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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1358**

Sue McLean & Associates, Inc.,
Appellant,

vs.

Commerce and Industry Insurance Company, Inc.,
Respondent.

**Filed June 9, 2009
Affirmed
Lansing, Judge**

Hennepin County District Court
File No. 27-CV-07-9238

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Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

LANSING, Judge

This is an appeal from the district court's summary-judgment determination that Commerce and Industry Insurance Company's weather-insurance policy did not provide coverage to concert promoter Sue McLean & Associates, Inc. when adverse weather forced an early termination of an outdoor concert. Because the narrow dispute turns on whether the early termination of the concert constituted abandonment under the policy and the district court applied the policy's plain language to conclude that the 8:47 p.m. termination of the concert did not constitute abandonment, we affirm.

FACTS

Sue McLean & Associates, Inc. (McLean) promotes outdoor concerts at the Minnesota Zoo Amphitheater. As a company, McLean takes on a wide range of responsibilities, including contracting with musicians and ticket vendors, hiring stage managers, and purchasing advertising. McLean's profits consist of one-hundred percent of ticket sales over costs. When a concert is cut short due to weather, McLean issues refunds if, by its own assessment, the concertgoers did not receive a full show.

Since at least 2004, McLean has been purchasing weather insurance for the zoo concerts from Commerce and Industry Insurance Company, Inc. The policy at issue in this coverage action was purchased in June 2006 and covered four specific outdoor concerts, the first of which was scheduled for June 16, 2006.

The insurance policy states that the "Insured Peril" is "Severe Adverse Weather causing necessary Cancellation or Abandonment of the Insured Event." It also states that

the “Hours occurring” are “4:00 PM – 9:00 PM ([Five] Insured Hours Each Day).” The policy defines “cancellation” as “the inability to proceed with the Insured Event prior to commencement.” And it defines “abandonment” as “the inability to complete FIFTY (50) PERCENT or more Insured Hours once the Insured Event has commenced during the period of this Insurance.”

These are the coverage provisions that the district court applied to the events that occurred at the June 16 concert. The concert started on time at 7:30 p.m. with an opening act. The main act, Delbert McClinton, took the stage at 8:30 p.m. McClinton’s contract called for a seventy-five-minute set plus an encore, but zoo officials terminated the show at 8:47 p.m. because of heavy rainfall and lightning.

It is undisputed that the zoo terminated the concert because of “severe adverse weather” as the term is defined in the insurance policy. It is also undisputed that the termination of the event did not constitute a cancellation under the policy because the event had commenced. But McLean and Commerce and Industry dispute whether the termination of the concert at 8:47 p.m. met the policy’s definition of “abandonment.”

When Commerce and Industry denied coverage, McLean sued. The parties filed cross-motions for summary judgment and submitted the motions to the district court on stipulated facts in the fall of 2007. The district court denied the motions, concluding that the policy is ambiguous and that genuine issues of material fact prevented summary judgment. After receiving the district court’s order, McLean and Commerce and Industry submitted the additional stipulated fact that “Delbert McClinton took the stage at the

Minnesota Zoo at 8:30 p.m.,” and asked the district court to reconsider its order denying summary judgment.

On reconsideration, the district court granted Commerce and Industry’s motion for summary judgment and denied McLean’s motion for summary judgment. It determined that abandonment occurs under the policy when “extreme weather conditions occur sometime between 4:00 p.m. and 9:00 p.m. and cause the calling off of an insured event after the event has begun but sometime before the lapse of half or more of the time remaining between when the event started and 9:00 p.m.” The court tested its conclusion by applying it to the two possible starting times for the event and determined that, either way, termination at 8:47 p.m. did not constitute abandonment under the language of the policy. Accordingly, the district court concluded that as a matter of law the insurance policy did not provide coverage. McLean appeals.

D E C I S I O N

In appellate review of an order for summary judgment on an insurance coverage issue, we determine whether there is an issue of material fact and whether the district court erred in applying the law. *Zimmerman v. Safeco Ins. Co. of Am.*, 605 N.W.2d 727, 729 (Minn. 2000). When “material facts are not in dispute and the sole issue is a question of insurance policy interpretation, our review is de novo.” *Id.*

“General principles of contract interpretation apply to insurance policies.” *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998). When interpreting a policy, our cardinal purpose is “to give effect to the intention of the parties as expressed in the language they used in drafting the whole policy.” *Art Goebel, Inc. v.*

N. Suburban Agencies, Inc., 567 N.W.2d 511, 515 (Minn. 1997). We apply the policy’s plain and ordinary language and “guard against the invitation to ‘create ambiguities’ where none exist.” *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32, 36 (Minn. 1979). To determine whether a policy is ambiguous, courts use “a process of synthesis in which words, phrases, and sentences are assigned a meaning in accordance with the apparent purpose of the [policy] as a whole.” *Metro Office Parks Co. v. Control Data Corp.*, 295 Minn. 348, 352, 205 N.W.2d 121, 124 (1973).

Applying these principles, we conclude that the district court properly applied the language of the contract to determine that the June 16 concert was not abandoned. The policy defines “abandonment” as “the inability to complete FIFTY (50) PERCENT or more Insured Hours once the Insured Event has commenced during the period of this Insurance.” Although the meaning of this abandonment definition incorporates a series of other terms in an equation that has a complicated application, it is possible to ascertain a fixed meaning for the words and phrases through a process of synthesis.

