Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-328

MARCH TERM, 2020

Tatese Birch* v. Vermont Mutual Insurance Company	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit, Civil Division
	}	
	}	DOCKET NO. 192-4-16 Wncv
		Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals from the trial court's order granting defendant-insurer judgment as a matter of law. We affirm.

In January 2015, plaintiff sought coverage for mold in her home under a policy issued by defendant. An endorsement to Section I of the policy contained limited mold coverage. The endorsement specifically stated that it did not insure for loss caused by:

> Constant or repeated seepage or leakage of water or the presence or condensation of humidity, moisture or vapor, over a period of weeks, months or years unless such seepage or leakage of water or the presence or condensation of humidity, moisture or vapor and the resulting damage is unknown to all "insureds" and is hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure.

(Emphasis added.) Under the policy, $10,000 was the most that defendant would pay for:

> (1) The total of all loss payable under Section I – Property Coverages caused by 'fungi' . . . ;
>
> (2) The cost to remove 'fungi' . . . from property covered under Section I – Property Coverages;
>
> (3) The cost to tear out and replace any part of the building or other covered property as needed to gain access to the 'fungi' . . . ; and
>
> (4) The cost of testing of air or property to confirm the absence, presence or level of "fungi" . . . whether performed prior to, during

> or after removal, repair, restoration or replacement. The cost of such testing will be provided only to the extent that there is a reason to believe that there is the presence of "fungi" . . . .

This coverage applied only "when such loss or costs [were] a result of a Peril Insured Against that occurs during the policy period and only if all reasonable means were used to save and preserve the property from further damage at and after the time the Persil Insured Against occurred."

Defendant found no covered cause of loss under the policy and denied plaintiff's claim. Plaintiff then sued defendant. She sought declaratory relief and she also raised claims of breach of contract; bad faith; breach of the covenant of good faith and fair dealing; and violation of the Vermont Consumer Protection Act, 9 V.S.A. §§ 2451-2466c. Plaintiff alleged that "[u]pon information and belief, the mold and water damage [in her home] was located inside the wall of the home and confined there until evidence of its existence appeared on the outer surface of the walls in November and December, 2014."

A two-day jury trial was held in November 2018. At trial, plaintiff moved for judgment as a matter of law on her request for declaratory judgment. Defendant moved for judgment as a matter of law on all claims. The court granted defendant's request. It later clarified the basis of its trial ruling and that clarification is set forth below.

As the court explained, plaintiff alleged that defendant wrongfully denied her claim relating to mold damage in her home. Defendant did not dispute that there was mold in the home but denied the claim after concluding that it fell outside the scope of the policy's limited mold coverage. The policy provided coverage for mold damage if both the related moisture and the mold damage were hidden in the structure of the house and unknown to the insureds. It did not cover visible mold.

Plaintiff alleged that, over time, visible mold became apparent on internal surfaces in her home. She asserted that the mold and water damage had been confined inside the home's walls until evidence of its existence appeared on the outer surface of the walls. The court found that plaintiff presented no evidence to support an inference that the visible surface mold originated anywhere other than where it was obvious and known.

Plaintiff raised five claims in her complaint, but the first two claims—declaratory relief and breach-of-contract—did not provide any detail as to the breach alleged or the loss suffered. In proposed jury instructions that plaintiff submitted pretrial, plaintiff appeared to consolidate her first two claims into one breach-of-contract claim but she did not explain the basis of this claim. In her proposed instructions, she claimed damages for the costs to fix the mold damage, loss of use of her home, and loss of equity in her home at the time she moved out.

The court explained that, in general, an insured has the burden of proving that a claim falls within the terms of an insurance policy. Jacobs v. Loyal Protective Ins. Co., 97 Vt. 516, 522 (1924); accord 17A Couch on Ins. § 254:11 (3d ed.) ("Generally speaking, the insured bears the burden of proving all elements of a prima facie case including the existence of a policy, payment of applicable premiums, compliance with policy conditions, the loss as within policy coverage,

and the insurer's refusal to make payment when required to do so by the terms of the policy."). Thus, plaintiff had the clear burden at trial to show that her claim was covered by the policy, i.e., that the related moisture and the damage caused by mold were hidden in the structure of the house and unknown to her.

