IN THE COURT OF APPEALS OF IOWA

No. 2-946 / 12-0821
Filed November 29, 2012

FEDERAL INSURANCE COMPANY, as Subrogee of BUENA VISTA COUNTY HOSPITAL d/b/a BUENA VISTA REGIONAL MEDICAL CENTER,
Plaintiff-Appellant,

vs.

WOODRUFF CONSTRUCTION, et al.,
Defendants-Appellees.

Appeal from the Iowa District Court for Buena Vista County, Patrick M. Carr, Judge.

An insurer appeals from the district court's grant of summary judgment in favor of several contractors in a subrogation claim. **AFFIRMED.**

Larry Eaton of Cozen O'Connor, Chicago, Illinois, and Kevin Driscoll of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for appellant.

David Phipps of Whitfield & Eddy, P.L.C., Des Moines, Joseph Fitzgibbons and Ned Stockdale of Fitzgibbons Law Firm, L.L.C., Estherville, William Beck and Ryan Snell of Woods, Fuller, Schulz & Smith, P.C., Sioux Falls, South Dakota, Michael Frey of Hellige, Frey & Roe, R.L.L.P., Sioux City, and Kirke Quinn of Law Offices of Kirke C. Quinn, Boone, for appellees.

Heard by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

EISENHAUER, C.J.

Federal Insurance Company (Federal) appeals from the district court's grant of summary judgment in favor of several contractors in its subrogation suit. Federal contends the court erred in (1) not properly applying a contract provision concerning insurance, (2) misconstruing a contract term, and (3) failing to apply Iowa law properly in interpreting the contract. We affirm.

I. Background

Buena Vista County Hospital (hospital) contracted with Woodruff Construction (Woodruff) to make certain improvements in the hospital, including a new operating suite and related support rooms. Woodruff subcontracted portions of the work to three other contractors. During construction a sprinkler in the mechanical support room for the new operating room activated, resulting in extensive water damage. The water damaged some of the construction project and also damaged the contents of a storage room unrelated to the construction. The parties agree about ninety percent of the damages related to the cost of replacing the contents of the storage room.

Federal, the hospital's property insurance provider, paid the hospital for all of its damages, then, as subrogee of the hospital, sued the contractors to recover the amount paid to the hospital. The contractors moved for summary judgment, contending the hospital waived subrogation rights against the contractors in the contract between the hospital and Woodruff. The district court granted summary judgment in favor of the contractors, ruling the hospital waived any right of recovery against the contractors to the extent damages were covered by insurance.

II. Scope and Standards of Review

We review a district court's ruling on a motion for summary judgment for correction of errors at law. Iowa R. App. P. 6.907; *Kern v. Palmer Coll. of Chiropractic*, 757 N.W.2d 651, 657 (Iowa 2008). Under Iowa Rule of Civil Procedure 1.981(3), summary judgment is appropriate only when the record reveals no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lobberecht v. Chendrasekhar*, 744 N.W.2d 104, 106 (Iowa 2008).

III. Merits

The fighting issue before us is the extent of the waiver set forth in the construction contract. Construction of a contract concerns the legal effect of a contract, an issue the court decides as a matter of law. *RPC Liquidation v. Iowa Dep't of Transp.*, 717 N.W.2d 317, 321 (Iowa 2006). Our task is to construe—that is, determine the legal effect of—section 11.4.7. Does the waiver language apply only to damages to "the Work" or to any damages covered by insurance "applicable to the Work?" Section 11.4.7 describes the waiver:

> The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architects' consultants, separate contractors described in article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, *for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 11.4 or other property insurance applicable to the Work*, except such rights as they shall have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties

> enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

(Emphasis added.) Federal contends the waiver extends only to damages to "the Work," which all agree refers to the construction project. The contractors contend the waiver extends to any damages covered by insurance provided "pursuant to this Section 11.4 or other property insurance applicable to the Work."

