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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1590**

Mississippi Welders Supply Company, Inc., Plaintiff,

vs.

Flueger Crane, LLC,
Respondent,

Western National Mutual Insurance Company,
Appellant,

and

Musty Barnhart Insurance Agency, Inc., Third-Party Defendant.

**Filed May 11, 2020
Affirmed
Bryan, Judge**

Goodhue County District Court
File No. 25-CV-18-1800

Daniel J. Heuel, O'Brien & Wolf, L.L.P., Rochester, Minnesota (for respondent)

John E. Varpness, Fisher Bren & Sheridan, LLP, Minneapolis, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Reyes, Judge; and Bryan,
Judge.

UNPUBLISHED OPINION

BRYAN, Judge

Appellant argues that the district court erred in entering a judgment against it for respondent's defense costs of \$40,000. We conclude that the defense costs provision in the insurance policy at issue is ambiguous. Therefore, it must be construed against appellant, and we affirm the district court.

FACTS

In 2016, respondent Flueger Crane LLC contracted with plaintiff Mississippi Welders Supply Company Inc. (Mississippi Welders) to haul a 6,000 gallon bulk tank. While transporting the tank, Flueger Crane's vehicle rolled over and damaged the tank. Mississippi Welders sued Flueger Crane to recover the damages. Flueger Crane filed a third party complaint against its insurer, appellant Western National Mutual Insurance Company (Western National), and Western National's authorized agent, third party defendant Musty Barnhart Insurance Agency, Inc. Flueger Crane alleged Western National had a duty to defend the suit because the insurance policies issued by Western National indemnified Flueger Crane against the claims asserted by Mississippi Welders.

At the time of the accident, Western National provided Flueger Crane coverage through two separate insurance policies: a commercial general liability policy and an inland marine policy.¹ The commercial general liability policy does not cover "'Bodily Injury' or

¹ The record is somewhat unclear on what policies and coverages were actually in place at the time of the accident. In the undisputed facts section of the district court order for summary judgment, the district court states that the inland marine policy was initially

‘Property Damage’ arising out of the . . . use . . . of any aircraft, ‘auto’ or watercraft owned or operated by . . . any insured.” The general liability policy also expressly does not cover damage to property “in the care, custody or control of the insured.” The parties agree that the general liability policy did not cover Flueger Crane for the claims asserted against it for the damage to the bulk tank.

Only the inland marine policy is at issue in this appeal. More specifically, the parties refer to two portions of the inland marine policy: the coverage provision and the defense costs provision. The coverage provision evinces Western National’s promise to cover Flueger Crane’s “legal liability for loss to covered property: a. while under [Flueger Crane’s] care, custody, and control; and b. that you become legally obligated to pay as a common or contract carrier” (quotation marks omitted.) The defense costs provision provides:

- a. Coverage**—We have the option to defend any suit brought against you as a result of damage to covered property caused by a covered loss. We may investigate and settle a claim or suit.
- b. Coverage Limitation**—We do not have to provide a defense after we have paid the limit as a result of a judgment or written settlement.
- c. You Must Not**—You must not:
 - 1) admit liability for a loss, settle a claim, or incur expense without our written consent; or
 - 2) interfere with our negotiation for a settlement.
- d. Covered Expenses**—We will pay the following expenses associated with any suit we defend:
 - 1) expenses that we incur while investigating and defending the suit;

issued in 2015, that it was renewed on September 28, 2016, and that it did not provide coverage for cargo liability. Neither party challenges these facts on appeal.

- 2) actual loss of your salary, up to \$250 per day, for your time spent away from work at our request;
- 3) expenses that you incur at our request;
- 4) all costs that you are required to pay as a result of any suit we defend;
- 5) interest that accrues after entry of a judgment, . . .
- 6) interest that is awarded against you . . .
- 7) cost of a bond for the release of attachments . . .

(quotation marks omitted).

Western National moved for summary judgment claiming it had no duty to defend because the defense costs provision expressly reserved an option to defend. Flueger Crane filed a cross motion for summary judgment, arguing that the defense costs provision is ambiguous. The district court denied Western National's motion and granted Flueger Crane's. It concluded that the policy language regarding Western National's option to defend is ambiguous because the policy does not explain under what circumstances Western National may exercise its option to defend a suit. The parties continued to negotiate and ultimately settled the underlying coverage dispute and all other claims except one: Flueger Crane's claim for defense costs. The parties stipulated that Flueger Crane had incurred \$40,000 in defense costs and jointly requested a judgment in this amount in order to appeal the district court's determination regarding the defense costs provision. The district court issued an order acknowledging that the parties settled all claims except Flueger Crane's defense costs, and awarding Flueger Crane \$40,000 in defense costs.

D E C I S I O N

Western National argues that the defense costs provision unambiguously gives it the option to defend because the word "option" is only susceptible to one interpretation.

