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Court of Appeals of Minnesota.

Lang Fur Farms, Inc., et al., Appellants,
Bird Island - Hawk Creek
Mutual Ins. Co., Respondent.

A20-0683
|
Filed February 8, 2021

Affirmed and remanded

Stearns County District Court

File No. 73-CV-18-6217

Attorneys and Law Firms

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Considered and decided by Gaïtas, Presiding Judge; Connolly, Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

Connolly, Judge

***1 CONNOLLY**, Judge

Appellants-insureds challenge the partial summary judgment granted to respondent-insurer, arguing that the district court erred in concluding that the chemical-or-biologicalmaterials and anti-concurrent-causation exclusions apply to their vandalism claim relating to their mink farms. Appellants also argue that the district court erred in not dismissing claims involving a bank, because the parties had stipulated to the dismissal of the bank from the case and the district court apparently overlooked the dismissal. Because we agree that the exclusions apply and there is no insurance coverage, we affirm the partial summary judgment; because we agree that the claims involving the bank should be dismissed, we remand for that purpose.

FACTS

In May 2017, appellants Lang Fur Farms and one of its owners, Daniel Lang, obtained an insurance policy (the policy) in part from respondent Bird-Island Hawk Creek Mutual Insurance Company, a township mutual insurance company. Five of the policy's provisions are relevant to the issues now on appeal. The first, in the "DEFINITIONS" section, defines the term "Farm Barns, Buildings and Structures" to include "any fixtures or equipment attached to, installed in or connected for use within a building."

The second relevant provision is in the "BASIC PERILS" section and includes in the list of perils covered "Vandalism, or Malicious Mischief." Appellants claim that their damage was the result of vandalism. The third relevant provision is the heading "GENERAL EXCLUSIONS," followed by the phrase "(Apply to all Coverages)." Both the fourth and fifth relevant provisions are under this heading. The fourth is the "Chemical or Biological" exclusion, which reads, "Regardless of the amount of damage or loss, this exclusion applies to any losses that are carried out or caused by dispersal or application of pathogenic or poisonous biological or chemical materials."

The fifth relevant provision is the "Concurrent Causation" exclusion, which provides that, if any one exclusion applies, respondent does not cover the loss resulting directly or indirectly from any concurrent cause, i.e., it does not cover a loss "[i]f one or more of the exclusions apply to the loss, regardless of other causes or events that contribute to or aggravate the loss whether such causes or events act to produce the loss before, at the same time as, or after the excluded causes or events."

In July 2017, a herbicide containing the chemical glyphosate [1] was introduced into the water systems for the minks' cages on appellants' two farms. Appellants filed a claim for the cost of replacing the water systems. Respondent investigated and denied the claim.

Appellants brought this action, seeking a declaratory judgment stating that their loss and damages were covered and claiming breach of contract, joint enterprise, joint venture, and a right to an order for appraisal. Respondent moved to dismiss, alleging that the policy's exclusions barred coverage. The district court denied the motion. Respondent then filed an answer, alleging that the policy exclusions barred coverage and that appellants' willful misrepresentations, concealment and fraud, and intentional causation of all damages were affirmative defenses for respondent. Respondent also filed a counterclaim against appellant Daniel Lang, alleging insurance fraud. The parties filed cross motions for summary judgment.

***2** Following a hearing, the district court issued an order and a memorandum that begins by noting that "[t]he underlying issue of fraud (whether the loss was the result of third-party vandalism or acts of the insured) is a matter for the jury ... that will be addressed no further at this time." The order granted respondent's motion for partial summary judgment based on the chemical-or-biological exclusion and the anti-concurrent-cause exclusion, denied respondent's motions for summary judgment based on the misrepresentation-and-fraud exclusion, the pollutants exclusion, and the terrorism exclusion, and awarded respondent recoverable costs and expenses. [2]

Appellants challenge the summary judgment, arguing that none of the policy's exclusions applies to their claim. [3]

DECISION

Standard of Review

This court reviews a district court's legal conclusions on summary judgment de novo, viewing the evidence in the light most favorable to the party against whom the summary judgment was granted. *Commerce Bank v. W. Bend. Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015). More specifically, interpretation of an insurance policy and whether a policy provides coverage in a particular situation are questions of law that are subject to de novo review. *Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co.*, 825 N.W.2d 695, 704 (Minn. 2013). Insurance policy language is to be given its plain and ordinary meaning. *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 151 (Minn. App. 2001). Exclusions are construed in favor of the insured. *Canadian Universal Ins. Co. v. Fire Watch, Inc.*, 258 N.W.2d 570, 572 (Minn. 1977).