The district court, after examining sections 11.4.1, 11.4.5, and 11.4.7, ruled:

> [T]he question becomes whether the damages now claimed were "caused by . . . causes of loss to the extent covered by property insurance" issued by Federal. The alternate question is whether the claim is for damages caused by "causes of loss covered by other property insurance applicable to the work."
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> This is clearly the case here. . . . [T]he scope of the subrogation waiver is not defined by what property got damaged. The scope of the subrogation waiver is defined by the extent of coverage of property insurance applicable, whether it insures the work or not, so long as it was "retained or maintained" pursuant to paragraph 11.4 or is "other property insurance applicable to the work." Thus, the scope of subrogation waiver is defined by the scope of coverage. Here, the scope of coverage was broad enough to cover both work and non-work property.

Federal contends the district court erred in (1) not properly applying the provisions of section 11.4, (2) misconstruing the phrase "property insurance applicable to the Work" in section 11.4.7, and (3) not properly applying Iowa law in interpreting the contract.

The provisions of section 11.4 in the contract are standard boilerplate provisions concerning property insurance from the American Institute of Architects (AIA) Document A201. Courts in many jurisdictions have addressed contract language identical or nearly identical to the provisions at issue here. All agree the language such as found in section 11.4.7 waives any claim the property owner or its insurance company as subrogee might have against contractors "for damages caused by fire or other causes of loss." They disagree, however, on the scope of the waiver.

The majority limit the waiver to the proceeds of the "property insurance obtained pursuant to [the contract] or other property insurance applicable to the Work." *See, e.g.*, *ASIC II Ltd. v. Stonhard, Inc.*, 63 F. Supp. 2d 85, 92 (D. Me. 1999) (concluding waiver did not restrict waiver to damages to work but to proceeds of any insurance provided under the contract); *Lloyd's Underwriters v. Craig & Rush, Inc.*, 32 Cal. Rptr. 2d 144, 146, 148 (Cal. Ct. App. 1994) (holding waiver limited by the insurance coverage, not by the nature of the property harmed); *Haemonetics Corp. v. Brophy & Phillips Co.*, 501 N.E.2d 524, 526 (Mass. App. Ct. 1986) (waiver of rights extends to proceeds of any insurance provided under the contract); *Employers Mut. Cas. Co. v. A.C.C.T., Inc.*, 580 N.W.2d 490, 493 (Minn. 1998) (stating owner relying on existing policy broad enough to cover work and non-work property waives right to sue for damages covered by the policy); *Lexington Ins. Co. v. Entrex Commc'n Servs., Inc.*, 749 N.W.2d 124, 134-36 (Neb. 2008) (concluding waiver applies to all damages, work and non-work, covered by owner's property insurance policy); *Chadwick v. CSI, Ltd.*, 629 A.2d 820, 826 (N.H. 1993) (finding waiver of subrogation effective as to

both work and non-work property because waiver provision applies "even though [a] person or entity would otherwise have a duty of indemnification, contractual or otherwise"); *Walker Eng'g v. Bracebridge Corp.*, 102 S.W.3d 837, 843-44 (Tex. Ct. App. 2003) (holding waiver extended to the extent damaged property was covered by insurance); *Trinity Universal Ins. v. Bill Cox Constr.*, 75 S.W.3d 6, 14-15 (Tex Ct. App. 2001) (stating clause waives right to sue for all damages as long as covered by the insurance policy). These courts make no distinction between damages to "work" and "non-work" property. Instead, they consider whether the insurance policy was broad enough to cover damages to work and non-work property and whether the policy paid for the damages. If the answer to both questions is yes, the waiver applies.

