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IN THE COURT OF APPEALS OF INDIANA

Indiana Farmers Mutual Insurance Company,

Appellant,

v.

HomeWorks Management Corporation; HomeWorks Funding Group II LLC; HomeWorks Construction Inc.; HomeWorks Holdings LLC; HomeWorks Realty LLC; HomeWorks Management and Remodeling LLC; HomeWorks Investments, Inc.; Selena Wiley; Joevonne Hiles, Sr.; Child Doe A; Child Doe B; Jeff Muzik; Ken Mensik; Joe Colvin, Jodi Pearce;

December 21, 2022

Court of Appeals Case No. 22A-PL-1232

Appeal from the St. Joseph Circuit Court

The Honorable John E. Broden, Judge

Trial Court Cause No. 71C01-2101-PL-19

Becky Medich; Mitchell Hooton; and Ron McCall,

Appellees.

Brown, Judge.

[1] Indiana Farmers Mutual Insurance Company ("Indiana Farmers") appeals the trial court's entry of summary judgment in favor of HomeWorks Management Corporation and HomeWorks Funding Group II LLC. We reverse.

Facts and Procedural History

[2] Indiana Farmers issued separate insurance policies (collectively, the "Policy") to HomeWorks Management Corporation. Each commercial general liability coverage form contained identical language with respect to bodily injury and property damage liability. The Policy includes an exclusion (the "Lead Exclusion") which states:

> THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
>
> **ASBESTOS & LEAD EXCLUSION**
>
> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE FORM

This insurance does not apply to:

ASBESTOS, LEAD

a. Actual or alleged, threatened or suspected "bodily injury", "property damage", "personal and advertising injury" or medical payments arising out of "asbestos" or "lead".

Such claims may include but are not limited to those arising out of or resulting, in whole or in part, from:

1. Inhalation, ingestion, or prolonged physical exposure;
2. The failure to warn, improperly supervise or instruct or recommend any action or inaction on the part of another;
3. Use of in constructing, manufacturing or servicing any good, product or structure;
4. Any personal protective equipment, product or device designed and/or used to protect individuals or organizations from exposure;
5. Removal or abatement and repair or replacement from any good, product or structure; or
6. Manufacture, sale, resale, distribution, installation, rebranding, handling, transportation, storage or disposal;

b. Any loss, cost or expense arising out of any request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify, neutralize, abate or in any way respond to or assess the effects of "asbestos" or "lead".

c. Any loss, cost or expense arising out of any claim of "suit" by or on behalf of any governmental authority for damages resulting from testing for, monitoring, cleaning up, removing, disposing of, remediating, abating, containing, treating, detoxifying, neutralizing, or in any way responding to or assessing the effects of "asbestos" or "lead".

d. The following definitions are added to **SECTION V – DEFINITIONS:**

* * * * *

2. "lead" means lead or compounds or products containing lead in any form or a mixture or combination of lead and other dust or particles.

Appellant's Appendix Volume II at 90-91.

[3] On December 31, 2020, Selena Wiley and Joevonne Hiles, Sr., individually, and as the parents of Child Doe A and Child Doe B, filed a third amended complaint in the St. Joseph Circuit Court under cause number 71C01-2011-CT-404 ("Cause No. 404") against HomeWorks Management Corporation, HomeWorks Funding Group II LLC, HomeWorks Funding Group LLC, HomeWorks Construction Inc., HomeWorks Holding LLC, HomeWorks Realty LLC, HomeWorks Management and Remodeling, LLC, HomeWorks Investments, Inc., Jeff Muzik, Ken Mensik, Joe Colvin, Jodi Pearce, Becky Medich, Mitchell Hooton, and Ron McCall. They alleged that they rented a property from HomeWorks; a HomeWorks worker scraped paint on and around windows in August 2018 but failed to clean up any paint particles, debris, and dust scattered across the floor; HomeWorks hired Ron McCall to perform painting work at the property; Wiley and Child Doe A unknowingly breathed dangerous lead dust for months; and Child Doe A suffered lead poisoning. They asserted that HomeWorks failed to warn them that its properties contained lead-based paint, failed to take appropriate remedial measures, attempted to intimidate them to deflect responsibility, and failed its lead clearance assessments. The complaint alleged: Count I, negligent/willful