1. The "Chemical or Biological" Exclusion

The policy excludes coverage for "any losses that are carried out or caused by dispersal or application of pathogenic or poisonous biological or chemical materials." The district court concluded that glyphosate, an ingredient of the herbicide poured into the damaged watering system, was a pathogenic or poisonous chemical material that was dispersed through the water in the system and that "the incident at Lang Fur Farms was a dispersal of a chemical and is subject to the Chemical or Biological Exclusion."

Appellants offer three reasons why the chemical or biological exclusion does not apply. First, they argue that, because the herbicide was poured into the watering system, it was not "dispersed." When a term in an insurance policy is not defined in the policy, it is to be given its plain and ordinary meaning. *Gen. Mills, Inc.*, 622 N.W.2d at 151. The meanings of "disperse" include "to become spread widely" and "to distribute (something, such as fine particles) more or less evenly throughout a medium." *Disperse Definition,* Merriam-Webster.com, www.merriamwebster.com/dictionary/disperse (last visited Nov. 23, 2020). The glyphosate was spread widely throughout the minks' watering system, causing the damage.

Appellants rely on *Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*, 480 N.W.2d 368, 374 (Minn. App. 1992) (citing a Tenth Circuit case for the view that "dispersal" connotes "the issuance of a substance from a state of containment" rather than "the placement of a substance into an area of confinement"), *review denied* (Minn. Mar. 26, 1992). This reliance is misplaced because *Sylvester Bros.* is distinguishable. That case concerned a pollution exclusion, not a chemical-or-biological exclusion. [4] The word "dispersal" occurs in the phrase "discharge, dispersal, release, or escape" of pollutants, and "the 'escape' of pollutants [as opposed to the deposit of pollutants in the

landfill] is the critical inquiry for purposes of determining the applicability of the pollution exclusion." *Sylvester Bros. Dev. Co.*, 480 N.W.2d at 373-74. Here, in the chemical or biological exclusion, the word "dispersal" occurs in the phrase "dispersal or application," and the critical inquiry for applicability of the exclusion was the deposit of glyphosate into the watering systems, not its "escape" into them. Given the very different contexts in which "dispersal" was used in the pollution exclusion in the *Sylvester Bros*. policy and the chemical or biological exclusion in appellants' policy, its definition in *Sylvester Bros*. is not relevant to, much less dispositive of, its definition here.

***3** Second, appellants also argue that the glyphosate was not poisonous. This argument conflicts with their previous position that the vandals "took specific action to kill, maim, and release the mink. ... [T]hey tainted their drinking water and made mink very sick and many died" and that "[I]t is true that the mink at issue got very sick, were rendered blind, and many died after drinking the water." Having represented to the district court that glyphosate was a poisonous chemical, appellants may not argue now that it is not a poisonous chemical within the meaning of the exclusion. A party may not "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).

Third, appellants argue that, because the damage was the result of vandalism, a "covered peril," it is covered, and that the means chosen by the vandal(s), i.e., dispersing a poisonous chemical through the watering system, cannot vitiate this coverage. But with this reasoning, all exclusions would be meaningless: anything vandals chose to do, whether it was a covered peril or an excluded peril, would be covered.

2. The Concurrent-Causation Exclusion

Appellants argue that "[w]hen property damage is caused by the acts of vandals, vandalism coverage applies and there is no 'concurrent cause' sufficient to trigger that exclusion." But the concurrent-causation exclusion says there is no coverage when *any* other exclusion applies to a damage claim, regardless of when that excluded event occurred. Here, there is no coverage for vandalism that occurred before and during the excluded dispersal of a chemical.

