MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

Kevin L. Moyer
Moyer Law Firm, P.C.
Indianapolis, Indiana.

ATTORNEYS FOR APPELLEE

Stephen C. Wheeler
Cassie R. S. Stockert
Fisher Maas Howard Lloyd & Wheeler, P.C.
Carmel, Indiana.

IN THE COURT OF APPEALS OF INDIANA

Metropolitan Property and Casualty Insurance Company d/b/a Farmers Property and Casualty Insurance Company, Phillip Ellis, and Kathy Ellis,

Appellants-Plaintiffs,

v.

West Bend Mutual Insurance Company,

Appellee-Defendant.

March 13, 2023

Court of Appeals Case No. 22A-CT-2128

Appeal from the Hendricks Superior Court

The Honorable Mark A. Smith, Judge

Trial Court Cause No. 32D04-2109-CT-120

Memorandum Decision by Judge Foley
Judges Robb and Mathias concur.

Foley, Judge.

[1] Philip and Kathy Ellis ("the Ellises") held an insurance policy with Metropolitan Property and Casualty Insurance Company d/b/a Farmers Property and Casualty Insurance Company ("Farmers").[1] Their condominium association held an insurance policy with West Bend Mutual Insurance Company ("West Bend"). Farmers made a payment for damage to the Ellises' condominium after it sustained water damage. Farmers then sought a judgment declaring that West Bend provide primary coverage for the damage. The trial court did not make that declaration, and instead granted summary judgment to West Bend. The parties contest two issues: (1) whether the water damage is covered by the West Bend policy; and (2) if so, whether that coverage is primary. We find the second issue to be dispositive, and therefore do not reach the first. Farmers failed to demonstrate that any coverage that may exist is primary. Thus, we affirm.

Facts and Procedural History

[2] In March 2021, Philip and Kathy Ellis resided in a condominium in Avon. The condominium "was substantially damaged by water."[2] Appellee's App. Vol. II p. 3. The property damage amounted to $31,586.55. At the time, the Ellises held an insurance policy with Farmers, who paid $25,108.00 on their behalf.

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[1] We use the term "Farmers" to connote all of the Appellants where appropriate.

[2] Curiously, nothing in the record provides any further detail about the nature of the water damage.

The condominium was a part of the Oxford Park Condominium Association, Inc. which, itself, held an insurance policy with West Bend ("West Bend policy"). On September 15, 2021, Farmers filed a "Complaint for Declaratory Judgment and Petition for Further Relief[,]" naming West Bend as the defendant. *Id*. at 2. Farmers sought a declaration that the West Bend policy "provides primary coverage for the damaged property . . . resulting from the March 30, 2021 water loss." *Id*. at 4.

[3] West Bend filed an answer asserting that the Ellises had waived any subrogation rights pursuant to the terms of the Oxford Park Condominium Declaration ("Declaration")[3] and that, at any rate, the West Bend policy did not cover the loss. In support of its subrogation defense, West Bend cited the following language from the Declaration:

> **Section 6. Unit Owners' Insurance.** Any Unit Owner or Occupant may carry such insurance in addition to that provided by the Association pursuant hereto as the Unit Owner or Occupant may determine, subject to the provisions hereof, and provided that no Unit Owner of [sic] Occupant may at any time purchase individual policies of insurance against loss by fire or other casualty-covered by the insurance carried pursuant hereto by the Association. In the event any Unit Owner or Occupant violates this provision, any diminution in insurance proceeds resulting from the existence of such other insurance shall be chargeable to the Unit Owner who acquired or whose Occupant acquired such other insurance, who shall be liable to the

[3] The Ellis condominium is subject to the Declaration and by virtue of their ownership of the condominium, the Ellises are members of the Oxford Park Condominium Association, Inc.

> Association to the extent of any diminution and/or loss of proceeds. Without limiting the foregoing, a Unit Owner or Occupant may obtain insurance against liability for events occurring within a Unit, losses with respect to personal property and furnishings, and losses to improvements owned by the Unit Owner or Occupant, provided that if the Association obtains insurance for permanent improvements and build-in fixtures and equipment, then the insurance obtained by the Unit Owner with respect to improvements within the Unit shall be limited to the type and nature of coverage commonly referred to as "tenants' improvements and betterment". All such insurance separately carried shall contain a waiver of subrogation rights by the carrier as to the Association, its officers and trustees, and all other Unit Owners and Occupants. Unit Owners shall be responsible for the deductible of any insurance policy, prorated among the Unit Owners in proportion to their loss.