or wanton conduct by HomeWorks; Count II, violation of Indiana landlord-tenant statutes; Count III, negligent/willful or wanton conduct by McCall who performed repair and painting work; Count IV, increased medical care and expenses claim; and Count V, loss of society, companionship, and services.

[4] On January 21, 2021, Indiana Farmers filed a complaint under cause number 71C01-2101-PL-19 ("Cause No. 19") against HomeWorks Management Corporation, HomeWorks Funding Group II LLC, HomeWorks Funding Group LLC, HomeWorks Construction Inc., HomeWorks Holdings LLC, HomeWorks Realty LLC, HomeWorks Management and Remodeling, LLC, HomeWorks Investments, Inc., Wiley, Hiles, Child Doe A, Child Doe B, Muzik, Mensik, Colvin, Pearce, Medich, Hooton, and McCall. Indiana Farmers sought declaratory relief and a determination that it had no duty to defend or indemnify under the Policy with respect to the plaintiffs' claims under Cause No. 404.

[5] On August 19, 2021, Indiana Farmers filed a motion for summary judgment under Cause No. 19. It argued that all of the allegations from the lawsuit under Cause No. 404 arose from exposure to lead paint, the clear and unambiguous language of the Policy excluded coverage for any claims resulting from exposure to lead in any form, and it owed no duty to defend any insured for the claims asserted in the third amended complaint. On September 15, 2021, HomeWorks Management Corporation and HomeWorks Funding Group II LLC filed a cross-motion for summary judgment alleging that the Lead Exclusion was ambiguous and unenforceable.

[6] On February 16, 2022, the court denied Indiana Farmers' motion for summary judgment, granted the cross-motion for summary judgment filed by HomeWorks Management Corporation and HomeWorks Funding Group II LLC and found Indiana Farmers was obligated to insure and indemnify the defendants. The court found:

> In the Definitions section of the contract or contracts at issue "lead" is defined as follows: "'lead' means lead or compounds or products containing lead in any form or a mixture or combination of lead and other dust or particles." The Court concurs with Defendants that this language regarding lead is so broad, so vague, and so all encompassing that it renders the contract language unenforceable. Defendants point to the myriad of things only tangentially related to lead that would lead to the exclusion of coverage under the relevant contracts before the court. Similar to so-called "pollution" exclusion cases, Indiana courts have held that where the terms of exclusion are vague, the Court should refuse to apply the exclusion on grounds of ambiguity. *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948 (Ind. 1996)[, *reh'g denied*]. The Court of Appeals found that such a vague and broad exclusion "cannot be read literally as it would negate virtually all coverage." Such similar pollution exclusions have been consistently construed against insurance companies. *State Auto. Mut. Ins. Co. v. Flexdar*, 964 N.E.2d 845, 850 (Ind. 2012)[, *reh'g denied*]. It has been long held that it is incumbent upon the insurance company to specify what falls within the exclusion and the insurer's failure to do so renders its policy ambiguous and the policy should therefore be construed in favor of coverage. *Flexdar*, at 851. At the January 20 hearing, both Plaintiff's and Defendants' counsel argued over the application of the *Cont'l Ins. Co.* case to the present case and the Court concurs with Defendants that the lead exclusion in this matter is much more akin to Exclusion K than the "respirable dust" definition at issue in [] *Cont'l Ins. Co. v. George J. Beemsterboer, Inc.*, 148 F.

