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STATE OF NORTH DAKOTA

Supreme Court No. 20150161
District Court No.: 37-2015-CV-00079

CIVIL

IN THE SUPREME COURT OF NORTH DAKOTA

Timothy Huether and
TK Huether Farms,

Plaintiffs and Appellant,

vs.

Nodak Mutual Insurance Company,

Defendant and Appellee.

Appeal from Order Granting Summary Judgment
And Judgment of Dismissal
District Court, County of Ransom, State of North Dakota

The Honorable Jerod E. Tufte
District Court Judge
Southeast Judicial District

REPLY TO APPELLEE'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: PARAGRAPH

[1] **LAW AND ARGUMENT**

[2] **I. <u>This is not a case concerning consequential damages.</u>**

[3] The issue here is not whether the loss of use damages are consequential damages but instead whether the definitions in the policy along with the language in the Endorsement allow coverage for loss of use of the grain dryers. See Appellee's Brief ¶26; See Appellant's Brief ¶20. To state "property damage," a defined term in Section A of the policy, only applies to the liability section of the policy ignores the policy as a whole. See Appellee's Brief ¶11; App. p. 108. The North Dakota Supreme Court looks to the whole contract to help interpret the meaning of the contract and to interpret clauses within the policy. See Wisness v. Nodak Mutual Insurance Company, 2011 ND 197, ¶ 5, 806 N.W.2d 146. The plain language of the policy provides coverage for the loss of use of the grain dryer. App. p. 93. Coverage is not for consequential damages if the policy language contained in the Endorsement says otherwise. See App. pp. 28-32, 93.

[4] Nodak argues that "property damage" does not equal "damage" within the policy. See Appellee ¶11. Section I, Coverage F of the policy states: "We cover direct physical loss to farm personal property." App. p. 44. The one word missing in that section is "damage." See App. p. 44. It does not say it covers "direct physical loss or damage" to farm personal property. See App p. 44. In addition, Section I (F), Coverage F lists "Property not insured." App. pp. 46-47. That section specifically states "'we' do not insure: #16, All grain or crop dryers." App. p. 46. Therefore Mr. Huether paid an additional premium of $1,215.00 to add Agricultural Equipment Endorsement, FR 02101 07. App. pp. 96-97.

[5] The Endorsement has different language than that found in Section I, Coverage F Blanket Farm Personal Property. App. pp. 44-47, 93. The first sentence of the Endorsement states "[t]his Endorsement covers the property described in the Declarations against loss or damage directly caused by the risks and perils insured against." App. p. 93. Here the words, "property" and "damage" are both contained within the Endorsement. App. p. 93. As stated above, Section I, which covers personal farm property, includes the word "property" but not the word "damage." See App. pp. 44-47. The word "damage" is also absent from Section I (E), Unscheduled Farm Personal Property, nor is it found in Section I (D) Scheduled Farm Personal Property. See App. pp. 37-44. There is, therefore, a difference in the language contained in the Farm Personal Property coverages under Section I (D, E, & F) compared to what is stated in the Endorsement that covers the grain dryer. See App. pp. 37-47, 93. If Nodak intended to provide and exclude coverage in the Farm Personal Property section the same way coverage is provided and excluded in the Endorsement, Nodak would have used the same language in the Endorsement that it used in the Farm Personal Property Section I (D, E, & F). App. pp. 37-47, 93. Nodak, however, used different language. App. pp. 93, 37-47. The Endorsement is the only place where Nodak uses the word "damage" in covering Farm Personal Property. App. p. 93. Why would Nodak change the language in the Endorsement, unless Nodak was offering different coverage than it provided under the Farm Personal Property Section I (D, E, & F). See App. pp. 93, 37-47.