The minority ask only whether the damage was to the "work." If so, the waiver applies; if not, the waiver does not apply. *See, e.g.*, *Fidelity & Guar. Ins. Co. v. Craig-Wilkinson, Inc.*, 948 F. Supp. 608, 611 (S.D. Miss. 1996) (finding claim for damage to non-work property not barred because contractual waiver provided solely for waiver of claims for damage to work); *Town of Silverton v. Phoenix Heat Source Sys., Inc.*, 948 P.2d 9, 12 (Colo. Ct. App. 1997) (holding waiver limited to value of work performed under contract and inapplicable to other parts of town hall damaged by fire); *S.S.D.W. Co. v. Brisk Waterproofing Co.*, 556 N.E.2d 1097 (N.Y. 1990) (concluding waiver applies only to damage to areas within the limits of the work).

Federal's three stated claims are all arguments to convince us to adopt the minority approach. Having considered the parties' arguments and reviewed the reasoning supporting both approaches, we find the majority approach

comports better with all the contract language,[1] the policies underlying the waiver, and Iowa law. We adopt the majority approach.

A. Contract Language. Federal argues the phrase "or other" in section 11.4.7 "informs the reader that insurance obtained pursuant to section 11.4 falls into the group of 'property insurance applicable to the work.'" It asserts the proper understanding of "property insurance obtained pursuant to this Section 11.4 or other property insurance applicable to the Work" means "the contract only waives subrogation rights for insurance that is 'applicable to the work.'"

The district court correctly outlined the gist of the language in section 11.4.7, noting the hospital and Woodruff agreed:

> 1. To waive all rights
> 2. Against each other
> 3. For damages caused by fire or other causes of loss, to the extent covered by
>
> a. Property insurance obtained pursuant to this Section 11.4, or
>
> b. Other property insurance applicable to the work.

The Federal policy was existing property insurance, not a specific policy "obtained pursuant to this Section 11.4." Federal's general property insurance policy, therefore, was "other property insurance applicable to the work." The damages sustained by the hospital caused by the sprinkler head activation were caused by "other causes of loss." They were entirely covered by the Federal's general property insurance policy, less a deductible amount. Thus, according to the plain, unambiguous language of section 11.4.7, the hospital and Woodruff

[1] *Sweet on Construction Industry Contracts: Major AIA Documents* section 22.04 traces amendments the AIA has made to the property insurance provisions of its A201 document in response to court decisions limiting the waiver of subrogation. The amendments have made the waiver provisions broad and inclusive in "a strenuous effort to bar subrogation claims." Jonathan Sweet, *Sweet on Construction Industry Contracts: Major AIA Documents* § 22.04 at 38-39 (Westlaw 2012).

agreed to waive all rights against each other for damages "to the extent covered" by Federal's "property insurance applicable to the work." To adopt Federal's proposed reading would require rearranging the contract language so the waiver would be "for damages caused by fire or other causes of loss ~~to the extent~~ covered by property insurance obtained pursuant to this Section 11.4 or other property insurance to the extent applicable to the Work." As written, the waiver looks to whether the loss was covered by insurance, not whether the loss was to "the work."

Federal also asserts section 11.4.7, quoted above, modifies section 11.4.5. Section 11.4.5 provides:

> If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Section 11.4.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

The district court concluded section 11.4.5 "help[ed] fortify" the court's conclusion on the extent of the waiver set forth in section 11.4.7. We agree. Section 11.4.5 clearly provides for waiver of all rights for damages covered by any property insurance policies "separate from those insuring the project" that cover "properties, real or personal or both, at or adjacent to the site." The hospital agreed to waive all rights under these policies "in accordance with the terms of Section 11.4.7."

"It is a fundamental and well-settled rule that when a contract is not ambiguous, we must simply interpret it as written." *Smidt v. Porter*, 695 N.W.2d 9, 21 (Iowa 2005). "We give effect to the language of the entire contract according to its commonly accepted and ordinary meaning." *Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 797 (Iowa 1999). Words and phrases are not interpreted in isolation. *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991). Instead, they are interpreted in context. *Home Fed. Sav. & Loan Ass'n v. Campney*, 357 N.W.2d 613, 617 (Iowa 1984).

