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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

THE STATE OF NORTH DAKOTA

Timothy Huether and TK Huether Farms, Plaintiffs and Appellant, v. Nodak Mutual Insurance Company, Defendant and Appellee.	**Supreme Court No.: 20150161** **District Court No.: 37-2015-CV-00079**

BRIEF OF APPELLEE NODAK MUTUAL INSURANCE COMPANY

Appeal from Order Granting Summary Judgment
and Judgment of Dismissal
Dated May 15, 2015
Ransom County District Court
Southeast Judicial District
The Honorable Jerod E. Tufte

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STATEMENT OF THE ISSUES

[1] Whether the District Court correctly ruled that Plaintiff's added expense of drying his crops at other grain drying facilities is not "direct physical loss or damage" caused by the fire, but rather, are indirect or consequential damages that are not covered by the Nodak Mutual policy.

STATEMENT OF THE CASE

[2] The Plaintiff/Appellant Timothy Huether ("Huether") commenced this action seeking first party insurance coverage under a Farm and Ranch Policy issued by Defendant/Appellee Nodak Mutual Insurance Company ("Nodak Mutual"). Huether served and filed a Motion for Summary Judgment which was denied by District Judge Jerod E. Tufte by a Memorandum Opinion & Order Denying Motion for Summary Judgment dated December 10, 2014. App. p. 105-109. The Court reasoned:

> Giving meaning to the term "direct physical loss or damage" as a whole, while also looking at each individual word in the term, the Court cannot fairly interpret the term so as to include coverage for consequential damages such as these increased expenses due to loss of use within the ordinary meaning of "direct" and "physical" damages. Mr. Huether's added expenses of drying his crops at other grain drying facilities are indirect or consequential damages, not "direct physical loss or damage" caused by the fire which damaged his 2011 grain handler dryer, fans and parts located at site three.

App. p. 108

[3] Nodak Mutual moved for summary judgment on April 3, 2015 on the grounds that Huether's added expenses of drying his crops at other grain drying facilities are not "direct physical loss or damage" caused by the fire on October 19, 2013, but are indirect or consequential damages as a matter of law. On May 15, 2015, Judge Jerod E. Tufte granted Nodak Mutual's Motion for Summary Judgment in a Memorandum

Opinion & Order Granting Defendant's Motion for Summary Judgment. App. pp. 166-171. The District Court ruled that "Huether's added expenses of drying his crops at other grain drying facilities are neither direct nor physical damages, and thus are not 'direct physical loss or damages' caused by the fire that damaged the grain dryer at site three." App. p. 170. A judgment of dismissal was entered on July 10, 2015. App. p. 179. This appeal followed.

STATEMENT OF THE FACTS

[4] The District Court's Memorandum Opinion & Order Denying Motion for Summary Judgment and the District Court's Memorandum Opinion & Order Granting Defendant's Motion for Summary Judgment both set forth the following undisputed facts.

[5] The Plaintiff Timothy Huether entered into an agreement with Nodak Mutual Insurance Company which covered his dwelling, buildings and structures at site locations one, two and three. App. pp. 94-99, 105, 166. The Farm and Ranch Policy did not, however, cover grain dryers. App. pp. 105, 166. Therefore, an agricultural equipment endorsement was added to provide coverage for Huether's agricultural equipment, including a 1980 Super B 585 Automatic AS 1599C batch dryer and a 2011 grain handler dryer, fans and parts located at site three. App. pp. 93, 105, 166.

[6] On October 19, 2013, a fire occurred at site three destroying the 2011 grain handler dryer fans and parts with a $250,000 limit and a $1,000 deductible covered under the addendum to the agricultural equipment endorsement. App. pp. 13-15, 105, 161. The agricultural equipment endorsement covered "against direct physical loss or damaged caused by perils 1 through 10." App. pp. 93, 106. Under the Plaintiff's Farm and Ranch policy, fire is listed as peril 1. App. pp. 55, 106.

