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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1463**

Nichole Cox,
Appellant,

vs.

Mid-Minnesota Mutual Insurance Company, et al.,
Respondents.

**Filed May 20, 2019
Affirmed
Worke, Judge**

Stearns County District Court
File No. 73-CV-15-11801

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(for appellant)

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Considered and decided by Slieter, Presiding Judge; Worke, Judge; and Schellhas,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant-insured challenges the district court's dismissal of her claims against
respondent-insurers on contractual-limitation grounds. We affirm.

FACTS

On January 9, 2014, appellant Nichole Cox's home was destroyed by fire. Cox's husband was charged, and convicted, of arson. On January 23, 2014, Cox submitted a proof of loss to respondents Mid-Minnesota Mutual Insurance Co. and North Star Mutual Insurance Co. (collectively the insurers). On June 3, 2014, the insurers denied Cox's claim due to the determination that the fire had been intentionally set by Cox or someone under her direction.

On January 11, 2016, Cox attempted to serve the insurers with a summons and complaint by faxing the documents to the sheriffs of Benton and Lyon Counties. The sheriffs personally served North Star Mutual on January 14, 2016, and Mid-Minnesota Mutual on January 19, 2016.

The insurers moved to dismiss, asserting that Cox failed to commence her action within the two-year limitation period provided by both the insurance policy and the Minnesota standard fire insurance policy, Minn. Stat. § 65A.01, subd. 3 (2018). In opposing the insurers' motion to dismiss, Cox conceded that she was required to commence her action "within two years of the date of the fire." Cox argued that the deadline to commence her action was January 9, 2016, which was extended to January 11, 2016, by operation of Minn. Stat. § 645.15 (2018), because January 9, 2016, fell on a Saturday. Cox asserted that her action was timely commenced on January 11, 2016, when she faxed the summons and complaint to the sheriffs pursuant to Minn. R. Civ. P. 3.01(c). The district court agreed with Cox and denied the insurers' motion to dismiss.

This court reversed, holding that the action was never commenced, because Cox faxed the summons and complaint to the sheriffs, and rule 3.01(c) requires personal delivery to the sheriff. The supreme court affirmed our holding as to service being ineffective under rule 3.01(c) due to the lack of personal delivery to the sheriffs, but reversed our determination that the action was never commenced. *See Cox v. Mid-Minnesota Mut. Ins. Co.*, 909 N.W.2d 540, 546-47 (Minn. 2018). The supreme court held that the action was commenced under rule 3.01(a) when the sheriffs personally served the insurers. *Id.* at 547. However, the supreme court noted that “[o]ur conclusion may be cold comfort to Cox. Given that the district court determined that the statute of limitations expired on January 11, 2016, Cox still may not have a remedy. Regardless, the post-script must be written in the district court, to which we remand this case” *Id.*

On remand, the insurers renewed their motion to dismiss. Contrary to her prior argument, Cox asserted that the two-year limitation period expired on some date other than the two-year anniversary of the fire due to an ambiguity in the meaning of the word “loss,” among other reasons. The district court granted the insurers’ motion to dismiss on the basis that the limitation period expired on January 11, 2016, and Cox’s suit was thus untimely, or in the alternative, Cox was judicially estopped from making an argument contrary to her original position. This appeal followed.

DECISION

Limitation Period

Cox argues that the district court erred in dismissing her action for failing to commence it within the limitation period provided by her insurance policy. “Absent

ambiguity, the interpretation of a contract is a question of law.” *Roemhildt v. Kristall Dev., Inc.*, 798 N.W.2d 371, 373 (Minn. App. 2011), *review denied* (Minn. July 19, 2011). “Whether language in a contract is plain or ambiguous is a question of law that we review *de novo*.” *Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 776 (Minn. 2016). “The language of a contract is ambiguous if it is susceptible to two or more reasonable interpretations.” *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010). “[W]he[n] [contract] language is ambiguous, resort may be had to extrinsic evidence, and construction then becomes a question of fact for the jury, unless such evidence is conclusive.” *Bari v. Control Data Corp.*, 439 N.W.2d 44, 47 (Minn. App. 1989), *review denied* (Minn. July 12, 1989).

