

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 1, 2018**

Sheila T. Reiff  
Clerk of Court of Appeals

**NOTICE**

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**Appeal No. 2017AP545**

**Cir. Ct. No. 2015CV2367**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**MICHAEL FOLEY AND RHONDA SUE FOLEY,**

**PLAINTIFFS-APPELLANTS,**

**v.**

**WISCONSIN MUTUAL INSURANCE COMPANY AND HASTINGS MUTUAL  
INSURANCE COMPANY,**

**DEFENDANTS-RESPONDENTS,**

**HARRY "BUDDY" SIMONS, JR., RUSSELL ZINGG AND JOHN ZINGG,**

**DEFENDANTS.**

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APPEAL from an order of the circuit court for Dane County:  
JUAN B. COLAS, Judge. *Affirmed.*

Before Sherman, Kloppenburg and Fitzpatrick, JJ.

¶1 FITZPATRICK, J. Michael and Rhonda Sue Foley hired Harry Simons, Jr. to remodel their house. Foleys allege in this lawsuit that their house was rendered uninhabitable because of Simons' negligence during the remodeling. Foleys sued their own insurer, Wisconsin Mutual Insurance Company, Simons, and Simons' insurer, Hastings Mutual Insurance Company, in the Dane County Circuit Court asserting claims of breach of contract, statutory interest for delay, bad faith, and negligence.

¶2 The circuit court ruled that the Wisconsin Mutual and Hastings Mutual policies do not afford coverage for Foleys' claims. Foleys appeal. We conclude that the plain language in exclusions in both policies preclude coverage for Foleys' claims and affirm.

### **BACKGROUND**

¶3 The following allegations are drawn from Foleys' complaint. Foleys hired Simons to remodel their residence, including the addition of a bathroom.<sup>1</sup> In September 2014, Foleys noticed "black mold spotting on the ceiling below" the second-story bathroom. According to Foleys, the mold grew as a result of leaking water caused by the negligent provision of construction services by Simons. The mold released the chemical trichothecene into the residence. The trichothecene contaminated the entire house, rendering it uninhabitable, and caused health problems for Foleys.

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<sup>1</sup> Foleys also sued Russell Zingg and John Zingg, but they have been dismissed from this lawsuit and are not parties to this appeal.

¶4 Foleys filed a claim with Wisconsin Mutual, the company that issued a farmowner’s insurance policy to Foleys. Wisconsin Mutual denied the claim based on exclusions in its policy.

¶5 Following the denial of coverage, Foleys commenced this lawsuit. Foleys sued Wisconsin Mutual alleging breach of contract, statutory interest for delay, and bad faith. Foleys also sued Simons and Hastings Mutual, which insured Simons against damage claims arising out of negligent acts and omissions from his performance as a contractor, alleging negligence.

¶6 Hastings Mutual sought declaratory relief that it had no duty to defend or indemnify Simons based on the “Fungi or Bacteria Exclusion”<sup>2</sup> and the “Total Pollution Exclusion” in its policy. Wisconsin Mutual sought summary judgment, arguing that the “Pollution” exclusion and the “Virus or Bacteria Exclusion” in its policy precluded coverage. The circuit court granted Hastings Mutual’s request for declaratory relief and Wisconsin Mutual’s motion for summary judgment.

¶7 We will mention other material facts and allegations relevant to particular arguments in the Discussion that follows.

## **DISCUSSION**

¶8 Foleys appeal the circuit court’s grants of declaratory relief to Hastings Mutual and summary judgment to Wisconsin Mutual. We review each in turn.

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<sup>2</sup> We will refer to this as the “Fungi Exclusion.”

## I. Foleys' Claims Against Hastings Mutual.

¶9 Hastings Mutual argues that, because of exclusions in its policy, it has no duty to defend or indemnify Simons against the negligence claim brought by Foleys. We agree and conclude that coverage is precluded based on the plain language of a Hastings Mutual exclusion.

