STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0085

Nationwide Insurance Company,
Appellant,

vs.

Wadena Insurance Company, et al.,
Respondents,

Matthew J. Fee,
Respondent,

Luke A. Buck,
Respondent,

John Patrick Gillen,
Respondent.

Filed June 20, 2023
Affirmed
Connolly, Judge

Washington County District Court
File No. 82-CV-22-620

Sylvia Ivey Zinn, Brendel and Zinn, Ltd., St. Paul, Minnesota (for appellant)

Kevin J. Kennedy, Amanda G. Sperow, Borgelt, Powell, Peterson & Frauen, S.C., Oakdale, Minnesota (for respondent Wadena Insurance Company)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

On appeal in this declaratory-judgment action, appellant-insurer challenges the district court's grant of summary judgment in favor of respondent-insurer. Appellant argues that the district court erred in determining that appellant's policy was primary because there is no coverage under appellant's homeowner's insurance policy for respondent-insured's operation of a golf cart he does not own. We affirm.

FACTS

On June 16, 2019, respondents Matthew Fee, Luke Buck, and John Gillen played golf at respondent Tanners Brook Golf Course (Tanners Brook). During the game, Fee was allegedly injured when he was thrown from a golf cart operated by Gillen that struck a golf cart operated by Buck.

The golf carts were owned by Tanners Brook, and respondent Wadena Insurance Company (Wadena) provided businessowners insurance to Tanners Brook at the time of the incident. The relevant provisions in Wadena's insurance policy provide that an insured is "[a]ny person using or legally responsible for the use of golf carts loaned or rented to others by you or any of your concessionaires, but only with respect to their liability arising out of the use of the golf carts." But the policy contains an "Other Insurance" provision, which states, in relevant part, as follows:

> 1. If there is other insurance covering the same loss or damage, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. . . .

2. Business Liability Coverage is excess over:

    a. Any other insurance that insures for direct physical loss or damage; or

    b. Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured.

3. When this insurance is excess, we will have no duty under Business Liability Coverage to defend any claim or "suit" that any other insurer has a duty to defend.

Appellant Nationwide Insurance Company (Nationwide) provided homeowner's insurance to Buck during the relevant time period. Nationwide's policy contains the following provision related to coverage for personal liability:

> If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:
>
> 1. Pay up to our limit of liability for the damages for which an "insured" is legally liable. . . .
>
> 2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from the "occurrence" has been exhausted by payment of a judgment or settlement.

Nationwide's policy also contains a "Motor Vehicle Liability" exclusion, which states in relevant part:

> 1. Coverages **E** and **F** do not apply to any "motor vehicle liability" if, at the time and place of an "occurrence":

. . . .

b. The involved "motor vehicle" is being:

. . . .

4) Used for any "business" purpose except for a motorized golf cart while on a golfing facility.

2. If Exclusion **A.1.** does not apply, there is still no coverage for "motor vehicle liability" unless the "motor vehicle" is:

. . . .

d. Designed for recreational use off public roads and:

1) Not owned by an "insured"; or

. . . .

e. A motorized golf cart that is owned by an "insured," designed to carry up to 4 persons, not built or modified after manufacture to exceed a speed of 25 miles per hour on level ground and, at the time of an "occurrence," is within the legal boundaries of:

1) A golfing facility and is parked or stored there, or being used by an "insured" to:

a) Play the game of golf or for other recreational or leisure activity allowed by the facility;

b) Travel to or from an area where "motor vehicle" or golf carts are parked or stored; or

c) Cross public roads at designated points to access other parts of the golfing facility.

Fee commenced a lawsuit against Buck for injuries sustained in the golf-cart collision. Nationwide later commenced this declaratory-judgment action seeking an order requiring Wadena to defend and indemnify Buck in Fee's personal-injury action. Nationwide argued that the claims asserted in Fee's personal-injury action triggered coverage under Wadena's insurance policy, and that those claims are excluded from coverage under Nationwide's policy. Wadena responded, claiming that Nationwide's policy provides primary coverage, and that Wadena's policy only provides excess coverage over any other insurance. Nationwide and Wadena subsequently filed cross motions for summary judgment on the insurance-coverage issue.