[7] It is undisputed that as a result of the October 19, 2013 fire that resulted in fire damage to Huether's grain dryer, control room and grain handling equipment, Defendant Nodak Mutual issued a settlement check to Huether for the direct physical loss of the damaged equipment in the amount of $278,187.44 based on estimates provided by Huether. In addition to Huether's submitted claims for the physical damage to his bin site, which Nodak Mutual paid in accordance with the terms of the policy, Huether also submitted an additional $82,954.77 claim for expenses that Huether incurred drying his crops at other grain drying facilities. App. pp. 13-15, 106. Nodak Mutual denied Huether's claim on the basis that the agricultural equipment endorsement only insures against direct physical loss or damage, and not for loss of use. App. pp. 100, 106. As a result, Huether filed the civil suit against Nodak Mutual seeking damages for the denied claim as Breach of Contract, Repudiation of Contract, Declaratory Relief and Bad Faith. App. pp. 3, 106.

[8] Nodak Mutual's Answer notes that the Farm and Ranch Policy specifically limits coverage to "the property described in the Declarations against loss or damage directly caused by the risks and perils insured against." See SECTION I-AGRICULTURAL EQUIPMENT ENDORSEMENT, page 1 of 1. App. p. 112. The Answer also alleges that the policy issued by Defendant Nodak Mutual to Plaintiff does not provide first party coverage for consequential loss of use alleged to have occurred as a result of the fire. App. p. 112.

[9] In the Memorandum Opinion & Order Granting Defendant's Motion for Summary Judgment, the District Court framed the legal issue as follows:

> The fundamental legal question is whether the plain meaning of the term "direct physical loss or damage" can be construed in a manner which would also provide insurance coverage for the added expenses Huether incurred by drying his crops at other grain drying facilities as a

> consequence of the fire which rendered Mr. Huether's own grain handler dryer fans and parts damaged and unusable.

App. p. 169. The Court concluded that the term or phrase "direct physical loss or damage" did not include coverage for the added expenses Huether incurred while awaiting repair or replacement of the grain dryer. The Court concluded as a matter of law:

> Giving meaning to the term "direct physical loss or damage" as a whole, while also looking at each individual word in the term, the Court cannot fairly interpret the term to include coverage for the added expenses he incurred while awaiting repair or replacement of the grain dryer. A "direct" loss or damage is one that flows immediately and naturally from the causal event, in this case the fire. The plain meaning of the word "direct" indicates an exclusion of damages that are not "direct," such as the indirect, loss of use damages claimed here. Further, the plain meaning of the term "physical" also defines the scope of coverage. The plain meaning of "physical" as used here means material or tangible, as opposed to intangible, economic, or lost profits damages. Huether's added expenses of drying his crops at other grain drying facilities are neither direct nor physical damages, and thus are not "direct physical loss or damages" caused by the fire that damaged the grain dryer at Site three.

App. pp. 169-170.

THE FARM AND RANCH POLICY

[10] The Farm and Ranch Policy issued to Huether, and specifically the Agricultural Equipment Endorsement, limits coverage as follows:

> This endorsement covers the property described in the Declarations against loss or damages directly caused by the risks and perils insured against, not to exceed the amount specified in respect to each item described in the Declarations.
>
> **A. PERILS INSURED**
>
> This endorsement insures against direct physical loss or damage caused by:
>
> **1.** Perils **1** through **10**.

App. p. 93.