### A. Standard of Review.

¶10 Hastings Mutual's request for declaratory relief presents a question of law and turns upon interpretation of the insurance policy in light of relevant facts. *Olson v. Farrar*, 2012 WI 3, ¶24, 338 Wis. 2d 215, 809 N.W.2d 1 (citing *Estate of Sustache v. American Family Mut. Ins. Co.*, 2008 WI 87, ¶18, 311 Wis. 2d 548, 751 N.W.2d 845); *see also Fontana Builders, Inc. v. Assurance Co. of Am.*, 2016 WI 52, ¶48, 369 Wis. 2d 495, 882 N.W.2d 398. We review these questions about insurance coverage independent of the circuit court's analysis. *Olson*, 332 Wis. 2d 215, ¶24 (citing *Bellile v. American Family Mut. Ins. Co.*, 2004 WI App 72, ¶6, 272 Wis. 2d 324, 679 N.W.2d 827).

### B. Interpretation of Insurance Policies.

¶11 The objective in interpreting an insurance policy is to ascertain the intention of the parties. *Paper Machinery Corp. v. Nelson Foundry Co., Inc.*, 108 Wis. 2d 614, 620, 323 N.W.2d 160 (Ct. App. 1982) (citing *Herwig v. Enerson & Eggen*, 98 Wis. 2d 38, 39, 295 N.W.2d 201 (Ct. App. 1980)). Language in an insurance policy is given its common and ordinary meaning. *Kremers-Urban Co. v. American Employers Ins. Co.*, 119 Wis. 2d 722, 735, 351 N.W.2d 156 (1984). Therefore, insurance policies are interpreted based on "what a reasonable person in the position of the insured would have understood the words to mean" and not

by what the insurer intended. *Id.* Interpretations that render policy language superfluous are to be avoided when a construction exists that gives meaning to the phrase. *Bulen v. West Bend Mut. Ins. Co.*, 125 Wis. 2d 259, 263, 371 N.W.2d 392 (Ct. App. 1985).

### C. Duties to Defend and Indemnify.

¶12 Our analysis of the Hastings Mutual policy concerns whether Hastings Mutual has a duty to defend, and a duty to indemnify, Simons for his allegedly negligent construction work at the Foley residence.<sup>3</sup> Insurance policies, such as the policy Hastings Mutual issued to Simons, are contracts that establish an insurer’s “duty to indemnify the insured against damages or losses, and the duty to defend against claims for damages.” *Water Well Sols. Serv. Grp., Inc. v. Consolidated Ins. Co.*, 2016 WI 54, ¶14, 369 Wis. 2d 607, 881 N.W.2d 285 (quoting *Olson*, 338 Wis. 2d 215, ¶27).

¶13 The “duty to defend” is the insurer’s “responsibility to defend the insured from all actions brought against the insured based on alleged facts or circumstances falling within the purview of coverage under the policy, regardless of the suit’s validity or invalidity.” *Marks v. Houston Cas. Co.*, 2016 WI 53, ¶37, 69 Wis. 2d 547, 881 N.W.2d 309 (citing 14 Steven Plitt et al., *Couch on Insurance* § 200:1 (3d ed. 2015)). The “duty to indemnify” is the insurer’s duty “to pay all covered claims and judgments against [its] insured.” *Id.*, (citing *Couch on Insurance* § 200:3). An insurer’s duty to defend its insured is broader than its duty to indemnify. *Id.*, ¶17. Because we conclude that Hastings Mutual has no

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<sup>3</sup> Simons has not taken a position in this appeal as to whether Hastings Mutual has a duty to defend, or indemnify, him in this context.

duty to defend, we need not address the duty to indemnify. In considering whether there is a duty to defend, we are limited to comparing “the four corners of the underlying complaint to the terms of the entire insurance policy.” *Id.*, ¶15.

¶14 In determining whether an insurer has a duty to defend, courts use a three-step process. *Water Well*, 369 Wis. 2d 607, ¶16. First, we examine the alleged claim to determine whether the policy language makes an initial grant of coverage. *Id.* Second, if there is an initial grant of coverage, we examine whether any of the policy exclusions preclude coverage. *Id.* If any exclusion applies, we next consider whether an exception to the exclusion applies so as to restore coverage. *Id.*

#### *1. Initial Grant of Coverage.*

¶15 As to the first step, the parties agree that the Hastings Mutual policy contains an initial grant of coverage under the “Commercial General Liability Coverage Form,” which covers bodily injury and property damage liability for Simons’ allegedly negligent provision of construction services to Foleys.

#### *2. Policy Exclusions.*

¶16 Second, we examine whether any of the policy exclusions preclude coverage. *Water Well*, 369 Wis. 2d 607, ¶16. Hastings Mutual argues that the Fungi Exclusion in its policy precludes Foleys’ claims. We agree.