The court found that, for most of the trial, there was no evidence of hidden and unknown moisture and related mold damage. It stated that plaintiff eventually withdrew her breach-of-contract claim, which had become a claim based on a breach of the coverage available in the limited mold endorsement. The court found that plaintiff's declaratory-judgment claim had evolved into a claim for coverage for costs due to the loss of use of the home. To the extent that there was no evidence of hidden and unknown moisture and mold damage, plaintiff argued that this was attributable to defendant's failure to look more thoroughly for it.

The court found, with respect to the declaratory-judgment claim, that loss-of-use damages must be predicated on some other covered loss, in this case, hidden and unknown mold damage. It found the evidence insufficient to support any finding of hidden and unknown mold. The court also ruled that defendant was not required under the policy to seek out otherwise hidden and unknown mold just because plaintiff presented evidence of surface mold. It determined that all of plaintiff's claims lacked any reasonable basis in the evidence and thus granted judgment to defendant as a matter of law.[*]

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[*] The evolving nature of plaintiff's claims appears to have created some confusion, none of which requires reversal given that the court addressed all relevant issues. In its ruling at trial, the court explained that in the first count of her complaint, plaintiff requested "a declaration that [defendant] had a duty to cover the loss" she suffered. The court found this to be a fairly generalized statement that involved consideration of the various duties and obligations of defendant and whether defendant breached those obligations. It was not a cause of action, in and of itself, but essentially a generalized summary of a breach-of-contract claim and it did not provide a basis for the kind of declaration that plaintiff sought. Plaintiff then refined this claim during the second day of trial. She argued that she was requesting a declaration that because her witness testified that there was a possibility that mold was present in the casing around a window, this triggered a duty by defendant to undertake testing and remediate if in fact there was mold in the cavity.

The court examined the terms of the policy, including the specification of what defendant would be obligated to pay for, including "the cost of testing of air or property to confirm the absence, presence, or level of fungi . . . , whether performed prior to, during, or after removal, repair, restoration, or replacement." The court rejected plaintiff's assertion that this provision triggered a requirement that defendant undertake further investigation and testing to determine more information about what was or was not present. It found defendant's obligation under the policy was to pay the cost of testing, not to do the testing itself. The only testing referenced in the policy was testing for the presence or absence or level of mold; it imposed no duty on defendant to undertake a complete further investigation of what was behind the walls throughout the house.

The court did not promptly issue a final judgment following its trial ruling. Many months later, in March 2019, plaintiff moved for a new trial and renewed her motion for judgment as a matter of law on her declaratory-judgment claim. The court denied plaintiff's request and clarified its trial ruling as set forth above. The court found that in her post-trial motion, plaintiff primarily objected to the court's ruling on her declaratory-judgment claim. At trial, plaintiff's witness, without having examined the house itself, testified that some black discoloration apparent in one photograph taken by someone else of a part of a windowsill that was previously concealed was "more likely than not mold." The court found this single statement was the exclusive evidence of mold that might indicate a covered claim. Plaintiff argued that the identification by its witness of this one spot obligated defendant to search for hidden mold. The court found that there was no testimony or other evidence of any property damage caused by the one black spot or what moisture might have caused it, and there was no evidence that the isolated black spot somehow was the source of mold in the rest of the house or could possibly have been responsible for the mold exposure that caused plaintiff to move out of the house. The court found that plaintiff's first claim necessarily failed due to a fundamental lack of any evidence that she had to move out of the house due to a covered claim under the limited mold endorsement.

The court reiterated that there was nothing in the insurance policy that required defendant, upon being presented with evidence of visible surface mold, to conduct an invasive investigation into the insides of the walls and ceilings of plaintiff's home to determine if they hid covered mold that might have been the source of the visible mold. The question here was whether plaintiff presented a covered claim and she bore the burden of proof. The court determined that plaintiff failed to present evidence sufficient to support a finding in her favor by the jury. Thus, beyond clarifying its ruling, the court otherwise declined to modify its decision or grant a new trial. This appeal followed.

Plaintiff first argues that the court erred in granting judgment to defendant on her declaratory-relief claim. She asserts that she was not obligated under the policy to perform or pay for testing. She maintains that defendant must do so. Plaintiff further contends that defendant's counsel, in his opening statement, made "judicial admissions that, by law, dispensed with the need for evidence on a number of issues." In essence, plaintiff argues, defendant's counsel admitted that if she could show hidden mold, her claim would be covered. She cites the testimony of her witness about a possible spot of mold where the windowsill used to be and asserts that the evidence was sufficient to send the question to the jury.