[11] "Direct physical loss or damage" is an undefined term in the insurance policy. App. p. 168. Contrary to Huether's position, the first party property coverage in the Farm and Ranch Policy issued by Nodak Mutual to Huether does not refer to "property damage." The term "property damage", which is defined to include loss of use (App. p. 32), is referenced only in the liability coverage portion of the policy, which is SECTION II. App. pp. 76, 86. However, the policy issued by Nodak Mutual to Huether does not provide first party coverage for consequential loss of use alleged to have occurred as a result of the fire. The District Court rejected Huether's argument that the definition of "property damage" should be applied wherever the term "damage" is used in the policy, noting:

> "Direct physical loss or damage" is an undefined term in the insurance policy. "Property damage", however, is a defined term, and is defined in paragraph A(17) on page 5 of the policy as follows: "Property Damage' means injury to or destruction of tangible property including the loss of use of this property." The definitions provided in the first five pages of the policy are not expressly limited to particular sections of the policy. In addition, the agricultural equipment endorsement states that it "changes the policy" and that in addition to the terms stated on it, "All other provisions of this policy apply." [Exh. 2] Plaintiff would have the court apply the definition provided for "property damage" to define "damage" wherever the "damage" is in reference to the property. This suggestion runs contrary to the plain meaning of the policy because the defined term "property damage" is cited repeatedly in the liability section of the insurance contract and each time it appears in double quotes to signal the intention to apply the defined term. Nodak presumably would have drafted this endorsement to cover "against loss or 'property damage'" if it had intended to incorporate the defined term, which, again, is uniformly referenced in quotation marks. Huetter asks the Court to read the endorsement as having this effect.

App. pp. 168-169

[12] The District Court also interpreted the Agricultural Equipment Endorsement as follows:

> The Agricultural Equipment Endorsement begins: "This endorsement covers the property described in the Declarations against loss or damage directly caused by the risks and perils insured against …" [Exh. 2

> (emphasis added)] This reference to "loss or damage" that is "directly caused" by a covered peril is followed in the next sentence by the terms at issue here: "This endorsement insures against direct physical loss or damage caused by …" Two conclusions are compelled by this juxtaposition. First, that "loss or damage" is employed as a unit or a compound term and that either "loss" or "damage" must be caused in a "direct" manner. Second, not only must any "loss or damage" be caused directly, it must also be "physical" loss or "physical" damage.

App. p. 169.

LAW AND ARGUMENT

I. SUMMARY JUDGMENT STANDARD.

[13] Summary judgment under N.D.R.Civ.P. 56(c) is a procedural device for the prompt and expeditious disposition of any action without a trial if either litigant is entitled to judgment as a matter of law and if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or if resolving factual disputes will not alter the result. Duemeland v. Norback, 655 N.W.2d 76, 78-79 (N.D. 2003). Whether the trial court properly granted summary judgment is a question of law, which this Court reviews de novo based on the entire record. Lawrence v. Roberdeau, 2003 ND 124 ¶7, 665 N.W.2d 719, 722.

[14] The moving party has the burden of showing there are no genuine issues of material fact and the moving party, therefore, is entitled to judgment as a matter of law. Good Bird v. Twin Buttes Sch. Dist., 207 ND 103, 733 N.W.2d 601. Once that occurs, the burden shifts to the party opposing the motion to come forward with facts that created a genuine issue of material fact. Dahlberg v. Lutheran Soc. Serv. of North Dakota, 2001 ND 72 ¶11, 625 N.W.2d 241, 246. The party opposing summary judgment "must also explain the connection between the factual assertions and the legal theories in the case, and cannot leave to the Court the chore of divining what facts are relevant or

why facts are relevant, let alone material, to the claim for relief." Peterson v. Zerr, 477 N.W.2d 230, 234 (N.D. 1991).

[15] Issues of fact may become issues of law if reasonable persons could reach only conclusion from the facts. Dahlberg, ¶11, 625 N.W.2d at 246. If the only question to be decided is one of law, summary judgment is appropriate. American State Bank & Trust Co. of Williston v. Sorenson, 539 N.W.2d 59, 61 (N.D. 1995). Facts that are disputed but do not affect the outcome do not preclude summary judgment. Koapke v. Herfendal, 2003 ND 64 ¶11, 660 N.W.2d 206, 210.