> Supp[.] 3d 770, 778-790 (N.D. 2015). In *Cont'l Ins. Co.*, the court found the language in Exclusion K to be ambiguous because of the breadth of the claims which could have been excluded by the insurer under the provision. So too it is here with the lead exclusion language in the IFM insurance contracts before this Court, the exclusion is unenforceable because of its vagueness, ambiguity, and resultant breadth of exclusions.

Appellant's Appendix Volume II at 16-17.

[7] On March 18, 2022, Indiana Farmers filed a motion to correct error. Pursuant to Ind. Trial Rule 53.3, the motion was deemed denied.

Discussion

[8] The issue is whether the trial court erred in denying Indiana Farmers' motion for summary judgment and granting the motion for summary judgment filed by HomeWorks Management Corporation and HomeWorks Funding Group II LLC. Indiana Farmers argues that the Lead Exclusion is straightforward and applies on the face of the underlying complaint in Cause No. 404. It contends the Lead Exclusion "is not vague as to the risks excluded, unlike the non-specific 'pollutants' which are the subject of the pollution exclusion." Appellant's Brief at 15.

[9] HomeWorks Management Corporation and HomeWorks Funding Group II LLC (the "Appellees") argue that there is no case law on the enforceability of a lead exclusion in Indiana and an examination of Indiana courts' interpretation of pollution exclusions is instructive. They assert that "because [Indiana Farmers] chose to define 'lead' as anything that has lead in it, without any

specificity, the exclusion is ambiguous and unenforceable." Appellees' Brief at 17. They emphasize the language in the Lead Exclusion that "[s]uch claims may ***include but are not limited to*** (emphasis added) those arising out of or resulting, in whole or in part, from" certain situations, contend that the Lead Exclusion is expansive, ambiguous, and vague, and assert that Indiana Farmers could have explicitly limited the exclusion to "lead paint" or "respirable lead compounds." *Id.* at 22, 23. They argue that an insurer could exclude coverage for an accidental discharge of a firearm if the bullet contains lead, a hammer containing lead falling on a guest's foot, or the death of an individual caused from smoke inhalation during a fire of a home containing lead. They also assert that the Lead Exclusion is akin to Exclusion K in *Cont'l Ins. Co. v. George J. Beemsterboer, Inc.*, 148 F. Supp. 3d 770 (N.D. 2015).

[10] In reply, Indiana Farmers argues that the Lead Exclusion provides that "the 'bodily injury' must arise out of or result, 'in whole or in part, from' the specific peril of 'lead'" and that a causal connection must exist. Appellant's Reply Brief at 6. It asserts that the hypotheticals relied upon by the Appellees lack any causal connection between the "lead" and the injury. *Id.* It also argues that the non-exhaustive language of "[s]uch claims may include but are not limited to those arising out of or resulting from" certain situations, which is relied upon by the Appellees, "is subject to the same causal 'arising out of' requirement – the 'lead' must in all cases cause the 'bodily injury' for the Lead Exclusion to apply." *Id.* at 7. They assert that the rationale behind *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996), *reh'g denied*, and its progeny is that the

insurer must specify what falls within an exclusion for it to be enforceable and that it "did precisely that." *Id.* at 8.

[11] We review an order for summary judgment *de novo*, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). The moving party bears the initial burden of making a *prima facie* showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Manley v. Sherer*, 992 N.E.2d 670, 673 (Ind. 2013). Summary judgment is improper if the moving party fails to carry its burden, but if it succeeds, then the nonmoving party must come forward with evidence establishing the existence of a genuine issue of material fact. *Id.* We construe all factual inferences in favor of the nonmoving party and resolve all doubts as to the existence of a material issue against the moving party. *Id.* Our review of a summary judgment motion is limited to those materials designated to the trial court. *Mangold ex rel. Mangold v. Ind. Dep't of Natural Res.*, 756 N.E.2d 970, 973 (Ind. 2001). Matters involving disputed insurance policy terms present legal questions and are particularly apt for summary judgment. *Erie Indem. Co. for Subscribers at Erie Ins. Exch. v. Estate of Harris by Harris*, 99 N.E.3d 625, 629 (Ind. 2018), *reh'g denied*.