Because we cannot read the word “option” in isolation and must consider the provision as a whole, we conclude that the defense costs provision is ambiguous.

Appellate courts “interpret insurance policies using the general principles of contract law” and our standard of review is de novo. *Midwest Family Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628, 636 (Minn. 2013); *Depositors Ins. Co. v. Dollansky*, 919 N.W.2d 684, 687 (Minn. 2018) (stating that interpretation of insurance policies is reviewed de novo). In interpreting policy language, we must read it “as a whole” and “[p]rovisions in a policy must be read in context with all other relevant provisions.” *Commerce Bank v. West Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015). Individual words or phrases in an insurance policy are not construed in isolation. Rather, appellate courts read the policy as a whole to determine “if an ambiguity truly exists.” *Eng’g & Constr. Innovations, Inc., v. L.H. Bolduc Co.*, 825 N.W.2d 695, 706 (Minn. 2013). A policy provision is ambiguous if it is susceptible to more than one reasonable meaning. *Midwest Family Mut. Ins. Co.*, 831 N.W.2d at 640. We resolve ambiguities in an insurance policy against the insurer and in favor of the insured. *Eng’g & Constr. Innovations, Inc.*, 825 N.W.2d at 705; *Midwest Family Mut. Ins. Co.*, 831 N.W.2d at 636. This is so because the supreme court has recognized that there is “great disparity in bargaining power between insurance companies and those who seek insurance” and that courts have a “general tendency to protect insureds’ rights as against those of insurance companies.” *Depositors Ins. Co.*, 919 N.W.2d at 689.

First, we take a broad look at the policy and consider Flueger Crane’s argument that the lack of option language in the coverage provision creates ambiguity regarding the

option or the duty to cover defense costs. In the coverage provision, Western National agrees to cover Flueger Crane’s “legal liability for loss to covered property: a. while under [Flueger Crane’s] care, custody, and control; and b. that you become legally obligated to pay as a common or contract carrier” Western National has no option to deny coverage for losses to covered property. This language does not conflict with the option to defend in the defense costs provision because defense costs are separate from the property losses contemplated in the coverage provision.² The absence of a term like “option” in one provision does not render the presence of an option term in the other provision susceptible to two, different and reasonable meanings. This coverage provision alone does not create the duty to defend.

Second, we consider the defense costs provision of the “coverage extensions” section. Paragraph 2a states that Western National has “the option to defend any suit brought against [Flueger Crane] as a result of damage to covered property caused by a covered loss.” (quotation marks omitted.) Western National argues that the “option to defend” means that it has a choice: it can defend the insured or it can refuse to do so. We do not disagree with Western National that “option” means “[t]he power or freedom to choose.” *The American Heritage College Dictionary*, 1238 (5th ed. 2011). This definition,

² The policy here differs in this important respect from the policy at issue in *Okada v. MGIC Indem. Corp.*, 823 F.2d 276 (9th Cir. 1986), one of the primary cases relied on by Flueger Crane. The definition of covered losses in the *Okada* policy included “defense of legal actions, claims or proceedings,” and gave the insurer an “option” to advance certain “expenses.” *Id.* at 278-80. Whether the word “expenses” in the *Okada* policy included defenses costs cannot assist our analysis in the case before us. This distinction also applies to other cases relied on by Flueger Crane, such as *Am. Cas. Co. of Reading, Penn. v. Bank of Mont. Sys.*, 675 F.Supp. 538, 540-42, 546 (D. Minn. 1987) (applying Montana law).

however, leads to ambiguity in light of paragraphs 2b, 2c, and 2d of the defense costs provision.

Paragraph 2b is titled “coverage limitation” and states “[w]e do not have to provide a defense after we have paid the limit as a result of a judgment or written settlement.” (quotation marks omitted). One reasonable interpretation of this paragraph is that, if Western National exercises its option to defend, then it will only defend up to this point. Another reasonable interpretation is that paragraph 2b is a more specific provision about when Western National does “not have to provide a defense.” These two reasonable interpretations make this paragraph ambiguous. We must adopt the latter interpretation because it is more favorable to Flueger Crane. Problematically, if we were to read “option to defend” in paragraph 2a to mean that Western National may refuse to defend a lawsuit at the outset, then we render meaningless paragraph 2b, in violation of two basic rules of interpretation. *See Eng’g & Constr. Innovations, Inc.*, 825 N.W.2d at 705 (stating the rule that appellate courts will not interpret an insurance policy in a way that “entirely neutralizes one provision . . . if the contract is susceptible of another construction which gives effect to all its provisions and is consistent with the general intent” (quotation omitted)); *Burgi v. Eckes*, 354 N.W.2d 514, 519 (Minn. App. 1984) (applying the rule that the specific in a writing governs over the general).