II. STANDARD OF REVIEW FOR INTERPRETATION OF INSURANCE CONTRACTS.

[16] The construction of insurance contracts, to determine if allegations of the complaint fall within coverage, is a question of law to be resolved by the Court. Cormier v. National Farmers Union Prop. & Cas. Co., 445 N.W.2d 644, 646 (N.D. 1989). A contract of insurance should be construed as a whole and the interpretation should give effect to every part of the contract if it is reasonably practicable. N.D.Cent.Code §9-07-06. If the contractual terms are clear and unambiguous, and can be interpreted without reference to extrinsic evidence, then their interpretation is entirely a question of law. See Sorlie v. Ness, 323 N.W.2d 841, 844 (N.D. 1982). "Thus, an unambiguous contract is particularly amenable to summary judgment." Garolfalo v. St. Joseph's Hosp., 2000 ND 149, ¶7, 615 N.W.2d 160, 162. The determination of whether a contract is ambiguous is a question of law. Cormier v. National Farmers Union Prop. & Cas. Co., 445 N.W.2d 644 (N.D. 1989).

[17] In interpreting a contract, the Court first looks to the language and, if the intent is apparent from its face, there is no room for construction. Stuhlmiller v. Nodak Mut. Ins. Co., 475 N.W.2d 136 (N.D. 1991). When the language of an insurance policy is

unambiguous it should not be strained to impose liability on the insurer. Id.; Cormier, supra, 445 N.W.2d at 646; Davis v. Auto-Owners Ins. Co., 420 N.W.2d 347, 348 (N.D. 1988). Moreover, a party should not be allowed to select individual words or partial phrases in order to create uncertainty as to the construction of an insurance contract. Thompson v. Nodak Mut. Ins. Co., 466 N.W.2d 115, 117 (N.D. 1991). The Court will not rewrite a contract to impose liability on an insurer if the policy unambiguously precludes coverage. See Ziegelmann v. T.M.G. Life Ins. Co., 2000 ND 55, ¶6, 607 N.W.2d 898, 900.

[18] If coverage hinges on an undefined term, the Court must apply the plain, ordinary meaning of the term in interpreting the contract. N.D.Cent.Code §9-07-09; Martin v. Allianz Lif Ins. Co. of N. Am., 1998 ND 8, ¶9, 573 N.W.2d 823, 825. "The ordinary meaning is the definition a non-law trained person would attach to the term." Martin, at ¶12. However, "the Court will not strain the definition of an undefined term to provide coverage for the insured." Id. at ¶9.

[19] "Direct physical loss or damage" is an undefined term in the Nodak Mutual insurance policy issued to Plaintiff. The Court, in accordance with N.D.Cent.Code §9-07-09, must therefore apply the plain, ordinary meaning of the term in interpreting the contract rather than according to its strict legal meaning without straining the definition of an undefined term to provide coverage for the insured. Martin, 1998 ND 8, ¶9, 573 N.W.2d 823.

III. THE AGRICULTURAL EQUIPMENT ENDORSEMENT DOES NOT PROVIDE COVERAGE FOR INDIRECT OR CONSEQUENTIAL DAMAGES AND THE TERM "DIRECT PHYSICAL LOSS OR DAMAGE" DOES NOT INCLUDE INDIRECT OR CONSEQUENTIAL DAMAGES.

[20] In this case, as correctly noted by the Court in its Conclusions of Law of its Memorandum Opinion & Order Denying Motion for Summary Judgment:

> Giving meaning to the term "direct physical loss or damage" as a whole, while also looking at each individual word in the term, the Court cannot fairly interpret the term so as to include coverage for consequential damages such as these increased expenses due to loss of use within the ordinary meaning of "direct" and "physical" damages. Mr. Huether's added expenses of drying his crops at other grain drying facilities are indirect or consequential damages, not "direct physical loss or damage" caused by the fire which damaged his 2011 grain handler dryer, fans and part locates at site three.

App. p. 108.