[12] "Insurance companies are free to limit their liability in a manner not inconsistent with public policy as reflected by case or statutory law." *Allstate Ins. Co. v. Boles*, 481 N.E.2d 1096, 1098 (Ind. 1985). "If a plainly expressed exception, exclusion or limitation in an insurance policy is not contrary to public policy, it is entitled to construction and enforcement as expressed." *Id.*

[13] "Insurance policies are contracts 'subject to the same rules of judicial construction as other contracts.'" *Erie Indem. Co. for Subscribers at Erie Ins. Exch.*, 99 N.E.3d at 630 (quoting *State Farm Mut. Auto. Ins. Co. v. Jakubowicz*, 56 N.E.3d 617, 619 (Ind. 2016)). When confronted with a dispute over the meaning of insurance policy terms, Indiana courts afford clear and unambiguous policy language its plain, ordinary meaning. *Id.* "By contrast, courts may construe—or ascribe meaning to—ambiguous policy terms only." *Id.*

[14] "'[F]ailure to define a term in an insurance policy does not necessarily make it ambiguous' and thus subject to judicial construction." *Id.* (quoting *Wagner v. Yates*, 912 N.E.2d 805, 810 (Ind. 2009)). Further, "failing to define a policy term merely means it has no exclusive special meaning, and the courts can interpret it." *Id.* "[P]arties to an insurance contract may not invite judicial construction by creating ambiguity." *Id.* They may not make a term ambiguous by simply offering different policy interpretations. *Id.* "In other words, ambiguity does not arise from mere disagreement over a policy term's meaning – that is, where 'one party asserts an interpretation contrary to that asserted by the opposing party.'" *Id.* (quoting *Wagner*, 912 N.E.2d at 810). "Rather, insurance policy provisions are ambiguous only if they are 'susceptible to more than one **reasonable** interpretation.'" *Id.* (quoting *Holiday Hosp. Franchising, Inc. v. AMCO Ins. Co.*, 983 N.E.2d 574, 578 (Ind. 2013)) (emphasis added in *Erie*).

[15] "When evaluating alleged ambiguities – whether there exist two reasonable interpretations for one policy term – courts read insurance policies 'from the perspective of . . . ordinary policyholder[s] of average intelligence.'" *Id.* (quoting *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243, 246-247 (Ind. 2005)). "If reasonably intelligent policyholders would honestly disagree on the policy language's meaning, then we will find the term ambiguous and subject to judicial construction." *Id.* "Conversely, if reasonably intelligent policyholders could not legitimately disagree as to what the policy language means, we deem the term unambiguous and apply its plain ordinary meaning." *Id.*

[16] With respect to Appellees' argument that the definition of lead in the Policy is overbroad and an insurer could exclude coverage for instances such as those involving a bullet or hammer containing lead, we note that, while the Policy defined "lead" as "lead or compounds or products containing lead in any form or a mixture or combination of lead and other dust or particles," it also provided that the Policy did not apply to "[a]ctual or alleged, threatened or suspected 'bodily injury', 'property damage', 'personal and advertising injury' or medical payments *arising out of* . . . 'lead'." Appellant's Appendix Volume II at 90-91 (emphasis added). We cannot say that the language in the Policy is overbroad or does not apply to exclude coverage related to the underlying complaint which alleged lead poisoning.