Additionally, in paragraph 2c, Flueger Crane is explicitly required to obtain Western National’s “written consent” before it may “admit liability for a loss, settle a claim, or incur expense.” If Flueger Crane must obtain Western National’s written consent to pursue a defense, then Western National is controlling the defense, which is inconsistent with

reading the “option to defend” as giving Western National the choice to refuse to defend. When Western National addressed the meaning of paragraph 2c at oral argument, counsel stated that Western National could both refuse to defend and require an insured to obtain its written consent before admitting liability, settling a claim, or incurring any expense. But it is inconsistent to interpret paragraph 2a as allowing Western National to refuse to defend, and also interpret paragraph 2c as requiring Flueger Crane to obtain Western National’s consent before it undertakes a defense. Western National cannot have it both ways. If Western National controls the defense then it has the duty to defend its insured.

Lastly, paragraph 2d governs the covered expenses. Given the language of 2b and 2c, it is not clear from paragraph 2d whether Western National agreed to cover these expenses. One reasonable interpretation is that these are the costs that Western National agreed to cover up to the coverage limit referred to in 2b. One could also interpret 2d as applying more broadly than 2b because the language is not consistent. Paragraph 2b states “[w]e do not have to provide a defense after we have paid the limit as a result of a judgment or written settlement,” but paragraph 2d makes no reference to a limit. Paragraph 2d promises to pay expenses “associated with any suit we defend.” Costs listed in paragraph 2d in excess of the coverage limit would still “be associated with” the defense provided before reaching the coverage limit. In addition, the language used in paragraph 2d does not mirror the language used in paragraph 2a. Paragraph 2a refers to controlling the defense, while paragraph 2d only relates to covering defense costs.

In sum, because we construe any ambiguity in an insurance policy against the drafter, we cannot construe paragraph 2a as Western National suggests. Reading Western

National's "option to defend" in light of the other paragraphs in the defense costs provision, as Minnesota law says we must, *e.g.*, *Eng'g & Constr. Innovations*, 825 N.W.2d at 706, we conclude that Western National's "option to defend" is ambiguous. If we interpret this phrase to mean that Western National may refuse to defend, then we create an ambiguity with the policy's promise to extend coverage and provide defense costs. It would also create an ambiguity to allow Western National to refuse to defend under paragraph 2a because it would negate paragraph 2b, stating that Western National may decline coverage of defense costs only after it has paid the policy limit as a result of judgment or written settlement. We also find ambiguity in allowing Western National to refuse to defend under paragraph 2a, while requiring Flueger Crane to obtain Western National's consent before admitting liability, settling a claim, or incurring expenses.

Because the language of the insurance policy as a whole controls our analysis, the caselaw from other jurisdictions that Western National relied on is inapplicable. None of those cases concerns policy language including a promise to extend coverage to include defense costs, a specific provision stating that an insurer did not have to provide a defense after paying its limits as a result of a judgment or written settlement, or a requirement that the insured obtain the insurer's written consent before undertaking a defense. *See, e.g.*, *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 636 N.W.2d 862, 866-67 (Neb. 2001) (policy stated insurer has "the right to . . . provide a defense for legal proceedings brought against you. If provided, the expense of this defense will be at our cost," determining unambiguous language gives insurer right to provide defense and settle but does not impose duty "to do either"); *Genaeya Corp. v. Harco Nat. Ins. Co.*, 991 A.2d 342, 346, 349 (Pa. Super. Ct.

2010) (policy stated insurer “may elect to defend you against suits;” determining may connote discretion and did not create a duty to defend); *E. Fla. Hauling, Inc., v. Lexington Ins. Co.*, 913 So. 2d 673, 675, 677 (Fla. Dist. Ct. App. 2005) (policy stated insurer has the right to “provide a defense for legal proceedings brought against you. If provided, the expense of this defense will be at our cost;” determining unambiguous language creates right not duty to defend); *see also Great W. Cas. Co. v. Flandrich*, 605 F. Supp. 2d 955, 977 (S.D. Ohio 2009) (policy stated insurers “reserve the right at their option . . . to conduct and control the defense on behalf of and in the name of the [i]nsured;” determining unambiguous language gives insurer right but not duty to defend); *B & D Appraisals v. Gaudette Mach. Movers, Inc.*, 752 F. Supp. 554, 556 (D.R.I. 1990) (policy stated insured “reserves the right at its sole option to defend such action . . . and will pay all legal expenses incurred by this Company in connection with any action it undertakes to defend;” determining unambiguous language gives insurer right “to exclusive control over potential litigation, without taking on the duty to defend [insured] in all instances”).

Having concluded that the defense costs provisions are ambiguous, we do not consider the two additional arguments raised by Flueger Crane: (1) that a duty to defend arises from every liability policy, and (2) that denying coverage for defense costs would defeat the reasonable expectations of the insured.

Affirmed.