[21] This conclusion is supported by Witcher Constr. Co. v. St. Paul Fire & Marine Ins. Co., 550 N.W.2d 1 (Minn. Ct. App. 1996), which addresses a similar first party claim. The District Court relied upon Witcher in ruling that "[t]he 'direct physical loss or damage' is not ambiguous as to whether it includes within its scope loss of use or similar damages – it does not." App. p. 170.

[22] In Witcher, a construction contractor brought an action against his insurer to recover under an all-risk property insurance policy for losses from business interruption during a delay to inspect the property for damages from a nearby explosion. Much like this case, the policy in Witcher provided coverage for "the insured property against risks of direct physical loss or damage." Id. at 5. The Court noted that first party property insurance does not generally cover the broader consequences of property damage, such as business interruption and lost profits. Id. at 6. The Court also noted that

a different rule applies to liability insurance. Id. at 6, fn. 2. The Court noted that "this distinction arises from the fact that liability insurance protects against the insured's own wrongful behavior, which may trigger damages for loss of use." Id. The Court in Witcher provided the following rationale why such items as business interruption, loss of use, or lost profits are not covered by first party property policies:

> Witcher's policy describes its property as the insured subject matter. Contrary to Witcher's assumption, this clause does not mean that Witcher enjoys the right to indemnification for all expenses incurred "with respect to" the property. Rather, in the absence of specific language covering business interruption, loss of use, or lost profits, the designation of Witcher's property as the insured subject matter limits coverage to the physical and economic damage done to that property.

Witcher, 550 N.W.2d at 7.

[23] The Court in Witcher also rejected the argument by the insured that the phrase "risks of direct physical loss or damage" is ambiguous and can be read to cover either the risk of direct physical loss or any kind of damage. Id. at 7. The Court noted that "This argument is contrary to the weight of authority." Id. The Court then listed a number of citations supporting the fact that this is not an ambiguous. See Teeples v. Tolson, 207 F.Supp. 212, 213 n.2, 215 (finding similar language "clear and unambiguous"); Glens Falls Ins. Co. v. Covert, 526 S.W.2d 222, 223 (Tex. Civ. App. 1975) (describing similar language as "clear"); Nevers v. Aetna Ins. Co., 14 Wash. App. 906, 546 P.2d 1240, 1241 (1976) (finding no ambiguity in similar language). See also Boyd Motors, Inc. v. Employers Ins., 880 F.2d 270, 271, 274 (10th Cir. 1989); Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n, 793 F.Supp. 259, 263 (D. Or. 1990); Source Food Technology, Inc. v. United States Fidelity & Guar. Co., 465 F.3d 834 (8th Cir. 2006). The

District Court in this case, relying upon Witcher, similarly held that the phrase "directly physical loss or damage" is not ambiguous as a matter of law. App. p. 170.

[24] Witcher is supported by decisions from other courts. See Roundabout Theatre Co., Inc. v. Continental Cas. Co., 302 A.D. 1, 751 N.Y.S. 4 (2002) (theatrical package policy covering "all risks of direct physical loss or damage to the property" not otherwise excluded was limited to losses involving physical damage to insured's property, and thus did not provide business interruption coverage for losses occasioned by city order closing street and denying access to theatre due to construction accident in area, where theatre itself sustained only minor physical damage).

[25] Huether relies extensively on Ashland Hospital Corp. v. Affiliated FN Ins. Co., 2013 WL 4400516 (E. D. Ky. 2013) and American Guarantee & Liability Ins. Co. v. Ingram Micro, Inc., 2000 WL 726789 (D. Ariz. 2000). The District Court distinguished Ashland by noting that the insured hospital was not seeking loss of use or other consequential damages such as fees paid to a substitute data processing company, but simply claimed "replacement damages for direct physical loss or damage to the [computer system]." Ashland Hospital, at 12. See App. p. 170. The District Court also distinguished Ingram by noting that the policy at issue expressly covered "business income" so additional expenses related to loss of use once the threshold of physical damage was established did not hinge on whether the term "direct physical loss or damage" by itself provided coverage for such damages. Id. ¶12. See App. p. 171.