[17] To the extent the trial court relied upon case law regarding general pollution exclusions, we note that the Indiana Supreme Court addressed such an exclusion in *State Auto. Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845 (Ind. 2012),

reh'g denied. In that case, Flexdar, Inc. ("Flexdar") manufactured rubber stamps and printing plates between 1994 or 1995 and 2003, and its manufacturing process used the chlorinated solvent TCE. 964 N.E.2d at 847. Flexdar discovered the presence of TCE in the soil and groundwater both on and off the site, the Indiana Department of Environmental Management informed Flexdar that it would be liable for cleanup costs, and Flexdar contacted State Automobile Mutual Insurance Company ("State Auto") requesting defense and indemnification, as Flexdar "maintained commercial general liability and umbrella insurance policies" through them. *Id.* The insurance policies in *Flexdar* contained pollution exclusion language providing:

> This insurance does not apply to:
>
> . . . .
>
> f. Pollution
>
> > (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
> >
> > > (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured;
>
> . . . .
>
> > (2) Any loss, cost or expense arising out of any:
> >
> > > (a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or

> (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants.
>
> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Id. State Auto filed a declaratory judgment action "contending that coverage for the TCE contamination at issue was excluded pursuant to the pollution exclusion present in the policies," and both Flexdar and State Auto moved for summary judgment on the issue of coverage. *Id.* The trial court granted summary judgment in Flexdar's favor, this Court affirmed, and the Indiana Supreme Court granted transfer and also affirmed the trial court. *Id.* at 848, 852.

[18] The Indiana Supreme Court began its analysis by noting that "[t]he language of the pollution exclusion at issue in this case is no stranger to this Court" and that it has "interpreted this or similar language on no fewer than three occasions, reaching the same result each time." *Id.* at 848. The Court turned to *Am. States Ins. Co. v. Kiger* noting that "State Auto characterizes *Kiger* as limited to its facts—that is, as applying only to a gas station's claim for a gasoline leak under a garage policy." *Id.* at 849. The Court disagreed with such a reading and noted that only two months later, in *Seymour Mfg. Co. v. Commercial Union Ins. Co.*, 665 N.E.2d 891 (Ind. 1996), *reh'g denied,* a case involving a solid waste

disposer, the Court recognized that "*Kiger* found the word 'pollutant' to be ambiguous" and "again construed this language against the insurer and found a duty to defend." *Id.* (citing *Seymour,* 665 N.E.2d at 892). The Court also noted that State Auto's argument that the endorsement language "addresses the concerns . . . expressed in *Kiger* " was flawed because such a provision "takes effect only when the contaminant at issue has first been identified as a pollutant and the pollution exclusion has been determined to apply" and that "[a]s discussed below the exclusion itself is ambiguous and unenforceable, and therefore the endorsement form does not come into play and is thus unavailing." *Id.* at 849 n.2 (citation and quotations omitted).

[19] The Court next turned to *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37 (Ind. 2002), in which "owners of a commercial building claimed coverage after toxic carpet glue fumes released during the installation of new carpet injured employees who worked in the building." *Id.* at 849 (citing *Freidline*, 774 N.E.2d at 39). On appeal, this Court "found the exclusion ambiguous and construed it against the insurer so as not to exclude the claimed coverage" and the Indiana Supreme Court "unanimously 'agree[d] and summarily affirm[ed] the Court of Appeals on this point.'" *Id.* (quoting *Freidline*, 774 N.E.2d at 40). The Court also noted that in *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968 (Ind. 2005), it again recognized its "previous declaration that under Indiana law, the definition of 'pollutants' in such exclusions is ambiguous" and "observed that our courts have 'consistently construed the pollution exclusion against insurance companies.'" *Id.* at 850 (quoting *Magwerks*, 829 N.E.2d at 975).