¶17 The Fungi Exclusion applies to the “Commercial General Liability Coverage Form,” which, as just noted, provides the initial grant of coverage.

¶18 Our initial focus is on the terms of the Fungi Exclusion:

This insurance does not apply to:

Fungi or Bacteria

a. ‘Bodily injury’ or ‘property damage’ which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any ‘fungi’ or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.

b. Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, ‘fungi’ or bacteria, by any insured or by any other person or entity

...

c. The following definition is added to the Definition Section:

‘Fungi’ means any type or form of fungus, including *mold* or mildew and any mycotoxins, spores, scents *or byproducts produced or released by fungi.*

(Emphasis added.)

¶19 We next consider Foleys’ complaint against Simons and Hastings Mutual. It alleges in relevant part:

- Simons failed to exercise ordinary care in installing and inspecting the bathroom he remodeled, and that failure resulted in a “shower area the condition of which was not watertight and leaked, which condition would foreseeably cause mold to grow.”
- The “proximate result” of water leaking around the shower area was that “mold proliferated,” a species of that mold “in turn released the toxic mycotoxin trichothecene” into the dwelling “contaminating” the house and

affecting members of the Foley family, and rendering the house and its contents permanently uninhabitable and unusable.

- As a “proximate result” of the trichothecene contamination, Foleys incurred medical expenses and sustained permanent damage to their bodies, and Foleys had to abandon their house and “construct a replacement residence on their farm and replace all of its contents.”<sup>4</sup>

¶20 We conclude that, based on the plain language of the Fungi Exclusion and Foleys’ allegations against Simons and Hastings Mutual in their complaint, Hastings Mutual has no duty to defend Simons.

¶21 Hastings Mutual’s exclusion defines “fungi” as “any type or form of fungus” including “mold” and any “byproducts produced or released by fungi.” So, both the mold found in the Foley home and the trichothecene released by that mold come within that definition of “fungi.” Foleys allege that the mold released trichothecene in their residence and the trichothecene caused bodily injury and property damage. The Hastings Mutual policy explicitly excludes coverage for bodily injury or property damage “which would not have occurred, in whole or in part, but for” the mold and the byproduct “released by” the mold, here, the trichothecene. Therefore, Foleys’ claim against the Hastings Mutual policy fails. Any alternative interpretation would render the Fungi Exclusion superfluous. *See*

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<sup>4</sup> In briefing in this court, Foleys state that they “reincorporated” into the negligence claim against Simons and Hastings Mutual all the allegations in their complaint against Wisconsin Mutual. That is a misstatement of the record. In fact, the record shows that Foleys did not “reincorporate” the allegations against Wisconsin Mutual into their claim for relief against Simons, but made only the allegations set forth in the text.



*Bulen*, 125 Wis. 2d at 263. Accordingly, we conclude that Hastings Mutual has no duty to defend Simons against Foleys’ allegations.<sup>5</sup>

¶22 Despite the language of the Fungi Exclusion, Foleys make several arguments that the Hastings Mutual policy affords coverage to Simons. We examine the arguments individually and reject each.

D. There Are No Water Damage Claims.

¶23 In determining whether an insurer has a duty to defend, we are to liberally construe the complaint and assume all reasonable inferences from the allegations of the complaint in favor of coverage. *Water Well*, 369 Wis. 2d 607, ¶15. Foleys contend that, under notice pleading standards, Hastings Mutual had “policy obligations” relating to “water damage claims” alleged in their complaint against Simons and Hastings Mutual. According to Foleys, these “water damage” claims are not related to mold, and are therefore not subject to the Fungi Exclusion. This argument fails based on the language in Foleys’ complaint against Simons and Hastings Mutual.

¶24 The complaint alleges that Simons’ remodeling work caused water leakage, the leakage caused the stachybotrys mold that released the chemical trichothecene, and the trichothecene made Foleys’ residence uninhabitable and caused health problems. The allegations of the complaint against Simons and Hastings Mutual do not allege any bodily injury or property damage that was not

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<sup>5</sup> We need not reach the third step of the analysis because Foleys do not argue that any exceptions restore coverage. Also, because we conclude that the Fungi Exclusion negates coverage, we need not reach the question of whether Hastings Mutual’s Total Pollution Exclusion excludes coverage.

caused by the stachybotrys mold's release of trichothecene. In fact, the complaint never uses the phrase "water damage." We conclude that no reasonable reading of the allegations of the complaint against Simons and Hastings Mutual, no matter how liberal, supports Foleys' assertion that water caused anything other than the mold proliferation and release of trichothecene.