The district court found that Nationwide is obligated to provide insurance coverage under two exceptions to its motor vehicle liability exclusions: (1) vehicles designed for recreational use off public roads that are not owned by Buck; and (2) golf carts owned by Buck and used in a certain manner. The district court also found that, although the phrase "vehicle designed for recreational use off public roads" is not defined in Nationwide's policy, both parties contend that Nationwide's policy is unambiguous, and the "Court agrees." The district court then determined that the "golf cart was designed for recreational purposes" and "[n]othing in the record supports the conclusion that the golf cart in this case was designed for primary use on public roads." Therefore, the district court concluded that the exception to Nationwide's motor vehicle liability exclusion "applies to Buck's operation of the golf cart because the golf cart is a vehicle designed for recreational use off public roads and the golf cart was not owned by Buck."

The district court also determined that "the 'other insurance' clause of the Wadena policy, which provides that the Wadena policy provides excess coverage over other insurance, does not conflict with the Nationwide policy." The district court concluded that, as a result, "the Nationwide policy provides coverage, and the Wadena policy provides excess coverage." (Footnote omitted.) Thus, the district court granted Wadena's motion for summary judgment and denied Nationwide's motion for the same. Nationwide appeals.

DECISION

Summary judgment is appropriate if the moving party shows that "there is no genuine issue as to any material fact" and that the moving party is "entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. This court reviews "a grant of summary judgment de novo." *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185, 190 (Minn. 2019). Similarly, our review is de novo where, as here, the sole issue involves the district court's interpretation of an insurance policy and whether the policy affords coverage for a particular situation. *Depositors Ins. Co. v. Dollansky*, 919 N.W.2d 684, 687 (Minn. 2018).

Insurance policies are interpreted according to general contract principles. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002). In general, when interpreting an insurance contract, the "policy must be read as a whole, and unambiguous language must be given its plain and ordinary meaning." *Com. Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015). Moreover, "[p]rovisions in a policy must be read in context with all other relevant provisions." *Id.* If the language is "clear and unambiguous," we "enforce the agreement of the parties as expressed" in the contract. *Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 776 (Minn. 2016) (quotation

omitted). In other words, we do not "rewrite, modify, or limit" the effect of an unambiguous provision "by a strained construction." *Id.* (quotation omitted).

Exclusions in an insurance policy "are as much a part of the contract as other parts thereof and must be given the same consideration in determining what is the coverage. Exclusions are ambiguous only when they are reasonably subject to more than one interpretation." *Pepper v. State Farm Mut. Auto Ins. Co.*, 813 N.W.2d 921, 927 (Minn. 2012) (quotations and citations omitted). But when an exclusion's "language is clear and unambiguous," we will interpret the exclusion "'according to plain, ordinary sense so as to effectuate the intention of the parties.'" *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008) (quoting *Canadian Universal Ins. Co. v. Fire Watch, Inc.*, 258 N.W.2d 570, 572 (Minn. 1977)).

Here, in granting summary judgment to Wadena, the district court referred to the definitions of "recreational vehicle" contained in Minn. Stat. § 168.002, subd. 27 (2022), and Minn. Stat. § 84.90, subd. 1(1) (2022). The district court then found that the golf cart in this case "was designed for recreational purposes" and is consistent with the definition of "recreational motor vehicle." Although the district court "recognize[d] that a golf cart is not a 'motor vehicle' under Minnesota's No-Fault Automobile Insurance Act," the court concluded that Nationwide's motor vehicle liability exclusion applies in this case because the golf cart operated by Buck "is a vehicle designed for recreational use off public roads and the golf cart was not owed by Buck."

Nationwide challenges the district court's decision, arguing first that the district court "committed reversible error in concluding that a golf cart is a vehicle." But it is well

settled that a party may not raise a new issue on appeal, "[n]or may a party obtain review by raising the same general issue litigated below but under a different theory." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Here, as Wadena points out, the "issue of whether a golf cart qualifies as a 'vehicle'" is not properly before this court because Nationwide failed to raise it in district court. Rather, Nationwide's position below was that no coverage was available under its policy because (1) Buck did not own the golf cart, and (2) the golf cart is not a recreational vehicle. Therefore, because Nationwide is arguing a new theory on appeal, its argument related to a golf cart not being a motor vehicle is not properly before us.[1]