The synthesis of fixed meaning is drawn first from the definition of one of the incorporated phrases that appears elsewhere in the policy. The “Hours occurring” provision assigns a fixed meaning to the phrase “Insured Hours” because it states that the “Hours occurring” are “4:00 PM – 9:00 PM ([Five] Insured Hours Each Day).” Second, the complementary cancellation coverage carves out a tandem coverage for a specified period of time before the event commences: it defines cancellation as “the inability to proceed with the Insured Event prior to commencement.” Thus, insured events are those

commencing between 4:00 and 9:00 p.m.; the cancellation provision applies prior to commencement and the abandonment provision applies after commencement.

Examining the definition of abandonment in light of these other provisions, the definition is susceptible to only one interpretation. The definition refers to “the inability to complete FIFTY (50) PERCENT or more” of a period of time, and the period of time is defined by the following phrase: “Insured Hours once the Insured Event has commenced during the period of this Insurance.” Because the insured hours span from 4:00 to 9:00 p.m. and the policy intends that the cancellation provision applies to the portion of these insured hours before the event commences, the period-of-time phrase must be read as identifying the portion of the insured hours after commencement. More specifically, the period-of-time phrase identifies the portion of the insured hours that begins “once the Insured Event has commenced” and ends at 9:00 p.m. Coverage is provided for fifty percent of that period. The district court therefore properly concluded that abandonment is the inability to complete fifty percent or more of the time period that elapses between commencement of the event and 9:00 p.m.

This interpretation is reasonable based on the apparent purposes of the policy as a whole. McLean’s purpose is to insure against lost profits when it has to issue refunds because of inclement weather. Commerce and Industry’s purpose is to assess and price the risk involved. Commerce and Industry can better minimize its exposure by defining a fixed range of hours and creating an incentive for McLean to start shows on time within that range. For example, an event scheduled to begin at 7:00 p.m. will have abandonment coverage for a full sixty minutes if it starts on time. If weather that evening looks

questionable, McLean might decide to postpone the start of the event until 7:30 p.m. Cancellation coverage would continue during the half-hour wait, but the abandonment coverage for the 7:30 p.m. start would only be forty-five minutes.

This type of coverage option helps keep the cost of a policy down by allowing McLean to take on more of the abandonment-side risk if it needs or wants to start a show late. It also keeps Commerce and Industry's exposure well within a defined range of hours. The mechanism for achieving these purposes was provided by standard policy language into which the parties inserted the 4:00-9:00 p.m. time period as the fixed range for coverage, the "Hours occurring" under the policy. If it now seems unreasonable to McLean that its coverage does not extend all the way to 9:00 p.m. for a 7:30 p.m. show, it is free to negotiate and presumably pay a higher price for a contract with a wider range of insured hours.

McLean argues that the district court's interpretation is unreasonable because it adds terms to the policy that the parties chose to omit. Specifically, McLean asserts that the interpretation redrafts the abandonment definition as "the inability to complete FIFTY (50) PERCENT or more [*of the remaining*] Insured Hours once the Insured Event has commenced during the period of this Insurance." It is true that the definition could have been more carefully drafted to convey the parties' intention that abandonment is the inability to complete fifty percent or more of the time period that elapses between commencement of the event and 9:00 p.m. Nevertheless the language conveys this intention without the insertion of the phrase "of the remaining." By stating "Insured Hours once the Insured Event has commenced during the period of this Insurance," the

language implicitly identifies the *remaining* insured hours. The phrase refers to the portion of the insured hours that begins “once the Insured Event has commenced.” Adding “of the remaining” to the text would only repeat what is already implied by the express language. Thus McLean’s argument that the interpretation is unreasonable is not persuasive.

McLean argues in the alternative that the abandonment definition is reasonably susceptible to more than one interpretation and is therefore ambiguous. It contends that abandonment occurs under the policy when, due to severe weather conditions, the concert is terminated within two-and-a-half hours of the concert’s commencement or by 9:00 p.m., whichever comes first. To reach this conclusion, McLean interprets the phrase “FIFTY (50) PERCENT or more Insured Hours” as fifty percent or more of five hours because the policy refers to “[Five] Insured Hours Each Day.” And it interprets the phrase “once the Insured Event has commenced during the period of this Insurance” as merely identifying when the clock starts running on the two-and-a-half hours of coverage: the clock starts running once the event commences between 4:00 and 9:00 p.m.

We reject this interpretation because it assumes that the five insured hours may be detached from the period between 4:00 and 9:00 p.m. In other words, McLean interprets the phrase “FIFTY (50) PERCENT or more Insured Hours” as referring to half of an unbounded five hours of coverage. The policy, however, includes only one reference to “[Five] Insured Hours” and this reference is a parenthetical description of the period

between 4:00 and 9:00 p.m. Thus McLean's interpretation of the abandonment definition as referring to an unbounded period of five hours is not reasonable.

As the district court reasoned, if the June 16 concert began with the opening act, at 7:30 p.m., abandonment did not occur because the concert terminated at 8:47 p.m., which is more than fifty percent of the ninety minutes of coverage between 7:30 and 9:00 p.m.. Similarly, if the June 16 concert began at 8:30 p.m. with McClinton's performance, abandonment did not occur because the concert terminated at 8:47 p.m., when more than fifty percent of the thirty minutes of coverage between 8:30 and 9:00 p.m. had elapsed. The district court applied the language of the policy to the June 16 occurrence and correctly determined that, under the language of the contract, abandonment did not occur.

Affirmed.