¶25 Foleys make two additional arguments premised on their failed "water damages" claim, which themselves fail. First, Foleys rely on *Kremers Bros., Inc. v. U.S. Fire. Ins. Co.*, 89 Wis. 2d 555, 570, 278 N.W.2d 857 (1979) for the proposition that "[w]here a policy expressly insures against loss caused by one risk but excludes loss caused by another risk, coverage is extended to a loss caused by the insured risk even though the excluded risk is a contributory cause." But, this argument is premised on the notion that water damage not related to mold is alleged in Foleys' complaint against Simons and Hastings Mutual. As we have explained, Foleys have not alleged any such water damage in their complaint against Simons and Hastings Mutual. Moreover, the mold, an excluded risk, is not merely a contributory cause of their bodily harm and property damage. Rather, the mold, and its release of the trichothecene, is the sole cause of their injuries and damages alleged in Foleys' complaint against Simons and Hastings Mutual.

¶26 Second, Foleys turn to WIS. JI—CIVIL 1500, entitled "Cause," for their assertion. To the extent we understand Foleys' cryptic argument, it appears they contend that, because that jury instruction defines "cause" as something that is a "substantial factor in producing the injury," there is a question of fact whether water damage was a "substantial factor" in "causing" the "ultimate contamination loss of the home and the Foleys' health." But, as we have explained, this is not a water damage case against Simons and Hastings Mutual. All Foleys' claims relate

only to the proliferation of stachybotrys mold that released the trichothecene, not to water damage. As a result, Foleys' argument regarding "causation" fails.

E. There Are No Other Coverages.

¶27 Next, Foleys assert that the Fungi Exclusion applies only to the "Commercial General Liability Coverage" part, and not to two other types of potential coverage, in the Hastings Mutual policy. Specifically, Foleys contend that the Fungi Exclusion does not apply to the "Products/Completed Operations Liability Part" and the "Builders Risk and Installation Floater" section, and those sections of the policy allow coverage for Foleys' bodily injury and property damage claims. These arguments also fail.

¶28 As already discussed, the Fungi Exclusion applies to the "Commercial General Liability Coverage" part of the Hastings Mutual policy. In making their argument that the Fungi Exclusion does not apply to the "Products/Completed Operations Liability Part," Foleys refuse to recognize that the "Products/Completed Operations Liability Part" is not a separate coverage part of the policy but, rather, a subset of the "Commercial General Liability Coverage." Indeed, there is no separate "Products/Completed Operations Liability" section at all. Rather, the definition of "Products-completed operations hazard" is found in "SECTION V—DEFINITIONS" of the "Commercial General Liability Coverage." So, that is not a separate coverage part but, rather, a subsection of the Commercial General Liability Coverage. That there is a separate policy limit for "Products/Completed Operations" does not create a separate coverage part without further policy provisions supporting that contention, and Foleys refer us to no portion of the policy to support their position. Accordingly, because the Fungi

Exclusion applies to the “Commercial General Liability Coverage,” it necessarily also applies to the “Products/Completed Operations Liability Part.”

¶29 In their reply brief, Foleys argue that the Fungi Exclusion does not preclude coverage because it does not apply to the “Builders Risk and Installation Floater” section of the policy. Hastings Mutual contends that, while Foleys raised this argument in the circuit court, they have abandoned this issue on appeal because they did not address it in their initial brief to this court. We agree. An issue that a party raised in circuit court but fails to argue in its main appellate brief may be treated as abandoned. *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 493, 588 N.W.2d 285 (Ct. App. 1998). We conclude that it would be inequitable to allow this argument to be raised by Foleys because Hastings Mutual did not have a chance to address the issue before us.

#### F. The Fungi Exclusion is Not Ambiguous.

¶30 Finally, Foleys argue that the Fungi Exclusion is inherently ambiguous in its use of the phrase “but for.” We reject this argument and conclude that the language in the exclusion is unambiguous.