[6] **II. The case of Witcher Constr. Co v. St. Pal Fire & Marine Ins. Co. is Distinguishable from this case.**

[7] Mr. Huether is not arguing that the loss of use of the grain dryer is consequential damages. See Appellee's Brief ¶26. Mr. Huether instead argues that the defined terms and the language within the Endorsement provide coverage for the loss of use of the grain dryer. See Appellant's Brief ¶20. The Court must look at the contract as a whole, but also must look at the meaning of each individual term with in the policy. Nodak Mut. Ins. Co. Heim, 1997 ND 36 ¶ 15, 559 N.W.2d 846. Nodak cites the case Witcher Constr. Co. v. St. Paul Fire & Marine Ins. Co., 550 N.W.2d 1 (Minn. Ct. App. 1996) to justify Nodak's argument that the language "direct physical loss or damage" is not ambiguous as to whether it includes coverage for loss of use. However, Witcher is distinguishable from this case. Id. In Witcher, the policy was an all risk policy and Witcher was not seeking coverage for damage to its building, but coverage for loss of use of its building while Witcher was determining the integrity of the building structure. Id. at 2-3. In Witcher there was an explosion that occurred three or four buildings away. Id. The explosion did not occur directly to Witcher's building. Id. Witcher was concerned the explosion may have damaged their building and therefore suspended operations for a month while tests were conducted to test the integrity of the building. Id. Witcher then filed a claim for the costs associated with loss of business expenses incurred. Id. The insurer, Saint Paul Fire and Marine Insurance Company, denied Witcher's claim citing the absence of physical loss to the insured's property. Id.

[8] The trial court granted Saint Paul Fire's summary judgment motion stating that direct physical loss or damage does not include loss of business expenses. Id. at 2. However in Witcher the policy specifically excluded loss caused by delay, loss of market,

loss of use, or any indirect loss and there was no direct loss to their building. Id. at 5. Witcher only suspended operations to test the integrity of its building. Id. at 2. The policy in Witcher contained no defined term for "property damage." Id. at 5-6. In Huether's case there is no applicable exclusionary phrase that excludes loss of use expenses. App. pp. 28-93. In Huether's case, the definition of property damage and the language within the Endorsement make loss of use of the grain dryer a covered expense under the policy. App. pp. 28-93.

[9] In Hampton Foods Inc. v. Aetna casualty & Sur. Co., 787 F.2d 349 (8th Cir. 1986), Hampton claimed the phrase "[t]his policy insures against loss of or damage to the property insured ... resulting from all risks of direct physical loss[.]" allowed loss of use expenses. The Hampton Court found that the term "direct physical loss or damage" is ambiguous and could include the loss of use expenses. Id. at 354. When Nodak in this Huether case changed the language in its Endorsement to include the term "damage," Nodak either 1) created an ambiguity as to what the policy Endorsement actually covered, or 2) clearly sent the message to would-be insureds that the Endorsement would cover loss of use since the only defined term including the word "damage" includes loss of use. See App. pp. 28-93.

[10] **III. "Property Damage" as defined in the policy applies to the entire policy creating ambiguity.**

[11] Nodak argues that the defined term "property damage" applies only to the liability sections, thus preventing Mr. Huether's claim for loss of use expenses. See Appellee's Brief ¶11. The first page of the policy includes definitions. App. p. 28. The first line under section A states "[i]n this policy .... [i]n addition, certain words and phrases are

defined as follows." App. p. 28. There are no defined terms limited to certain sections of the policy." App. p. 28. Nodak's claim that the definition for "property damage" only applies to the liability section is to assume rules of construction not set forth within the policy. See App. pp. 28-93. This type of argument by Nodak itself creates ambiguity—especially in the mind of an insured.

[12] Terms in insurance policies "should be construed to mean what a reasonable person in the position of the insured would think it meant," and "any ambiguity or reasonable doubt as to the meaning of an insurance policy is strictly construed against the insurer." Fisher v. American Family Mut. Ins. Co., 1998 ND 109, ¶6, 579 N.W.2d 599, 602 (N.D. 1998). "Limitation or exclusions from broad coverage must be clear and explicit," and "exclusions from broad coverage in an insurance policy are strictly construed against the insurer" and an exception to an exclusion from broad coverage results in coverage. Id. Therefore, ambiguous terms in policies are construed most strongly against the insurers and in favor of providing insurance coverage. Close v. Ebertz, 1998 ND 167, ¶12, 583 N.W.2d 794, 797 (N.D. 1998). Assuming that certain definitions set forth in the front of the policy only apply to certain sections would mean that one is not considering the entire policy. An insured may correctly assume the definitions apply throughout the policy and its Endorsements, unless the policy specifically limits the definitions to specific parts of the policy.