Nationwide also argues that the district court erred in concluding that Buck is entitled to coverage under Nationwide's homeowner's policy for liability arising from the operation of a golf cart that Buck does not own. To support its position, Nationwide refers to the plain language of the motor vehicle liability exclusion contained in its homeowner's policy, which Nationwide asserts "does not provide coverage for motor vehicle liability." Nationwide acknowledges, however, that the Motor Vehicle Liability exclusion "contains several exceptions, one dealing specifically with golf carts." Nationwide contends that this

[1] Wadena also asserts that Nationwide's addendum includes excerpts from Nationwide's insurance policy that we should not consider because they are not part of the district court record. Indeed, the appellate record consists of "documents filed in the [district] court, the exhibits, and the transcript of the proceedings," Minn. R. Civ. App. P. 110.01, and "[a]n appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below," *Thiele*, 425 N.W.2d at 582-83. Nationwide acknowledges that it "provided the entire certified homeowner's policy," and concedes "that only the portions in the [district] court file should be considered." We, therefore, considered only that portion of the insurance policy that were before the district court below.

"very limited" golf-cart exception "restores liability coverage to occurrences involving a motorized golf cart only when Buck owns the golf cart." Nationwide argues that, because Buck does not own the golf cart, the golf-cart exception does not apply. In other words, Nationwide argues that, because the golf-cart exception "is the limited exception regarding golf carts in the motor vehicle exclusion," and that "exception does not apply to the facts [in this case], coverage is not restored and the [motor vehicle liability] exclusion applies."

We are not persuaded. Despite Nationwide's argument that the only applicable exception to the motor vehicle liability exclusion is the golf-cart exception since it is the only exception explicitly relating to golf carts, the plain language of Nationwide's policy is not so limiting. There is nothing in the golf-cart exception stating that it is the *only* exception applicable to occurrences involving golf carts. Moreover, the exceptions to the motor vehicle liability exclusion contained in Nationwide's policy are separated by the word "or." "Or" is a disjunctive, meaning that if one exception does not apply, another exception might apply. *See Aberle v. Faribault Fire Dep't Relief Ass'n*, 41 N.W.2d 813, 817 (Minn. 1950) ("The word 'or' is a disjunctive and ordinarily refers to different things as alternatives."). As such, the plain language of Nationwide's policy indicates that, if the golf-cart exception does not apply, coverage may still be restored under another exception to the motor vehicle liability exclusion.

Wadena agrees that the golf-cart exception does not apply in this case because Buck does not own the golf cart. But Wadena contends that the district court correctly found that Nationwide's policy provides coverage under the recreational-vehicle exception. We agree.

As stated above, Nationwide's policy states that "there is still no coverage for 'motor vehicle liability' [under Nationwide's policy] unless the 'motor vehicle' is . . . [d]esigned for recreational use off public roads" and is "[n]ot owned by an 'insured.'" The parties agree that "recreational vehicle" is not defined by Nationwide's policy, nor does the policy define the phrase "designed for recreational use." But the parties also agree that the policy is unambiguous. When interpreting an insurance contract, the "policy must be read as a whole, and unambiguous language must be given its plain and ordinary meaning." *Com. Bank*, 870 N.W.2d at 773; *see Carlson*, 749 N.W.2d at 45 (stating that when an exclusion's "language is clear and unambiguous," this court will interpret the exclusion "according to plain, ordinary sense so as to effectuate the intention of the parties" (quotation omitted)).

Here, common sense dictates that a golf cart is a vehicle designed for recreational use off public roads. Golf carts are primarily used for transportation while playing golf, and golf is generally considered a recreational activity. *See The American Heritage Dictionary of the English Language* 1470 (5th ed. 2018) (defining "recreation" as "[r]efreshment of one's mind or body after work through activity that amuses or stimulates play. . . . An activity that provides such refreshment"). Moreover, because golf carts are primarily used for transportation while playing golf, they are generally designed for use off public roads. In fact, the district court found, and Nationwide does not dispute, that "[n]othing in the record supports the conclusion that the golf cart in this case was designed for primary use on public roads."