¶31 Policy language is ambiguous where terms or phrases in the policy are subject to more than one reasonable interpretation. *Wilson Mut. Ins. Co. v. Falk*, 2014 WI 136, ¶24, 360 Wis. 2d 67, 857 N.W.2d 156 (citing *Hirschhorn v. Auto-Owners Ins. Co.*, 2012 WI 20, ¶23, 338 Wis. 2d 761, 809 N.W.2d 529). “[T]he mere fact that a word has more than one dictionary definition, or that the parties disagree as to its meaning, does not render the word ambiguous if only one meaning comports with an insured’s objectively reasonable understanding.” *Hirschhorn*, 338 Wis. 2d 761, ¶23. “Absent a finding of ambiguity, we will not

apply rules of construction to rewrite an insurance policy to bind an insurer to a risk it did not contemplate and for which it did not receive a premium.” *Id.*, ¶24.

¶32 Foleys rely on *Liristis v. American Family Mut. Ins. Co.*, 204 Ariz. 140, 61 P.3d 22 (Ariz. Ct. App. 2002). In *Liristis*, after a fire was put out by water, parts of the Liristis residence became infested with mold. American Family denied the mold-related claims because of an exclusion in its policy.<sup>6</sup> *Id.*, ¶5. The Arizona Court of Appeals held that the loss to the property was not “caused by” mold. *Id.*, ¶15. Rather, the court distinguished the mold itself from the damage caused by mold. *Id.*, ¶¶15-17. The court found that, if American Family had wanted “to exclude not only losses caused by mold but also mold itself, it could have easily expressed that intention.” *Id.*, ¶15.

¶33 Foleys argue that the same ambiguity found in *Liristis* exists in Hastings Mutual’s policy. Namely, Foleys assert that the “but for” language (quoted in paragraph 18, above) in the Hastings Mutual Fungi Exclusion means that mold and pollution can be a “loss,” a “cause of loss,” or both. So, according to Foleys, the allegedly ambiguous language should be construed in their favor and coverage found. We reject this assertion for several reasons.

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<sup>6</sup> The policy exclusion at issue in *Liristis v. American Family Mut. Ins. Co.*, 204 Ariz. 140, ¶7, 61 P.3d 22 (2002), read:

**We do not cover *loss* to the property ... *resulting directly or indirectly from or caused by* one or more of the following.**

....

c. smog, rust, corrosion, frost, condensation, *mold*, wet or dry rot.

(Emphasis added.)

¶34 First, even if the facts of this case and the policy provisions were on all fours with those in *Liristis*, we are not bound by the holding of the Arizona Court of Appeals, and we need not adopt that court’s analysis.

¶35 Second, the policy exclusion at issue in *Liristis* is easily distinguishable from the Fungi Exclusion we construe because the Hastings Mutual exclusion is broader. While both limit coverage for losses related to mold, their language is significantly different. Specifically, and unlike the American Family exclusion in *Liristis*, the Fungi Exclusion in the Hastings Mutual policy excludes coverage for the “existence of” or “presence of” any “fungi” (mold). The holding of the *Liristis* case was premised on the existence of mold and that American Family did not exclude coverage for the presence of mold as a loss. *Liristis*, 204 Ariz. 140, ¶¶15-17. Here, Hastings Mutual’s exclusion does apply to the mere existence or presence of mold. Consequently, we do not find the analysis from *Liristis* persuasive here.

¶36 Third, contrary to the analysis in *Liristis*, the Foley complaint against Simons and Hastings Mutual does not allege that there was any harm caused simply by the presence of mold in the Foley residence. Foleys contend that the mold’s release of trichothecene caused both property damage and bodily injury. As a result, the analysis in *Liristis* is inapplicable to the facts before us.

¶37 Foleys’ arguments would require us to rewrite the exclusion in a manner that is inconsistent with Wisconsin case law. See *Hirschhorn*, 338 Wis. 2d 761, ¶24. We conclude that the Hastings Mutual policy unambiguously excludes coverage for the claim described in Foleys’ complaint against Simons and Hastings Mutual.

¶38 For those reasons, we conclude that Hastings Mutual does not have the duty to defend Simons against Foleys' claims.