[20] The Court noted the policy's definition of "pollutants," defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste," and stated that as in *Kiger*, "this clause cannot be read literally as it would negate virtually all coverage" because "practically every substance would qualify as a 'pollutant' under this definition, rendering the exclusion meaningless." *Id.* (quoting *Kiger*, 662 N.E.2d at 948). The Court noted State Auto's argument that Indiana "adopt what it describes as a 'common sense approach' and apply the pollution exclusion in situations where, as here, the release would "ordinarily be characterized as pollution." *Id.* The Court discussed what it described as "two main views when it comes to interpreting these exclusions, namely: a 'literal' approach and a 'situational' approach," identified the problems with each view, and noted:

> Indiana has gone in a different direction. Applying basic contract principles, our decisions have consistently held that the insurer can (and should) specify what falls within its pollution exclusion. In fact, State Auto has over the years promulgated an Indiana "business operations" endorsement, and an Indiana endorsement defining "pollutant." Where an insurer's failure to be more specific renders its policy ambiguous, we construe the policy in favor of coverage. Our cases avoid both the sometimes untenable results produced by the literal approach and the constant judicial substance-by-substance analysis necessitated by the situational approach. In Indiana, whether the TCE contamination in this case would ordinarily be characterized as pollution, is, in our view, beside the point. The question is whether the language in State Auto's policy is sufficiently unambiguous to identify TCE as a pollutant. We are compelled to conclude that it is not.

Id. at 850-851 (citations and quotation omitted). The Court also observed that State Auto "has the ability to resolve any question of ambiguity" through more careful drafting and that it "in fact []has done so. In 2005 State Auto revised its policies to add an 'Indiana Changes–Pollution Exclusion' endorsement. The language more specifically defined the term 'pollutants'" and listed specific pollutants including TCE. *Id.* at 852.

[21] Unlike in *Flexdar*, the Lead Exclusion did not use the general term "pollutants." Rather, it specifically mentioned lead. We conclude that the term "lead" under the Lead Exclusion is unambiguous and does not contravene public policy or the case law regarding a general pollution exclusion. *See Allstate Ins. Co. v. Rochkind*, 381 F. Supp. 3d 488, 513-514 (D. Md. 2019) (addressing an exclusion that applied to "personal injury or bodily injury which results in any manner from any type of . . . contaminants or pollutants, including . . . [l]ead in any form," and holding that the provision was not susceptible of two interpretations by a reasonably prudent layperson, "[t]he result [was] unambiguous: Lead paint poisoning is a personal injury that results from exposure to lead paint, which is a form of lead," and defendants' "contrary interpretation [was] simply too attenuated in light of the coverage exclusion's clear reference to lead"); *Peerless Ins. Co. v. Gonzalez*, 241 Conn. 476, 479-485, 697 A.2d 680, 681-684 (1997) (addressing an insurance policy containing an exclusion for personal injuries sustained as a result of "exposure to, or contact with lead or lead contained in goods, products or materials," and concluding that the policy's lead exclusion unambiguously applied to lead paint); *see also W. Bend Mut. Ins. Co. v. U.S. Fid.*

& Guar. Co., 598 F.3d 918, 923 (7th Cir. 2010) (observing that a pollution exclusion "itself clearly includes motor fuels" and the policy's definition for motor fuels explicitly applied to gasoline, and holding that the contract's plain language explained that insurer would not cover property damage or personal injuries related to gasoline and that the provisions in the policy "eradicate[d] the ambiguities on which *Kiger* rested").

[22] To the extent the trial court relied upon and the Appellees cite to *Cont'l Ins. Co. v. George J. Beemsterboer, Inc.*, we cannot say that case supports the trial court's decision. In that case, Continental Insurance Company ("Continental") issued insurance policies to George J. Beemsterboer, Inc. ("Beemsterboer"), which included "Exclusion K" stating:

> 5. Notwithstanding the foregoing, it is hereby expressly understood and agreed that this insurance does not cover against nor shall any liability at each hereunder:
>
> . . .
>
> K. For any loss, damage, cost, liability or expense of any kind or nature whatsoever, imposed on the Insured, directly or indirectly in consequence of, or with respect to, the actual or potential discharge, emission, spillage or leakage upon or into the seas, waters, land or air, of oil, petroleum products, chemicals or other substances of any kind or nature whatsoever.