The district court relied on an Eighth Circuit case, *State Bank of Bellingham v. BancInsure, Inc.*, 823 F.3d 456 (8th Cir. 2016) (affirming the application of a concurrent-causation exclusion in *State Bank of Bellingham v. BancInsure, Inc.*, 2014 WL 4829184 (D. Minn. 2014)). *Bellingham* concerned an insurer's denial of coverage for an insured bank's claim for damages resulting from fraudulent transfers, based on exclusions in the policy. *Bellingham,* 823 F.3d at 458-59.

> Concerning insurance contracts, Minnesota has adopted the concurrent-causation doctrine, which directs that an insured is entitled to recover from an insurer when cause of the loss is not excluded under the policy. This is true even though an excluded cause may also have contributed to the loss. ..... .
>
> ... Parties may include "anti-concurrent causation" language in contacts to prevent the application of the concurrent causation doctrine; however, in those cases where courts have found the contract contains an anti-concurrent causation clause, the language used is clear and specific. *See Ken Johnson Props., LLC v. Harleysville Worcester Summary Ins. Co.*, No. 12-1582, 2013 WL 5487444, at *12 (D. Minn. Sept. 30, 2013) (recognizing language that an exclusion applies "regardless of any other cause or event that contributes concurrently or in any sequence to the loss[,]" constitutes an adequate "anti-concurrent causation" provision[,] and "evidences the parties' intent to contract around the concurrent causation doctrine").

Id. at 459-60 (quotation and citations omitted). The language in *Ken Johnson* is very similar to the language here.

The district court noted further that the online *Survey of State Law Regarding Enforceability of Anti-Concurrent Causation Clauses*, http://www/timoneyknox.com/insurance-industry/survey-of-statelaw-regarding-enforceability-of-anti-concurrent-causation-clauses (last visited Jan. 25, 2021), indicates that "this interpretation of the anti-concurrent cause exclusion is consistent with the vast majority of states." The survey covers 34 states: 31 regard anti-causation clauses as valid and enforceable while three do not. [5]

***4** The conclusion of the district court's memorandum reveals an awareness that the decision for the insurer could "be deemed harsh."

> It is troubling that coverage for an act of vandalism may ultimately be determined by the method of vandalism; the release of a chemical versus another method such as arson. ....
>
> ... [T]he Court suspects that a party purchasing insurance would assume that the coverage extended to vandalism damage, regardless of the method in which the vandals acted.
>
> Unfortunately, many fail to read their policy after purchase. Even fewer would read a sample policy prior to purchase and fully understand the coverage that they are purchasing. Even for those who would read a policy prior to purchase, the likelihood that they would anticipate a loss of this nature, and the application of an exclusion, would be unfathomable. But the language of the policy is there and it governs the claim.
>
> At some point, either the legislature or our appellate courts may rein in the broad application of the [chemical and biological] exclusion as applied in conjunction with the anti-concurrent clause exclusion. But until then, this Court is bound to follow what it believes to be the established precedent, regardless of the harshness of the result.

Appellants rely on some of this language and on *Atwater Creamery Co. v. W. Nat. Mut. Ins. Co.*, 366 N.W.2d 271 (Minn. 1985) to argue that the district court "failed to properly apply the Reasonable Expectations Doctrine to address the manifestly unjust 'harsh' result." That doctrine provides that "the objectively reasonable expectations of [insureds] regarding the terms of insurance contracts will be honored even though the painstaking study of the policy provisions would have negated those expectations." *Id.* at 277 (quotation omitted). However, "some kind of ambiguity" in an insurance contract is traditionally required before the reasonable expectations doctrine is applied. *Id.*