## II. Foleys' Claims Against Wisconsin Mutual.

¶39 Foleys filed a claim against their own insurer, Wisconsin Mutual, pursuant to a farmowner's policy that insured Foleys' home and its contents.<sup>7</sup> Wisconsin Mutual asserts that there is no coverage based on one of the exclusions set forth in its policy entitled "Pollution" (which we will refer to as the "Pollution exclusion"). Foleys contend that there is coverage under the Wisconsin Mutual policy because the Pollution exclusion has been "superseded" by the policy's Virus or Bacteria Exclusion, which does not exclude coverage for the loss claimed by Foleys.

¶40 We conclude that the Pollution exclusion in the Wisconsin Mutual policy precludes coverage for Foleys' claim against Wisconsin Mutual, and that the Pollution exclusion is not superseded by the Virus or Bacteria Exclusion.

### A. Standard of Review and Summary Judgment Methodology.

¶41 The circuit court granted summary judgment to Wisconsin Mutual. Whether summary judgment should be granted is a question of law that is reviewed de novo. *Capitol Indem. Corp. v. Reasbeck*, 166 Wis. 2d 332, 336, 479 N.W.2d 247 (Ct. App. 1991).

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<sup>7</sup> Foleys agree that the Wisconsin Mutual policy affords coverage only for property damage and not bodily injury.

¶42 Summary judgment methodology is well established in Wisconsin. See *Envirologix Corp. v. City of Waukesha*, 192 Wis. 2d 277, 287-88, 531 N.W.2d 357, 362 (Ct. App. 1995). WISCONSIN STAT. § 802.08(2) (2015-16)<sup>8</sup> states, in part, that:

The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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.

¶43 Here, Foleys made a claim against their own insurer, Wisconsin Mutual. While Wisconsin Mutual denied coverage based on the allegations in Foleys' claim, whether Wisconsin Mutual is entitled to summary judgment on the issue of coverage requires an examination of all the admissible evidence submitted on summary judgment. *Water Well*, 369 Wis. 2d 607, ¶16 n.11. As argued by both parties, that evidence comprises the Wisconsin Mutual policy and the affidavit of Martine Davis, a "certified building biologist." We view those materials in the light most favorable to the non-moving parties, Foleys. *Affeldt v. Green Lake Cty.*, 2011 WI 56, ¶59, 335 Wis. 2d 104, 803 N.W.2d 56.

¶44 Foleys and Wisconsin Mutual agree on the terms of the Wisconsin Mutual policy issued to Foleys and do not dispute the statements in the Davis affidavit. Accordingly, we conclude there is no genuine issue of material fact and we may decide the insurance coverage issue as a matter of law. See WIS. STAT. § 802.08.

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<sup>8</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.



### B. Procedure for Coverage Issues.

¶45 For context, we summarize again the three-step procedure Wisconsin courts use when analyzing issues of insurance coverage. First, we examine the facts of Foleys' claim to determine whether the Wisconsin Mutual policy makes an initial grant of coverage. *See American Family Mut. Ins. v. American Girl, Inc.*, 2004 WI 2, ¶24, 268 Wis. 2d 16, 673 N.W.2d 65. If the claim triggers an initial grant of coverage, we next examine applicable exclusions in the policy to determine if any of those preclude coverage of the claim. *See id.* If an exclusion applies, we then consider whether there is an exception to the exclusion which reinstates coverage. *See id.*

¶46 Here, Wisconsin Mutual does not dispute that there was an initial grant of coverage for Foleys' claim under the Wisconsin Mutual policy.

### C. Only One Loss.

¶47 Before we examine the applicable exclusions, we first address the parties' arguments as to the nature of the loss in Foleys' claim against Wisconsin Mutual. Wisconsin Mutual contends that there is only one loss arising out of the mold growth and the subsequent release of trichothecene. Foleys contend that there were three separate losses within their claim against their Wisconsin Mutual policy: (1) water damage separate from the mold infestation; (2) damage to their residence and its contents from the trichothecene contamination separate from the mold infestation; and (3) damage caused by mold separate from the trichothecene contamination. We conclude that there is no genuine issue of material fact that Foleys' only property damage loss in their claim against Wisconsin Mutual was from trichothecene contamination released by the stachybotrys mold.