[26] Therefore, Nodak Mutual properly denied coverage for consequential loss of use alleged to have occurred as a result of the fire, and the District Court properly granted summary judgment in favor of Nodak Mutual. According to Witcher, and the

District Court in this case, the consequential loss of use alleged by Huether in this case is not loss or damage directly caused by the risks and perils insured against (i.e. fire), and the definition of "property damage" contained in the policy does not refer to the first party coverage in the policy.

[27] Therefore, the District Court correctly concluded that Huether's added expenses of drying his crops at other grain drying facilities is not "direct physical loss or damage" caused by the fire, but rather, are indirect or consequential damages that are not covered by the policy.

[28] The District Court also held that since it determined that the disputed language is not ambiguous, Huether's other arguments, which are premised on an initial finding of ambiguity, are not further discussed. App. p. 171. The District Court was correct not to address Huether's other arguments.

[29] Huether relies upon the "Doctrine of Contract of Adhesion", but this Court has made clear that the doctrine only applies to ambiguous policies. Continental Cas. Co. v. Kinsey, 499 N.W.2d 574, 577-78 (N.D. 1993). Huether also relies upon the Reasonable Expectations Doctrine. However, as the North Dakota Supreme Court stated in RLI Ins. Co. v. Heling, 520 N.W.2d 849, 854-55 (N.D. 1994), "the doctrine of reasonable expectations is an interpretive tool in the construction of contracts," which "has yet to be accepted by a majority of this Court." Furthermore, as the North Dakota Supreme Court noted in Heling, if the reasonable expectations doctrine had been adopted, it would not apply here because there has been no determination of ambiguity. Even in those jurisdictions which have accepted the doctrine of reasonable expectations, it is only applicable as "a tool for resolving ambiguity and for correcting extreme situations . . . where a party's coverage is significantly

different from what the party reasonably believes it has paid for and where the only notice the party has of that difference is in an obscure and unexpected provision." Carlson v. Allstate Ins. Co., 749 N.W.2d 41, 49 (Minn. 2008).

CONCLUSION

[30] For the foregoing reasons, the District Court's granting of Nodak Mutual's motion for summary judgment and the denial of Huether's motion for summary judgment is supported by the undisputed facts and law applicable to the issues and should be **AFFIRMED**. Therefore, Appellee Nodal Mutual respectfully requests this Court affirm the District Court's grant of summary judgment of dismissal of this action.

Dated this 11th day of August, 2015.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee, Nodak Mutual Insurance Company, in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellant Procedure, that the Brief of Appellee was prepared with proportional typeface and the total number of words in the above Brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 3,879.

Dated this 11th day of August, 2015.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Timothy Huether and TK Huether Farms, Plaintiffs and Appellant, v. Nodak Mutual Insurance Company, Defendant and Appellee.	**Supreme Court No.: 20150161** **AFFIDAVIT OF SERVICE**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

Sarah D. Iverson, Being first duly sworn on oath, deposes and says that she is of legal age and is a resident of Cass County, North Dakota, not a party to nor interested in the action; that she served the attached:

1. **Brief of Appellee Nodak Mutual Insurance Company**

on the following person(s) by electronic mail only on August 11, 2015:

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and on the following by U.S. Mail only on August 11, 2015:

N/A

To the best of Affiant's knowledge, the e-mail and post office addresses above given are the actual electronic mail and U.S. Mail addresses of the parties intended to be so served. The above documents are e-mailed and mailed by U.S. Mail in accordance with the provisions of the North Dakota Rules of Appellate Procedure.

Sarah D. Iverson

SUBSCRIBED AND SWORN TO before me on August 11, 2015.

BRENDA JO BRUNELLE
S E A L) Notary Public
State of North Dakota
My Commission Expires June 18, 2017

Notary Public