In addition to the plain and ordinary interpretation of the phrase "[d]esigned for recreational use off public roads," the definition of "recreational vehicle" contained in the Minnesota Statutes supports the determination that a golf cart is a vehicle designed for recreational use. For example, chapter 168 of the Minnesota Statutes, which applies to vehicle registration, defines "[r]ecreational vehicle," in relevant part, as "a vehicle that: (1) is not used as the residence of the owner or occupant; (2) is used while engaged in recreational or vacation activities; and (3) is either self-propelled or towed on the highways incidental to the recreational or vacation activities." Minn. Stat. § 168.002, subd. 27(b). As noted above, a golf cart is a vehicle "used while engaged in recreational activities." *See id.*

Similarly, chapter 84 of the Minnesota Statutes, which applies to the Department of Natural Resources (DNR), defines "[r]ecreational motor vehicle" as "any self-propelled vehicle and any vehicle propelled or drawn by a self-propelled vehicle used for recreational purposes, including but not limited to snowmobile, trail bike or other all-terrain vehicle, hovercraft, or motor vehicle licensed for highway operation which is being used for off-road recreational purposes." Minn. Stat. § 84.90, subd. 1(1). Again, a golf cart is a "self-propelled vehicle used for recreational purposes," that purpose being transportation during the game of golf. Although the statute lists several types of vehicles, none of which are golf carts, the statute specifically states that recreational vehicles are "not limited to" the vehicles described in the statute. *Id.*

Finally, the district court's conclusion that coverage is restored under Nationwide's policy is supported by the persuasive analysis in *Metro. Prop. & Cas. Ins. Co. v. Marti*, 162

F. Supp. 3d 868 (D. Minn. 2016). In that case, a passenger was injured during a social event at a winery while riding on the back of six wheeled John Deere Gator that was owned by the winery. *Marti*, 162 F. Supp. 3d at 870-71. A declaratory-judgment action was later commenced by the insurer of the Gator's driver to determine whether there was coverage under the driver's homeowner's insurance policy. *Id.* at 874. The driver's homeowner's policy excluded coverage for "motorized land vehicles," and the parties agreed that the Gator was a motorized land vehicle. *Id.* at 876. But the policy contained an exception from the exclusion for a motorized land vehicle not owned by the driver and "*principally designed for recreational use off public roads*," and "not subject to motor vehicle registration." *Id.* at 876-77 (emphasis added).

The court found that the recreational-use exception is not ambiguous and that the ordinary meaning of "recreation means refreshment of strength and spirits after work or a means of refreshment or diversion: hobby." *Id.* at 878-79 (quotations omitted). As such, the court concluded that "'recreational use' refers to activities of leisure or diversion, as opposed to work purposes." *Id.* at 879. The court then found that the operator's manual stated that the Gator is a "'utility vehicle, not a recreation vehicle'" and the winery owners testified that the Gator was used for agricultural purposes. *Id.* at 879-80. Relying on that evidence, the court concluded that the Gator's principal use was as a utility vehicle and, pursuant to the driver's insurance policy, the Gator was not a vehicle "principally designed for recreational use." *Id.* at 879-80. The court further noted that the statutory definition of "recreational motor vehicle" contained in section 84.90, subdivision 1(1) did not apply to the Gator because the statute limited the definition of recreational motor vehicle to those

used for recreational purposes. *Id.* at 880. Therefore, the court concluded that the plain and unambiguous language of the recreational-use exception to the motorized-vehicle exclusion contained in the driver's policy did not apply to the Gator because the Gator did not fall within the exception's limited application to vehicles that are principally produced with special intentional adaptation for leisure or diversion off public roads. *Id.* at 880-81.

Here, as the parties agree, the Gator at issue in *Marti* is not akin to the golf cart at issue in this case. But the policy language in *Marti* is very similar to the policy language at issue here. In interpreting the phrase "principally designed for recreational use off public roads," the court in *Marti* focused on the principal use of the Gator. *Id.* at 879-880. Applying that reasoning here, the focus is on whether a golf cart is "[d]esigned for recreational use." As discussed above, a golf cart, unlike the Gator in *Marti*, is designed for recreational use.

In sum, based on the plain and ordinary meaning of the phrase "designed for recreational use off public roads," as well as other authority defining "recreational vehicle," we conclude that a golf cart is a vehicle "designed for recreational use off public roads." Therefore, coverage is restored under Nationwide's policy, and the district court did not err in granting summary judgment to Wadena.[2]

Affirmed.

[2] We note that we have not been asked to determine which policy applies based on a closeness-to-the-risk analysis. *See Visser v. State Farm Mut. Auto. Ins. Co.*, 938 N.W.2d 830, 833 n.2 (Minn. 2020) (noting that the closeness-to-the-risk concept prioritizes "coverage when at least two policies insured the same risk, but those policies did not specify how to apportion liability").