STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0512

Julie L. Closner,
Appellant,

vs.

Illinois Farmers Insurance Company,
Respondent.

Filed January 6, 2009
Reversed
Peterson, Judge

Dodge County District Court
File No. 20-CV-07-655

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Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal from summary judgment, appellant insured challenges the district court's determination that coverage exclusions in an automobile-insurance policy were

not ambiguous and barred coverage. Because we conclude that the exclusions are ambiguous and do not bar coverage, we reverse.

FACTS

Faye L. Zimmerman was killed when the car she was driving collided head-on with a vehicle driven by appellant Julie Closner. When the collision occurred, Zimmerman was delivering newspapers. Under her newspaper-delivery contract, Zimmerman was an independent contractor who agreed to purchase newspapers and would then resell them to subscribers. Zimmerman was responsible for the costs of delivering the newspapers and for maintaining liability insurance on all vehicles used to distribute newspapers. Zimmerman controlled the price that subscribers paid, which could be either below or above the price published in the newspaper.

Zimmerman's vehicle was insured by respondent Illinois Farmers Insurance Company. The policy included two liability-coverage exclusions that are relevant to this case. The first exclusion states that there is no liability coverage when the vehicle is "used to carry persons or property for a charge." The second exclusion states that liability coverage does not apply to

> [b]odily injury or property damage arising out of the ownership, maintenance or use of any vehicle by any person employed or otherwise engaged in a business . . . .
>
> This exclusion does not apply to the maintenance or use of a:
>
> a. Private passenger car,
>
> . . . .
>
> However, this exclusion does apply to any vehicle:
>
> 1. While used in employment by any person whose primary duties are the delivery of products or services.

After Closner's insurer denied coverage, Closner obtained a default judgment against Zimmerman's estate and then began a declaratory-judgment action seeking a declaration that respondent is obligated to provide coverage for her injuries. Respondent moved for summary judgment, arguing that the two exclusions barred coverage. The district court found that the exclusions are not ambiguous and excluded coverage and, therefore, granted respondent's motion. This appeal followed.

D E C I S I O N

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "[T]he interpretation of insurance contract language is a question of law as applied to the facts presented." *Meister v. W. Nat'l Mut. Ins. Co.*, 479 N.W.2d 372, 376 (Minn. 1992). "Whether a contract is ambiguous is a question of law, on which the reviewing court owes no deference to the district court's determination." *Murray v. Puls*, 690 N.W.2d 337, 343 (Minn. App. 2004), *review denied* (Minn. Mar. 15, 2005).

"A contract is ambiguous if it is reasonably susceptible to more than one construction." *Blackburn, Nickels & Smith, Inc. v. Erickson*, 366 N.W.2d 640, 644 (Minn. App. 1985), *review denied* (Minn. June 24, 1985). "Ambiguity may also result from an irreconcilable conflict between terms or provisions within the policy." *Morris v. Weiss*, 414 N.W.2d 485, 487-88 (Minn. App. 1987) (citing *Rusthoven v. Commercial Standard Ins. Co.*, 387 N.W.2d 642, 644 (Minn. 1986). If an insurance policy is

ambiguous, the ambiguity must be resolved in favor of the insured. *Marchio v. W. Nat'l Mut. Ins. Co.*, 747 N.W.2d 376, 380 (Minn. App. 2008).

A. The first exclusion

The district court concluded that the liability-coverage exclusion for using an automobile "to carry persons or property for a charge" is not ambiguous and excluded coverage. In reaching this conclusion, the district court relied on this court's opinion in *Progressive Cas. Ins. Co. v. Metcalf*, 501 N.W.2d 690 (Minn. App. 1993), which the district court interpreted as a statement by this court that the phrase "for a charge" is not ambiguous.

In *Metcalf*, this court analyzed a liability exclusion that excluded coverage for "liability arising out of the ownership or operation of a vehicle while it is being used to carry persons or property *for a fee*." *Id.* at 691 (emphasis added). The insured in *Metcalf* worked at a pizza shop, and one of his duties was delivering pizzas. *Id.* The pizza shop paid the insured an hourly wage and 18 cents per mile for the use of his car for delivering pizzas. *Id.* The insured also received tips from 70 to 75 per cent of the delivery customers. *Id.* The pizza shop did not charge the customers for delivery. *Id.* The insured was involved in an automobile accident while delivering a pizza, and the issue on appeal was whether the liability-coverage exclusion was ambiguous. *Id.* This court held that given the various possible meanings of the word "fee," the exclusion was reasonably subject to more than one interpretation and, therefore, must be deemed ambiguous. *Id.* at 692.

In reaching this conclusion, this court identified two possible meanings of the term "fee." *Id.* This court stated:

> The term "fee" could refer to a per trip charge, as the Louisiana courts noted in *RPM Pizza, Inc. v. Automotive Cas. Ins. Co.*, 601 So.2d 1366, 1370 (La. 1992) and *McPherson v. Viola*, 593 So.2d 1370, 1371 (La. App. 1992). There was no such charge in this case.
>
> The term "fee" could also refer to the wages paid to an employee for driving. In this case, however, [the insured] received the same wage whether he was driving his car or performing other duties. Therefore, [the insured's] wages cannot be considered a "fee" within the meaning of the exclusion. The mileage reimbursement [the insured] received also is not determinative. *See United States v. Milwaukee Guardian Ins. Co.*, 966 F.2d 1246, 1247 n. 3 (8th Cir. 1992).

Id.

We see no basis for interpreting this court's statements in *Metcalf* as meaning that the phrase "for a charge" is not ambiguous. This court did not hold in *Metcalf* that using the phrase "for a charge" instead of "for a fee" would resolve the ambiguity in the policy exclusion. This court simply used the word "charge" when trying to explain possible meanings of the policy term "fee." Whether the term used is "fee" or "charge," the different meanings that this court identified in *Metcalf* apply. A fee or charge could be a separate amount that is applied on a "per trip" basis, or it could be an amount that is included in the price of the pizza to reflect the costs of making the delivery, but is not charged separately. In either case, it could be argued that the pizza is being delivered for a fee or a charge. Therefore, because the exclusion in Zimmerman's policy does not clearly state whether it applies to one or both of these possibilities, the phrase "for a

charge" is ambiguous, and the ambiguity must be resolved in favor of the insured.[1] Consequently, the exclusion does not bar coverage.

B. The second exclusion

Closner argues that the second exclusion should not bar coverage because the term "employment" is ambiguous. The district court concluded that the distinction between an independent contractor and an employee does not make the exclusion ambiguous. We disagree and conclude that the language and structure of the exclusion create an ambiguity regarding its application to an independent contractor.

The exclusion begins with the statement that liability coverage does not apply to "[b]odily injury or property damage arising out of the ownership, maintenance or use of any vehicle by any person employed or otherwise engaged in a business." The phrase "any person employed or otherwise engaged in a business" recognizes that a person using a vehicle for business purposes could be an employee of the business or be associated with the business in some other way; for instance, as an independent contractor. But because the phrase includes any person engaged in a business, whether as an employee or in some other way, liability coverage for any business use of the vehicle would be excluded under this first section of the exclusion.

[1] Courts in other jurisdictions have also recognized multiple definitions for the phrase "for a charge." *See United States v. Milwaukee Guardian Ins. Co.*, 966 F.2d 1246, 1247 (8th Cir. 1992) (identifying multiple definitions for the word "charge"); *see also Colonial Ins. Co. of Cal. v. Jermann*, 657 N.E.2d 336, 336–38 (Ohio Ct. App. 1995) (holding that "carrying property for a charge" is "susceptible to more than one interpretation as applied to the facts of this case, we find it to be ambiguous and, therefore, unenforceable").

However, the exclusion includes a second section, which states that "[t]his exclusion does not apply to the maintenance or use of a . . . [p]rivate passenger car." This section indicates that if the vehicle being used for business purposes is a private passenger car, the liability-coverage exclusion does not apply regardless of whether the person using the car is an employee of the business or is associated with the business in some other way.

Finally, the exclusion includes a third section, which states: "However, this exclusion does apply to any vehicle . . . [w]hile used in employment by any person whose primary duties are the delivery of products or services." Under this section, if the primary duties of the person using the vehicle are the delivery of products or services, the exclusion applies while the vehicle is used in employment, regardless of the type of vehicle used.

Reading all three sections together, Closner could conclude that under the first section, the exclusion applies to her because Zimmerman was using her vehicle as an independent contractor for a business purpose. However, moving on to the second section, Closner could conclude that the exclusion does not apply to her because the vehicle that Zimmerman was using to deliver newspapers was a private passenger car. But under the third section, the type of vehicle no longer matters, and it is undisputed that Zimmerman's primary duty as an independent contractor was to deliver newspapers. Consequently, the exclusion applies if, while using her vehicle to perform her duties as an independent contractor, Zimmerman was using the vehicle in "employment."

The district court concluded that "there is nothing ambiguous about the term 'employment' when it is followed by 'by any person whose primary duties are the delivery of products or services.'" But we conclude that the dichotomy created in the first section of the exclusion makes the term "employment" ambiguous when used in the third section of the exclusion.

As we have already explained, the phrase "any person employed or otherwise engaged in a business" used in the first section of the exclusion draws a distinction between a person employed in a business and a person otherwise engaged in a business. After observing this dichotomy in the first section of the exclusion, anyone reading the entire exclusion could reasonably construe the phrase "used in employment" to mean use by a person who is an employee of a business and not as use by an independent contractor engaged in a business. But because independent contractors are commonly described as being self-employed and the duties they perform are commonly described as employment duties, "used in employment" could also be reasonably construed to mean use by either an employee or an independent contractor in an occupational activity. Therefore, because the term "employment" could be interpreted narrowly as meaning only the activity of an employee or broadly as meaning any occupational activity of an employee or an independent contractor, it is ambiguous, and the ambiguity must be resolved in favor of the insured. Consequently, the exclusion does not bar coverage.

Reversed.