In response to the insurers’ initial motion to dismiss, Cox argued that the policy’s limitation period ran on January 9, 2016, but that she had until January 11, 2016, to commence her action because January 9, 2016, was a Saturday. *See* Minn. Stat. § 645.15. On remand, Cox argued, for the first time and inconsistent with her prior position, that the policy’s limitation provision is ambiguous. Under the terms of Cox’s policy, no suit may be maintained against the insurers unless “the suit is commenced . . . within two (2) years after the loss.” The analogous provision in the standard fire insurance policy provides that no suit may be maintained “unless commenced within two years after inception of the loss.” Minn. Stat. § 65A.01, subd. 3.

Cox argues that because the policy language does not mirror the statute, it is ambiguous, especially since the policy itself does not define the term “loss.” Cox relies on nonbinding foreign precedent for the proposition that the phrase “inception of the loss” is

a term-of-art with a specific meaning that is not conveyed by the general term “loss.” See *Fabozzi v. Lexington Ins. Co.*, 601 F.3d 88, 91 (2nd Cir. 2010) (“The phrase ‘after the inception of the loss’ is regarded . . . as a term of art which fixes the limitations period to the date of the accident. Other generic language . . . does not carry this same meaning; instead, it ties the limitations period to the moment when a claim accrues.”). *Fabozzi* is distinguishable because its holding turned upon a specific line of New York state caselaw inapplicable to the present suit. See *id.* at 89 (concluding that, “under longstanding New York Law,” the limitations period began when the claim accrued rather than the date of the accident).

Cox next argues that “loss” cannot refer to the fire because it does not mirror the statutory language. Under Cox’s interpretive approach, the failure to use the exact statutory language means “loss” must refer to some amount of money, as opposed to the fire itself, which would not occur until some later triggering event in the claims process. Cox asserts:

Had the insurers used the statutory language “inception of the loss” . . . the triggering event would have been the fire. That they did not use [“inception of the loss,” or the defined term “occurrence”] means it must be some different event, occurring later, that triggers the limitations period. Whether it was the submission of the proof of loss or when the claim was denied,

Cox contends that service was timely under either option.

Cox does not offer a reasonable alternative for the meaning of “loss,” which is required in order for this court to conclude that the contractual provision is ambiguous. See *Dykes*, 781 N.W.2d at 582. As the district court noted, to read the word “loss” to mean anything other than the fire would create numerous absurdities throughout the policy. This

is further belied by the vague terms in which Cox couches her proposed alternative interpretation: “it must be some different event, occurring later, that triggers the limitations period.” While Cox provides alternative interpretations, they are not reasonable within the context of the policy.

Cox does not cite any binding authority interpreting the word “loss” in an insurance policy to mean anything other than the fire. In *O’Reilly v. Allstate Ins. Co.*, this court analyzed the meaning of a limitation-of-suit provision in an insurance contract that provided “[a]ny suit or action must be brought within one year after the date of loss.” 474 N.W.2d 221, 222 (Minn. App. 1991). After noting that other jurisdictions interpret “inception of the loss” to mean “the date of the casualty causing the loss,” this court went on to modify that rule for cases in which the damage caused by the loss is progressive or latent. *Id.* at 222-23. This court held that the delayed discovery rule “applie[d] even more logically to O’Reilly’s policy language, which commence[d] the limitation period at the ‘date of loss.’ Unlike ‘inception,’ ‘date’ does not restrictively modify loss, and the initiation of the limitation period depends only on the determination of when O’Reilly’s loss arose.” *Id.* at 223.

In reliance on this language from *O’Reilly* distinguishing the lack of the restrictive modifier “inception,” Cox argues that “loss” could refer to some event other than the fire. This, however, ignores the remainder of this court’s opinion in *O’Reilly*. The issue in *O’Reilly* was not whether “loss” could refer to some event other than the windstorm which caused the latent damage, but rather, whether the latent damage to O’Reilly’s home occurred on the date of the storm, or at a later time when it finally became manifest. *See*

id. (“Whether appreciable damage occurred in 1983, when O’Reilly filed her initial claim, or in 1988, when the damage substantially increased, is a factual determination not properly resolved on summary judgment.”). Regardless of which date was ultimately settled upon, the phrase “date of loss,” by which the limitation period was measured, meant the damage caused by the windstorm. Here, there is no dispute that the fire which destroyed Cox’s home occurred on January 9, 2014.