If Federal were correct in its assertion section 11.4.7 modifies section 11.4.5, the result under Federal's reading of section 11.4.7 would be to render section 11.4.5 of no effect to the construction project because the policies described in section 11.4.5 are "separate from those insuring the project" and include property "at or adjacent to the site." If the waiver in section 11.4.7 extends only to damages to "the work," as Federal asserts, there would be no need for the waiver in section 11.4.5. In order to give effect to the waiver in section 11.4.5, we must understand the waiver in section 11.4.7 to extend to damages "to the extent covered" by the insurance described. If the waiver extended only to damages to "the work," there would be no need for the waiver in section 11.4.5 for damages to property adjacent to the site covered by policies separate from those described in section 11.4.7. Under section 11.4.5, the owner waived subrogation rights in policies separate from those related to the work and insuring property other than the work because any damages were insured.

B. Iowa Law and Public Policy. Federal argues its construction of the contract language best comports with Iowa law and public policy. The district court noted the view advanced by Federal "would erode the policy advanced by the waiver of contract subrogation provision in the first place, that is, to avoid litigation and delays in executing construction projects while the contracting parties litigate who is at fault under circumstances such as these." Federal's view would require the parties to determine whether the property damaged fit within the definition of "the work" and if not, who was responsible for the damages.

Iowa Law. Citing to *Connor v. Thompson Constr. & Dev. Co.*, 166 N.W.2d 109, 112-13 (Iowa 1969), Federal asserts "Iowa case law suggests that it recognizes a distinction between insured interests in a construction project and insurable property beyond those limits." Although the case recognized a distinction, the resolution was based on the owners' breach of contract to add the contractor as an additional insured on the policy, not on the scope of an agreed-upon waiver of rights. *Connor*, 166 N.W.2d at 112. The owners' breach "served in turn to make the owners [the contractor's] insurer and as such liable to him, on loss, to the same extent as though the prescribed insurance had been obtained" because an "insurer cannot recover by right of subrogation from its own insured." *Id.* at 112-13. The court also reasoned there would have been no right of recovery against the contractor if the owners had not breached the agreement because then the contractor would have been a co-insured under the policy. *Id.* at 113. The case is not on point.

Public Policy. Although Federal contends its reading of the contract language best comports with public policy, it does not set forth any such public policy in its argument. Like the district court, other jurisdictions have recognized the policies underlying the use of subrogation waivers in construction contracts:

> [A] waiver of subrogation is useful in construction contracts because it avoids disrupting the project and eliminates the need for lawsuits. . . . Applying the waiver to all losses covered by the owner's property insurance policy eliminates litigation over liability issues and whether the claimed loss was damage to the Work or non-Work property.

Lexington Ins. Co., 749 N.W.2d at 135 (citations omitted). The majority approach adopted by the district court best comports with and furthers these policies.

C. Applying Iowa Law. Federal contends the district court did not properly apply Iowa law in interpreting the contract because Iowa law "declines to relieve a party of his own negligence absent a clear statement in the contract." The clear statement in the contract is that the parties intend to shift the risk of property loss to an insurer. The waiver-of-subrogation provisions of the standard AIA construction contract differ from exculpatory provisions designed to relieve a party unilaterally of his own negligence. "They exist in the contract as part of a larger comprehensive approach to indemnifying the parties involved in the construction project, allocating the risks involved, and spreading the costs of different types of insurance." *Chadwick v. CSI, Ltd.*, 629 A.2d 820, 825 (N.H. 1993). The contract provisions address property damage, not personal injury, and only to the extent the property damage was covered by insurance. But exculpatory provisions encompassing personal injury do not violate public policy and are enforceable in Iowa. *See Huber v. Hovey*, 501 N.W.2d 53, 55 (Iowa

1993) (noting the supreme court has "repeatedly held that contracts exempting a party from its own negligence are enforceable and are not contrary to public policy"). We conclude the district court properly applied Iowa law.

IV. Conclusion.

We conclude the district court committed no error in construing the contract language, the policies underlying the waiver, and Iowa law.

AFFIRMED.