148 F. Supp. 3d at 774. The policies also included the following exclusion (the "Respirable Dust Exclusion"):

EXCLUSION—RESPIRABLE DUST

> It is understood and agreed that this insurance does not apply to any liability for, or any loss, damage, injury or expense caused by, resulting from, or incurred by reason of any one or more of the following:
>
> 1. "Bodily injury" arising in whole or in part out of the actual, alleged or threatened respiration or ingestion at any time of "respirable dust"; or
>
> 2. "Property damage" arising in whole or in part out of the actual, alleged or threatened presence of "respirable dust"; or
>
> 3. "Personal and advertising injury" arising in whole or in part out of the actual, alleged or threatened exposure at any time to or the presence of "respirable dust".
>
> The following definition applies herein:
>
> "Respirable dust" means respirable particulate matter but does not include living organisms.

Id. at 775.

[23] A class action complaint against Beemsterboer alleged that it failed to take reasonable measures to prevent petroleum coke ("pet coke") and coal dust from contaminating nearby communities. *Id.* The State of Illinois and the City of Chicago also commenced a lawsuit against Beemsterboer claiming that Beemsterboer's pet coke handling and storage operations caused damage to surrounding properties. *Id.* at 776. The court observed that "[p]et coke is alleged to be a lightweight and dust-like byproduct of the crude oil refining process that contains high concentrations of carbon and sulfur and trace elements of metals." *Id.* at 775. In analyzing whether Continental had a duty

to defend or indemnify Beemsterboer in light of Exclusion K, the court mentioned *Flexdar*, and stated that "[t]he question is whether the language in the Policies is sufficiently unambiguous to identify pet coke as one of the 'petroleum products' covered by Exclusion K." *Id.* at 789. It observed:

> Beemsterboer asserts that the term "petroleum products" in Exclusion K is ambiguous given the vast number of products made from petroleum, including all types of plastic products. Beemsterboer asserts that because the term "petroleum products" is vague, the Court should refuse to apply Exclusion K on the grounds of ambiguity. Continental appears to concede this point, as it fails to reply to Beemsterboer's argument in its summary judgment briefs. *See Johnson v. Gen. Bd. of Pension & Health Benefits of United Methodist Church*, 733 F. 3d 722, 729 (7th Cir. 2013) (holding that arguments not raised in opposition to a motion for summary judgment are waived). The Court finds that Exclusion K is ambiguous as to whether "petroleum products" includes pet coke. Because Continental's failure to be more specific renders Exclusion K ambiguous, the Court construes Exclusion K against Continental, and finds that it does not exclude coverage for the allegations in the Underlying Complaints.

Id. at 789-790. The court found "that the Respirable Dust Exclusion and the term 'respirable dust' [were] clear and unambiguous." *Id.* at 791.

[24] Unlike in *Cont'l Ins. Co.*, Indiana Farmers did not appear to concede that the term "lead" was vague. Moreover, the Policy specifically excluded "lead" and defined "lead" and the alleged harm in the underlying complaint arose from lead poisoning. Accordingly, we conclude *Cont'l Ins. Co.* does not support the trial court's ruling.

[25] For the foregoing reasons, we reverse the trial court's denial of Indiana Farmers' motion for summary judgment and grant of the motion for summary judgment filed by the Appellees.[1]

[26] Reversed.

Altice, J., and Tavitas, J., concur.

[1] Because we reverse, we need not address Indiana Farmers' arguments that its "indemnity obligations, if any, cannot be determined until the underlying lawsuit has concluded" or that, "even to the extent the judgment is affirmed, [it] owes a duty to defend only HomeWorks Management Corp., Ken Mensik, Mitchell Hooton, Becky Medich and Jodi Pearce and to no one else." Appellant's Brief at 19, 22. We also need not address Appellees' argument that the trial court's order should be amended to specify the defendants who are entitled to coverage.