But *Atwater* is distinguishable: that case involved a burglary policy in which "the technical definition of burglary [was], in effect, an exclusion from coverage" that would not be "interpreted so as to defeat the reasonable expectations of the [insured.]" *Id.* at 278-79. *Atwater* found that the definition in the policy "[was] not ambiguous," *id.* at 276, but also held that ambiguity in the policy was a factor, but not the dispositive factor, to consider when applying the reasonable-expectations doctrine. *Id.* at 278.[6] A year later, this court discussed *Atwater* in *Merseth by Merseth v. State Farm Fire and Cas. Co.*, 390 N.W.2d 16, 18 (Minn. App. 1986), *review denied,* (Minn. Aug. 13, 1986). *Merseth* noted that: (1) *Atwater* had "seemingly adopted the reasonable-expectations-regardless-of-ambiguity doctrine," (2) the dissent in *Rusthoven v. Commercial Standard Ins. Co.*, 387 N.W.2d 642, 646 (Minn. 1986) claimed the majority had abandoned the *Atwater* reasonable-expectations-regardless-of-ambiguity doctrine, (3) the result was uncertainty as to "how the reasonable expectations doctrine applie[d] in a case where the provision at issue is clear and unambiguous," and (4) this court declined "to apply the reasonable-expectations-regardless-of-ambiguity doctrine beyond the facts of *Atwater*."

***5** In their reply brief, appellants argue that in *Merseth* this court applied the reasonable-expectations doctrine where the exclusionary language was clear, precise, and unambiguous, but "obscurely placed in the policy, as the language is here." But the exclusions in this policy are not "obscurely placed": they are under the boldface heading "GENERAL EXCLUSIONS" that "apply to all coverages" on pages 14 and 16 of the 30-page "General Policy Provisions."[7]

Moreover, appellants do not argue that their "reasonable expectations" are based on any ambiguity in the policy. *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 49 (Minn. 2008) noted that:

> [I]n no case since *Atwater* [23 years ago] have we used the doctrine [of reasonable expectations] to provide coverage in contravention of unambiguous policy terms. Moreover, the doctrine has generated criticism and confusion that gives us pause. ... Commentators also have expressed concern that the doctrine enables courts to vitiate the unambiguous terms of a policy simply to achieve desirable outcomes. ... Against this backdrop, we are unwilling to expand the doctrine of reasonable expectations beyond its current use as a tool

> for resolving ambiguity and for correcting extreme situations like that in *Atwater*, 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.

Given the history of *Atwater* and the fact that appellants did not argue their policy was ambiguous, the district court did not err in declining to apply the reasonable-expectations doctrine.

The district court did not err in concluding that, under Minnesota law, the chemical-or-biological exclusion and the anti-concurrent-causation exclusion apply to prevent insurance coverage for this loss. We affirm the award of partial summary judgment to respondent and remand for the dismissal of the claims involving the bank.

Affirmed and remanded.

All Citations

Not Reported in N.W. Rptr., 2021 WL 416404

Footnotes

1 Glyphosate is defined as "[a] white compound, C3H8NO5P, soluble in water, and used as a broad-spectrum herbicide." *American Heritage Dictionary* 593 (4th ed. 2007).

2 The district court noted that "the grant of summary judgment[, determining that the chemical and biological exclusion barred coverage, was] so determinative of the ultimate outcome of this case that there [was] no just reason for delay in entry of final judgment as to that claim"; ordered entry of judgment under Minn. R. Civ. App. P. 54.02; and directed that the other issues remain suspended pending appeal of the summary judgment.

3 Appellants raise other issues that are not relevant to this appeal; therefore, we do not address them.

4 The district court explicitly concluded that the pollution exclusion here did not apply.

5 Of the 31 states, one state limits enforceable anti-causation clauses to policies other than fire policies; one limits them to clauses that do not conflict with other policy provisions, and one limits them to situations where two or more causes occur simultaneously to cause the loss.

6 Four of the *Atwater* justices joined in a special concurrence, saying they "would not apply the reasonable expectations test in the absence of ambiguity in the policy; but because [they] believe[d] such ambiguity exist[ed], [they] concur[red]" in its application. (Simonett, J.)

7 Appellants claim that the exclusions are "obscurely buried in the 123-page policy" and that "a layman farmer is utterly lost in riddling out the coverage." The policy at issue here is 30 pages long. Moreover, appellants in their principal brief state that they own and operate Lang Fur Farms at two locations; co-own Lang Family Properties; operate Lang Feed, a feed plant; and have successfully run a multi-million dollar business for almost 100 years. These facts do not support the implication that appellants were unable to understand the clearly labeled coverages and exclusions of the insurance policy.