The court did consider plaintiff's breach-of-contract claim at trial. It found that plaintiff failed to present sufficient evidence to allow the jury to infer that the source of the leaking or moisture was both hidden and unknown and that the damage was hidden and unknown. The court also noted that, as always required in a breach-of-contract case, plaintiff needed to provide evidence of damages and she had presented no evidence of damage to the property in monetary terms. Plaintiff clearly stated that the only damages she requested were damages for alternative living expenses, but the policy was clear that additional living expenses were payable only if there was a loss covered under the policy. Here, the court found that plaintiff's evidence was insufficient to show a covered loss. Thus, the court granted defendant's motion for judgment as a matter of law as to the breach-of-contract claim.

In determining whether judgment as a matter of law was appropriately granted, we apply the same standard as the trial court. Judgment as a matter of law may be granted if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." V.R.C.P. 50(a)(1). "When applying this standard, we view the evidence in the light most favorable to the nonmoving party and exclude the effect of any modifying evidence." Jones v. Block, 171 Vt. 569, 569 (2000) (mem.). "The motion must be denied if any evidence fairly or reasonably supports a lawful theory of the plaintiff." Id. (quotation omitted). As set forth below, we conclude that judgment as a matter of law was appropriately granted to defendant here.

First, we agree with the trial court that the plain terms of the policy required defendant to pay damages for certain types of losses; it did not impose on defendant an obligation to investigate the origin of the visible mold in plaintiff's home. "An insurance policy is construed according to its terms and the evident intent of the parties as expressed in the policy language." Cincinnati Specialty Underwriters Ins. Co. v. Energy Wise Homes, Inc., 2015 VT 52, ¶ 16, 199 Vt. 104 (quotation omitted). The language of the policy here clearly contemplates that defendant would cover costs incurred by plaintiff in connection with testing for mold and it imposed no burden on defendant to conduct such tests itself. It was not necessary to use the word "reimbursement" to convey this, as plaintiff suggests. No reasonable person would interpret the policy in the way that plaintiff proposes. See Integrated Techs., Inc. v. Crum & Forster Specialty Ins. Co., 2019 VT 53, ¶ 23 ("Our guiding principle requires us to review the language of an insurance contract from the perspective of what a reasonably prudent person applying for insurance would have understood it to mean." (quotation omitted)).

In any event, the trial court found that plaintiff's declaratory-judgment claim had evolved into a claim for loss of use of the home. It found that loss-of-use damages must be predicated on some other covered loss, which in this case was hidden and unknown mold damage. The question is not whether plaintiff presented "any" evidence to suggest hidden mold, as plaintiff posits, but rather whether she presented sufficient evidence that would allow a reasonable jury to find in her favor on this claim. We agree with the trial court that a single statement by a witness who looked at a photograph taken by another person of one black spot in the home did not suffice.

Plaintiff's citation to testimony by an investigator hired by defendant is equally insufficient. Plaintiff cites a statement where the investigator said he was "paraphrasing what the insured told him" about mold "coming through the wall." The investigator testified that he "would have no idea where it's coming from," and could not draw any conclusion from the fact that there was mold on the visible portion of the wall. The fact that there might "generally" be mold on the other side of a wall with visible mold is not equivalent to testimony that, in this case, it was more likely than not to be true. In fact, the investigator specifically said that he could not make such an assertion. That plaintiff and her family suffered breathing difficulties and incurred additional living expenses after moving out does not show that there was hidden mold. We note, moreover, that causation is inherently part of plaintiff's claim. She needed to establish that she suffered a loss from "seepage or leakage of water or the presence or condensation of humidity, moisture or vapor . . . and the resulting damage" was unknown to her and that it was "hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure." She did not present sufficient evidence to establish a prima facie case here.

It is difficult to ascertain the point of plaintiff's judicial-admissions argument, putting aside questions about preservation. Plaintiff had to establish a prima facie case that she suffered damage from mold that was covered by the policy. Any statement by defendant's counsel that plaintiff must show "hidden mold" is consistent with plaintiff's burden. Plaintiff simply failed to make the necessary showing.

Plaintiff also complains that the court treated her breach-of-contract claim as withdrawn but she does not explain why that matters or how this claim differed from her request for declaratory relief. She does not explain how she established a prima facie case for breach of contract or why the trial court's assessment of her breach-of-contract claim during the trial was in error. We consider any error in this regard to be harmless. We have reviewed all of plaintiff's discernable arguments and find them all without merit.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice