct physical loss[.]") (formatting omitted). Again, all of these cases[9] are inapposite because the policy language

[9] *Also see Widder v. La. Citizens Prop. Ins. Co.*, 82 So.3d 294 (La. Ct. App. 2011) (Court held contamination of house with inorganic lead making it unhabitable was covered by policy language stating, "[w]e insure against risk of direct physical loss to property."); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266 (Wash. Ct. App. 2002) (under policy with language covering "all risks of physical loss," odors from a methamphetamine lab were "physical loss" in Graff's claim under his insurance policy for vandalism), *rev. denied*; *Gen. Mills, Inc. v. Gold Medal Ins.*

in these cases differs dramatically from the language before us, specifically the absence of the words "risk of" in the insurance contract between IRT and Cincinnati Casualty.

[16] We find *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 A.D.2d 1 (N.Y. App. Div. 2002), instructive. In that case, Roundabout, a theater company, had to cancel all its performances for a month due to a street closure resulting from a nearby construction accident. *Id.* at *3. The court held Roundabout's damages did not stem from "direct physical loss or damage" to its property, but instead stemmed from damage at the nearby construction site, *id.* at *6-*7, and the loss of use of the theatre was not covered under the policy language requiring "direct physical loss or damage." Like here, Roundabout's building did not suffer any damage or alteration. Rather, the building was unusable for its intended purpose because of an outside factor. The COVID-19 pandemic in the instant case is like the construction accident in *Roundabout*.

[17] Specific to coverage involving COVID-19, the court in *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141 (8th Cir. 2021), held that Oral Surgeons' suspension of non-emergency procedures due to COVID-19 were not covered

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Co., 622 N.W.2d 147 (Minn. Ct. App. 2001) (inability to sell product was covered under policy stating coverage for "'All Risks' of direct physical loss or damage to property insured and described herein"), *rev. denied*; *Bd. of Educ. v. Int'l Ins. Co.*, 720 N.E.2d 622 (Ill. Ct. App. 1999) (Court held presence of friable asbestos in a school was evidence of "physical loss or damage." The policy language provided for coverage for "all risks of physical loss or damage"[.]); *Cent. Cold Storage, Inc. v. Lexington Ins. Co.*, 452 So.2d 1014 (Fla. Ct. App. 1984) (damage stemming from ammonia leak covered under policy language stating coverage for "all risks of direct physical loss or damage to the insured property from any external cause"), *reh'g denied*.

as "accidental physical loss or accidental physical damage" in its insurance contract with Cincinnati Casualty. *Id*. at 1145. The court held:

> The policy here clearly requires direct "physical loss" or "physical damage" to trigger business interruption and extra expense coverage. Accordingly, there must be some physicality to the loss or damage of property - e.g., a physical alteration, physical contamination, or physical destruction.

Id. at 1144.

[18] Finally, IRT's interpretation of "physical loss or physical damage" is unreasonable because it parses and dichotomizes the Policy language. IRT's interpretation of the Policy does not take into account the Policy as a whole, as it does not rectify its interpretation of "physical loss or physical damage" with the "period of restoration" provision of the Policy, which outlines the time when coverage begins and ends based on when the covered premises is "repaired, rebuilt or replaced" or the "business is resumed at a new permanent location." (Appellant's App. Vol. II at 34.) Without physical alteration or impact to IRT's premises, there can be no period of restoration, and thus IRT's interpretation of "physical loss or physical damage" does not take into account the language of the Policy as a whole.[10]

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[10] Additionally, Couch's treatise on Insurance Law states:

> The requirement that the loss be "physical," given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby to preclude any claim against the property insurer when the insured merely suffers a

[19] IRT is not alone in its plight. Millions of small business owners suffered losses due to the COVID-19 pandemic, and the ensuing worldwide financial crisis is dire. At the same time, we cannot ignore well-established principles of insurance contract interpretation and add provisions in the Policy that do not exist. IRT did not suffer physical loss or physical damage under the language of the Policy because the premises covered, that is the theater building located at 140 W. Washington Street in Indianapolis, was not destroyed or altered in a physical way that would require restoration or relocation. Based thereon, the trial court did not err when it granted summary judgment in favor of Cincinnati Casualty because the plain language of the Policy between the parties did not cover IRT's claim.

Conclusion

[20] IRT's claim for loss of use of its theatre due to the COVID-19 pandemic was not physical loss or physical damage as defined by the terms of its insurance Policy with Cincinnati Casualty. Therefore, the trial court did not err when it granted summary judgment in favor of Cincinnati Casualty. Accordingly, we affirm the decision of the trial court.

> detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.

10A Couch on Ins., § 148:46. The Couch treatise has been accepted as instructive for over fifteen years in Indiana. *See*, *e.g.*, *Dunn v. Meridian Mut. Ins. Co.*, 836 N.E.2d 249, 252 (Ind. 2005) (citing Couch on Insurance).

[21] Affirmed.

Riley, J., and Weissmann, J., concur.