Similarly, Cox argues “the loss” cannot mean the same thing as “inception of the loss,” because that would render the statutory phrase “inception of” a surplusage, which violates the canons of statutory construction. *See State v. Thonesavanh*, 904 N.W.2d 432, 437 (Minn. 2017) (stating that the canon against surplusage favors giving each word and phrase in a statute a distinct non-identical meaning). However, as noted in *O’Reilly*, “inception” restrictively modifies loss. 474 N.W.2d at 223.

The dictionary defines “inception” as “[t]he beginning of something, such as an undertaking; a commencement.” *The American Heritage Dictionary of the English Language* 887 (5th ed. 2011). “[L]oss” is defined as “1. The act or an instance of losing . . . 2a. One that is lost: *wrote their flooded house off as a loss.*” *Id.* at 1037. The statutory language is more precise, but does not create any surplusage if “the loss” is construed to mean “the fire.” “Inception of the loss” would mean the beginning of the fire and would measure the limitation period from the commencement of the fire. The phrase “the loss” standing alone still refers to the fire, which, if it occurred over several days or caused latent damage, would result in a longer limitation period than one measured from its inception.

Cox, relying on *Nathe Bros., Inc. v. Am. Nat.’l Fire Ins. Co.*, argues that “the loss” can reasonably be construed to mean upon “submission of a proof of loss.” 615 N.W.2d 341 (Minn. 2000). But that interpretation is both unreasonable—as it adds technical terms not present to the plain language of the policy—and is unsupported by *Nathe*. In *Nathe*, the supreme court held that timely submission of a proof of a loss is not a condition precedent to recovery, and “the time within which such proofs are required to be furnished is not of the essence to the contract.” *Id.* at 348 (quotation omitted). Therefore, it would create an absurd result if a provision whose timing is not of the essence were used as the measuring event for a contractual-limitation clause.

Finally, Cox, relying on *Stewart v. Nat’l Council of Knights & Ladies of Sec.*, argues that the limitation period should have been tolled until her claim was denied. 147 N.W. 651 (Minn. 1914). However, the limitation provision in the insurance policy in *Stewart* required *both* that an action be brought within one year *and* that the claim be paid or denied by the insurer prior to commencement. *Id.* at 652. Because this allowed the insurer to potentially exhaust the limitation period before denying the claim, the supreme court tolled the limitation period while the claim was pending. *Id.* at 653. Here, there was no requirement in Cox’s policy that she wait until her claim was denied before bringing suit, and furthermore, her claim was denied on June 3, 2014, 19 months before the expiration of the limitation period.

When policy language is unambiguous, “we will not render a construction which is more favorable to finding coverage but will apply the phrase to the facts of the case in order to give effect to the plain meaning of the language.” *Firemen’s Ins. Co. of Newark, N.J. v.*

Viktora, 318 N.W.2d 704, 706 (Minn. 1982). Because Cox has not supplied a reasonable alternative meaning for “the loss,” the language is unambiguous. Therefore, the district court appropriately dismissed the action due to Cox’s failure to commence it prior to the expiration of the two-year limitation period on January 11, 2016, as measured from the date of the fire.

Judicial Estoppel

Because we affirm the district court’s dismissal of the action for Cox’s failure to commence it within the contractual-limitation period, we do not reach the district court’s alternative basis for dismissal. Judicial estoppel “is intended to prevent a party from assuming inconsistent or contradictory positions during the course of a lawsuit.” *State v. Pendleton*, 706 N.W.2d 500, 507 (Minn. 2005). The doctrine generally requires that “the party presenting the allegedly inconsistent theories must have prevailed in its original position,” there is “a clear inconsistency between the original and subsequent position of the party,” and there are no “distinct or different issues of fact in the proceedings.” *Id.* Our supreme court has not expressly recognized judicial estoppel in Minnesota. *See id.* (“The doctrine of judicial estoppel has not been expressly recognized by this court.”). We therefore decline to apply it here.

Affirmed.