¶48 First, Foleys assert that there was “water damage” separate from the mold infestation, but there is no admissible evidence in the record to support Foleys’ contention. Foleys rely on the Davis affidavit, which states in pertinent part:

- Testing showed that the mold in the Foley house was stachybotrys, a black mold.
- The stachybotrys mold infestation “induce[d] an ensuing separate trichothecene contamination” of Foleys’ residence and Foleys.
- Trichothecene in sufficient concentrations is toxic to humans who come in contact with it.
- Trichothecene is not a virus, a bacteria, or a living organism but, instead, is “an inert chemical compound” which attaches itself to surfaces with which it comes into contact.

¶49 Contrary to Foleys’ assertion, there is nothing in that affidavit which allows the conclusion that there was water damage in the Foley residence separate from the mold infestation. Indeed, the Davis affidavit does not contain the word “water” or the phrase “water damage.”

¶50 Second, Foleys assert that there was property damage from the trichothecene contamination of the residence and its contents, separate from the mold infestation. The Davis affidavit does not support that contention. The Davis affidavit makes clear that the stachybotrys mold released the trichothecene. The trichothecene contamination was not an independent, unrelated and consecutive event from the stachybotrys mold infestation. The stachybotrys mold infestation was the cause of the trichothecene contamination of the Foley residence. In other

words, without the stachybotrys mold infestation, there would have been no trichothecene contamination and no property damage to the Foley residence and its contents. So, the trichothecene contamination was not a loss separate from the mold infestation.

¶51 Third, Foleys assert that there was property damage from the mold separate from the release of trichothecene. This contention also fails based on the Davis affidavit, which states in pertinent part:

Stachybotrys is a black mold which ... is unsightly and *if left unremediated long enough*, will structurally weaken materials on which it has grown such as wood, drywall, plaster, etc.

(Emphasis added.) The Davis affidavit speaks only in terms of potential structural weakening if the mold is “left unremediated long enough.” Foleys have placed no admissible evidence in the record to show that the stachybotrys mold was unremediated for a sufficient length of time that the mold actually caused a weakening of any materials in the Foley home. The Davis affidavit does not support Foleys’ contention that there was property damage caused by the mold through the weakening of structural materials in the Foley residence.

¶52 For these reasons, we conclude that, as it concerns the Wisconsin Mutual policy, there was only one loss at the Foley residence; that is, the property damage that resulted from the release of trichothecene by the stachybotrys mold.

#### E. Pollution Exclusion Applies.

¶53 We now turn to the question of whether the Pollution exclusion in the Wisconsin Mutual policy excludes coverage for Foleys’ loss. Foleys make no argument regarding the Pollution exclusion except that it is superseded by the

Virus or Bacteria Exclusion. Before we address that argument, we first conclude that there is no genuine issue of material fact that the Pollution exclusion applies.

¶54 Wisconsin Mutual argues that Foleys' property damage was caused by a release, discharge, or dispersal of a "pollutant;" that is, a chemical in solid, liquid, or gas form that was an irritant or contaminant.

¶55 The Davis affidavit proffered by Foleys confirms that trichothecene is a chemical that is "highly toxic to humans." As a result, that chemical is a "contaminant" within the exclusion's definition of "pollutant."<sup>9</sup> Also, as we previously concluded, the only property damage claim made by Foleys against Wisconsin Mutual was that the stachybotrys mold disbursed, released, or discharged the trichothecene chemical.

¶56 For those reasons, we conclude that there is no genuine issue of material fact that the Wisconsin Mutual Pollution exclusion applies and excludes coverage for Foleys' claim against Wisconsin Mutual.

#### D. Pollution Exclusion Was Not Superseded.

¶57 As stated, Foleys contend that there is no longer a Pollution exclusion in the policy issued by Wisconsin Mutual because the terms of the Pollution exclusion are "superseded" by the Virus or Bacteria Exclusion. Specifically, Foleys argue that paragraph 2 in the Virus or Bacteria Exclusion

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<sup>9</sup> Nothing in the record states explicitly that the trichothecene chemical was, as required by the Pollution exclusion, either a liquid, solid, or gas. Nonetheless, we take judicial notice that trichothecene must be one of those because liquid, solid, and gas are the only states of matter.

supersedes the Pollution exclusion and, in effect, causes the Pollution exclusion to be read out of existence. We reject this argument.

¶58 Paragraph 2 of the Virus or Bacteria Exclusion reads in relevant part:

The Virus or Bacteria exclusion set forth by this endorsement supersedes the ‘terms’ of any other exclusions referring to ‘pollutants’ or to contamination with respect to any loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress.