[13] A policy subject to two different arguments regarding the meaning of the policy must be construed in favor of the insured. Northwest G.F. Mut. Ins. Co. v. Norgard, 518 N.W.2d 179, 184 (N.D. 1994). The words "property" and "damage" do not appear

together in any subsection of section I of the policy addressing property coverages. See App. pp. 32-92. However the terms "property" and "damage" are both found in the Endorsement at issue. App. p. 93. The very first line of the Endorsement states, "[t]his Endorsement covers the property described in the Declarations against loss or damage directly caused by the risks and perils insured against." App. p. 93. An insured reading the Endorsement and knowing that "property damage" is defined in the policy to include loss of use would believe that the Endorsement covers loss of use if the grain dryer. See App. pp. 28-93. Nodak's interpretation of the policy is at direct odds with Mr. Huether's interpretation so there are at least two reasonable interpretations of the language and, thus, an ambiguity within the policy that must be construed in favor of Mr. Heuther. Ebertz, 1998 ND 167, ¶12, 583 N.W.2d 794. This is why the doctrine of contract of adhesion is applicable in this case. See Appellant's Brief ¶11; See Appellee's Brief ¶31.

[14] Nodak created this ambiguity within the policy when Nodak 1) defined "property damage" to include loss of use, 2) stated within Section I (property coverages) that it does cover direct physical loss to property under this coverage, 3) fails to state anywhere that the "property damage" definition applies only to Section II of the policy, and 4) specifically covers "damage" in the Endorsement with the language unique to the policy: "[t]his Endorsement insures against direct physical loss or damage ... ." See App. pp. 28-93 (emphasis added). Defendant is trying to confuse the Court with an argument that the definitions section only applies to Section II (Liability Coverage). See Appellee's Brief ¶11.

[15] **IV. CONCLUSION**

[16] Nodak's reliance on the Witcher is misplaced. 550 N.W.2d 1. The facts of Witcher are distinguishable from Huether's case because Mr. Huether's policy has defined terms that allow coverage under the Endorsement for loss of use expenses for the grain dryer. Id.; App. pp. 28-34, 93. The ambiguity within the policy created by Nodak must be interpreted in favor of Mr. Huether. Nodak's definition of "property damage" in the policy which includes loss of use, paired with Endorsement FR 021 01 07, which includes coverage for "damage," shows at the very least there are conflicting inferences which may be drawn regarding loss of use coverage. Therefore summary judgment on the issue of coverage should have been awarded to Mr. Huether. See App. pp. 28-93. Summary judgment in favor of Nodak should be reversed. Summary judgment in favor of Mr. Huether on the issue of coverage should be directed on remand. The only remaining issues on remand should be the amount of damages for the loss of use coverage and the amount of damages for bad faith claims.

Respectfully submitted this 24th day of August, 2015.

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RE: Timothy Huether and TK Huether Farms v. Nodak Mutual Insurance Company

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DISTRICT COURT CASE NO.: 37-2014-CV-00079

STATE OF NORTH DAKOTA)
)ss: **AFFIDAVIT OF ELECTRONIC SERVICE**
COUNTY OF RANSOM)

Jean D. Oster, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter.

On 24th day of August, 2015, Affiant Emailed from Lisbon, North Dakota, a true and correct copy of the following documents:

1. Reply to Appellee's Brief;
2. Affidavit of Electronic Service.

On: William P. Harrie and Clerk of the Supreme Court

EMAIL ADDRESS: wharrie@nilleslaw.com
supclerkofcourt@ndcourts.gov

To the best of Affiant's knowledge, the Email addresses, above given were the actual addresses of the parties intended to be served.

Jean D. Oster

Subscribed and sworn to before me this 24th day of August, 2015.

Notary Public

(SEAL)

HOLLY SCHMITZ
Notary Public
State of North Dakota
My Commission Expires Aug. 4, 2021