Id. at 60–61; *see also* Farmers' App. Vol. II p. 53.

[4] After discovery, the parties filed cross-motions for summary judgment pursuant to Indiana Trial Rule 56. The trial court held a hearing on the motions on August 19, 2022.[4] Four days later, the trial court issued an order denying Farmers' motion for summary judgment and granting summary judgment to West Bend.[5] This appeal followed.

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[4] The transcript of this hearing was not requested in the notice of appeal.

[5] We do not address any issues associated with potential subrogation, and neither did the trial court. As we read the trial court's order, it resolved the cross-motions on the narrow ground that Farmers did not demonstrate that the coverage offered by the West Bend policy was primary. Given that Farmers sought a declaration that the West Bend policy provided *primary* coverage, the issue of primacy was dispositive. The trial court did not conclude that there was no coverage, it simply did not reach the issue. And neither did the trial court address questions of subrogation, given that those questions only arose in the context of West Bend's affirmative defenses.

Discussion and Decision

[5] Farmers contends that the trial court erred in granting summary judgment to West Bend, and in denying summary judgment to Farmers. "'When this Court reviews a grant or denial of a motion for summary judgment, we stand in the shoes of the trial court.'" *Minser v. DeKalb Cnty. Plan Comm'n*, 170 N.E.3d 1093, 1098 (Ind. Ct. App. 2021) (quoting *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020)). "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.'" *Id*. (quoting *Murray v. Indianapolis Pub. Schs.*, 128 N.E.3d 450, 452 (Ind. 2019)); *see also* Ind. Trial Rule 56(C).

[6] The summary judgment movant invokes 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 shifts to the non-moving party which must then show the existence of a genuine issue of material fact. *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*.

[7] 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, Ind. Dep't of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018), *cert. denied*.

[8] 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. 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*).

[9] "'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)).

[10] > The text is the lodestar of a written contract, and we will not construe unambiguous provisions. *See Winterton, LLC v. Winterton Invs., 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 Mil. 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).

[11] 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*.

[12] Farmers sought a declaration that the West Bend policy provides not just coverage, but *primary* coverage of the Ellis loss. The Declaration does provide that the association will procure an insurance policy providing primary coverage. Being contractually required to obtain that coverage, however, does not mean *that is what the condominium association actually did.*

[13] West Bend correctly points out that it is not bound by the terms of the Declaration. Farmers' argument either asks us to: (1) use a document outside of the West Bend policy (which is to say, the Declaration) in order to interpret an aspect of the West Bend policy that is unambiguous in violation of the parol evidence rule; or (2) find that the Declaration—to which West Bend is not a party—somehow supersedes the West Bend policy and binds West Bend to provide primary coverage. Neither is a tenable result. Our role here is straightforward: examine the West Bend policy to determine whether it is

intended to confer primary coverage, regardless of whether the condominium association was *supposed* to secure a policy that does so. Farmers points to nothing in the West Bend policy, or any other designated evidence, suggesting that it was intended to provide primary coverage.

[14] To the contrary, the West Bend policy appears to explicitly state that it does *not* provide primary coverage:

> H. Other Insurance
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> 1. If there is other insurance covering the same loss or damage, we will pay *only* for the amount of covered loss or *damage in excess of the amount due from that other insurance*, whether you can collect on it or not. But we will not pay more than the applicable Limit of Insurance of Section I – Property.
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> 2. Business Liability Coverage is excess over:
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> a. Any other insurance that insures for direct physical loss or damage; or
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> b. Any other primary[6] insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured.

[6] This is the only reference to primary coverage in the entire West Bend policy.

Farmers' App. Vol. II p. 116 (emphasis added). Though it appears that the condominium association may have failed to fulfill its obligations under the Declaration, we conclude that it is of no moment. The trial court did not err in granting summary judgment to West Bend.

[15] Affirmed.

Robb, J., and Mathias, J., concur.