Foleys read that paragraph to, in effect, end the sentence after the word “pollutants” although no punctuation is placed there in the policy. Foleys assert that all the words after “contamination” refer only to the word “contamination” and not to the word “pollutants.” Under Foleys’ theory, that paragraph, as it concerns the Pollution exclusion, should be read as follows:

The Virus or Bacteria exclusion set forth by this endorsement supersedes the ‘terms’ of any other exclusions referring to ‘pollutants.’

The effect, according to Foleys, is that their reading causes the Pollution exclusion to be “superseded” by the Virus or Bacteria Exclusion.

¶59 Wisconsin Mutual makes several cogent arguments contrary to Foleys’ position. However, we need rely on only one of Wisconsin Mutual’s arguments.

¶60 Wisconsin Mutual cites to paragraph 4 of the Virus or Bacteria Exclusion. It reads:

The ‘terms’ of this endorsement, whether or not applicable to any loss, cost, or expense, cannot be construed to provide coverage for a loss, cost, or expense that would

otherwise be excluded under the policy to which this endorsement is attached.

According to that paragraph, any terms in the Virus or Bacteria Exclusion (regardless of whether the exclusion actually applies to a given loss) cannot be construed to provide coverage for a loss that would have otherwise been excluded under the Wisconsin Mutual policy. In other words, no portion of the Virus or Bacteria Exclusion can provide coverage for a claim by negating terms of another exclusion already in the policy.

¶61 As we have stated, the Pollution exclusion states, in relevant part:

10. **Pollution** – ‘We’ do not pay for loss caused by the release, discharge, or disbursal of ‘pollutants.’

The Wisconsin Mutual policy defines “pollutant” as: “any solid, liquid, gaseous, thermal, or radioactive irritant or contaminant, including acids, alkalis, chemicals, fumes, smoke, soot, vapor, and waste.”

¶62 In this context, the Pollution exclusion negates coverage for the release, discharge, or disbursal of any liquid, solid, or gas that is made of chemicals and is also an irritant or contaminant. But, according to Foleys, that Pollution exclusion has been replaced with a much narrower exclusion that excludes only losses caused by a virus, bacterium, or some type of microorganism and in addition those creatures must cause, or be capable of causing, disease, illness, or physical distress.

¶63 Foleys correctly state that the Virus or Bacteria Exclusion substantially narrows the definition of excluded losses as compared to the Pollution exclusion. But, paragraph 4 of the Virus or Bacteria Exclusion clearly states that the Virus or Bacteria Exclusion cannot displace an exclusion already in

the policy that would exclude claims not covered by the Virus or Bacteria Exclusion. As a result, we conclude that Foleys' reading of the Virus or Bacteria Exclusion, and its effect on the Pollution exclusion, fails because it is contrary to the unambiguous terms of the Wisconsin Mutual policy.

¶64 Foleys do not mention paragraph 4 of the Virus or Bacteria Exclusion except to assert, in their reply brief, that paragraph 4 "only compounds the ambiguity." However, Foleys neither explain that assertion nor offer any discernable argument that the plain language of paragraph 4 of the Virus or Bacteria Exclusion does not control our analysis of whether the Virus or Bacteria Exclusion supersedes the Pollution exclusion.

¶65 For those reasons, we conclude that the Pollution exclusion in the Wisconsin Mutual policy is not superseded by the terms of the policy's Virus or Bacteria Exclusion.<sup>10</sup>

## CONCLUSION

¶66 We affirm the circuit court's grant of summary judgment to Wisconsin Mutual and the circuit court's grant of declaratory judgment to Hastings Mutual. Foleys' negligence claim against Simons survives as do any third-party claims brought by Simons. Accordingly, we remand this matter to the circuit court for further proceedings consistent with this opinion.

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<sup>10</sup> Foleys also appear to contend that there is coverage because of a sentence following the Pollution exclusion (and other exclusions): "We' pay for an ensuing loss that results from any of the above, unless the ensuing loss itself is excluded." However, for Foleys' argument regarding that sentence to hold water, it is necessary that the Pollution exclusion be superseded by the Virus or Bacteria Exclusion. Because we conclude that the Pollution exclusion has not been superseded, Foleys' "ensuing loss" argument fails.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.



